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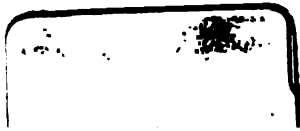
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THE
LAW JOURNAL REPORTS

FOR
THE YEAR 1881:

COMPRISING

REPORTS OF CASES

IN

The House of Lords and in the Privy Council,

IN

**The Court of Appeal, the Court for Crown Cases Reserved
and the Court of Bankruptcy;**

AND IN

THE HIGH COURT OF JUSTICE

VIZ.

**Chancery; Queen's Bench; Common Pleas; Exchequer;
Probate, Divorce and Admiralty, Divisions;
And in other Divisional Courts.**

MICHAELMAS, 1880, TO MICHAELMAS, 1881.

The Appellate Cases, in the House of Lords, and in the Court of Appeal, are with the Reports of Cases in the respective Divisions and Courts from which the Appeals come. These Cases and the Cases in the other Divisional Courts form four distinct Volumes, having separate Indexes of Subjects and Tables of Cases; viz., the Chancery and Bankruptcy Volume; the Bench, Pleas, and Exchequer, or Common Law Volume; the Probate, Divorce and Admiralty Volume; and the Magistrates' Cases.

THE CASES RELATING TO THE POOR LAW, THE CRIMINAL LAW, AND OTHER SUBJECTS CHIEFLY CONNECTED WITH THE DUTIES AND OFFICE OF MAGISTRATES, ARE SEPARATELY ARRANGED, AND FORM A DISTINCT VOLUME OF REPORTS, VIZ. THE MAGISTRATES' CASES.

THE PRIVY COUNCIL CASES HAVE THEIR OWN INDEX AND TABLE OF CASES, AND FORM A DISTINCT VOLUME OF REPORTS.

THE REPORTS ARE EDITED BY
MONTAGU CHAMBERS, Esq., ONE OF HER MAJESTY'S COUNSEL,
FREDERICK HOARE COLT, Esq.,
AND
JOHN GEORGE WITT, Esq., BARRISTERS-AT-LAW.



CHANCERY, VOL. L.

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MDCCCLXXXI.

**NAMES OF THE BARRISTERS
BY WHOM THE CASES ARE REPORTED.**

**In the House of Lords,
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**In the Privy Council,
EDWARD BULLOCK, Esq.**

**In Her Majesty's Court of Appeal,
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The Right Hon. Sir HENRY COTTON, Lord Justice of Appeal.
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The Right Hon. Sir ROBERT PHILLIMORE.

Sir HENRY JAMES, Attorney-General.
Sir FARRER HERSCHELL, Solicitor-General.

PREFERMENTS AND MEMORANDA.

In Michaelmas Sittings, the Right Hon. Sir ALEXANDER JAMES EDMUND COCKBURN, Bart., Lord Chief Justice of England, died after a short illness, and was succeeded by the Right Hon. LORD COLERIDGE, who was sworn in as Lord Chief Justice of England.

In the same Sittings, the Right Hon. Sir JAMES COLVILLE died.

In the same Sittings, CHARLES JAMES WATKIN WILLIAMS, Esq., Q.C., of the Inner Temple, was appointed a Judge of the High Court of Justice.

In Hilary Sittings, JAMES CHARLES MATHEW, Esq., of Lincoln's Inn; Sir HENRY JACKSON, Bart., Q.C., of Lincoln's Inn; LEWIS W. CAVE, Esq., Q.C., of the Inner Temple; and EDWARD E. KAY, Esq., Q.C., of Lincoln's Inn, were appointed Judges of the High Court of Justice.

Sir HENRY JACKSON died before taking his seat.

In the same Sittings, H. FOX BRISTOWE, Esq., Q.C., of Lincoln's Inn, was appointed Vice-Chancellor of the Duchy of Lancaster, in the room of GEORGE LITTLE, Esq., Q.C., deceased.

In the same Sittings, Sir RICHARD MALINS resigned the office of Vice-Chancellor of England, and was sworn of Her Majesty's Privy Council.

In the Vacation after Easter Sittings, the Right Hon. Sir WILLIAM MILBOURNE JAMES, Lord Justice, died.

In the Vacation after Trinity Sittings, the Right Hon. Sir GEORGE WILLIAM WILSHERE BRAMWELL resigned the office of Lord Justice of the Court of Appeal.

In Hilary Sittings, JOHN FORBES, Esq., of Lincoln's Inn; THOMAS HUTCHINSON TRISTRAM, Esq., D.C.L., of the Inner Temple, Chancellor of the Diocese of London; EUGENE COMERFORD CLARKSON, Esq., of Lincoln's Inn; the Hon. E. CHANDOS LEIGH, of the Inner Temple; HERBERT C. SAUNDERS, Esq., of the Middle Temple; HUGH SHIELD, Esq., of Gray's Inn; JAMES C. WHITEHORNE, Esq., of the Middle Temple; W. W. KARSLAKE, Esq., of Lincoln's Inn; JOHN BIGBY, Esq., of Lincoln's Inn; and ROBERT ROMER, Esq., of Lincoln's Inn,—were appointed Her Majesty's Counsel learned in the Law.

In Easter Sittings, CHARLES HALL, Esq., of Lincoln's Inn, Attorney-General to H.R.H. the Prince of Wales, was appointed one of Her Majesty's Counsel learned in the Law,

REPORTS
OF
CASES ARGUED AND DETERMINED
In the House of Lords,
(ON APPEAL FROM THE COURT OF APPEAL IN ACTIONS
IN THE CHANCERY DIVISION,)

REPORTED BY
LIONEL LANCELOT SHADWELL, Esq.
BARRISTER-AT-LAW.

IN
Her Majesty's Court of Appeal,
(ON APPEAL FROM THE CHANCERY DIVISION,)

REPORTED BY
ARTHUR CLEMENT EDDIS, Esq., and H. LACY FRASER, Esq.
BARRISTERS-AT-LAW.

AND IN THE
Chancery Division
OF
THE HIGH COURT OF JUSTICE.



REPORTED BY
DAVID PITCAIRN, Esq., CECIL C. M. DALE, Esq., JOHN GENT, Esq.
ARTHUR CORDERY, Esq., HENRY CHARLES DEANE, Esq.
JAMES E. HORNE, Esq., RICHARD BRAMWELL DAVIS, Esq.
WILLIAM HARMOOD COCHRAN, Esq., and GEORGE A. STREETEN, Esq.
BARRISTERS-AT-LAW.

EDITED BY
MONTAGU CHAMBERS, Esq., ONE OF HER MAJESTY'S COUNSEL,
FREDERICK HOARE COLT, Esq., AND JOHN GEORGE WITT, Esq.,
BARRISTERS-AT-LAW.

DURING FOUR SITTINGS,
VIZ.
MICHAELMAS 1880, HILARY, EASTER, AND TRINITY, 1881.

44 & 45 VICTORIAE.

SUPREME COURT OF JUDICATURE.

CASES ARGUED AND DETERMINED

IN

The Chancery Division

AND DIVISIONAL COURTS

OF

THE HIGH COURT OF JUSTICE.

IN

The London Court of Bankruptcy

DECIDED BY THE CHIEF JUDGE,

AND ON APPEAL THEREFROM TO

THE COURT OF APPEAL AND HOUSE OF LORDS.

MICHAELMAS 1880 to MICHAELMAS 1881.

44 *Victoria*.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.

JAMES, L.J.

COTTON, L.J.

1880.

Nov. 5.

In re VAN HAGEN;
SPERLING v. ROCHEFORT.

Testamentary Power of Appointment over Real Estate, with Gift over in Default—Testamentary Appointment to Trustee upon certain Trusts—Failure of Trusts in Lifetime of Appointor—Resulting Trust for Appointor's heir-at-law.

The effect of a testamentary appointment, either of real or personal estate, to a trustee upon trust for A., who dies in the lifetime of the appointor, is that the appointed property does not revert to the donor of the power, nor to those who would have taken under a gift over (if any) in default of appointment, but remains part of the general estate of the appointor.

Where, therefore, a testatrix having a general testamentary power of appointment over real estate, subject to a gift over in default of appointment, devised the property to trustees upon trust for A., who died in her lifetime,—

Held, that the property remained vested in the trustees as part of the general estate

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of the testatrix, subject to a resulting trust for her heir-at-law (if any).

Semble, if the heir-at-law could not be found, the title of the trustees was good as against the Crown.

This was an appeal from the decision of Malins, V.C. (reported 49 Law J. Rep. Chanc. 705), where the facts and the arguments are fully stated.

Mr. Joshua Williams and Mr. E. S. Ford, for the appellants.

Mr. J. Pearson and Mr. Rodwell, for the respondents.

JESSEL, M.R.—This case has been decided by the Vice-Chancellor not on any general ground of law, as applicable to the exercise of all powers of appointment, but on the ground that there is a distinction between real and personal estate as regards the exercise of such powers. Now I wish to say, in the first place, that I think there are quite sufficient distinctions in our law between real and personal estate without introducing a new one for the first time; and if the reason of the law in the case of personal estate makes the exercise of a general

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power of testamentary appointment in favour of a trustee for a legatee who dies in the lifetime of the testator, take effect as a disposition of the property so as to make it equivalent to the testator's own, I see no reason why it should not equally apply to a devise of real estate. In fact, to a slight extent, it appears to me that the case of real estate is really the stronger of the two, because in the case of a devise there is an actual legal estate carrying with it the right of possession, which must be disturbed by those who claim a paramount title. Now then, taking the law to be the same as regards both real and personal estate, the Vice-Chancellor does not in his judgment for a moment suggest that if it were the same the appellant should not succeed. Having thus disposed of the only reason for that decision, I will consider in a very few words what the effect is of a testamentary appointment to a trustee, either of real or personal estate, on trust for A., who dies in the lifetime of the testator, and therefore cannot take. Now, in the first place, I will consider intention. The intention of the testator is that the person, whom I will call the beneficial legatee or devisee, shall take; and there being nothing in the will to shew that the case of dying in the lifetime, or lapse, was contemplated by the testator, the rule has always been that the testator did not contemplate it, but expected and intended that the devisee or legatee would survive him and take accordingly. So that we have to deal with a case as to which there is in that sense no expressed intention, the only intention being that nobody shall take under the original settlement creating the power, the testator having, according to his belief, disposed of the property both legally and beneficially, as against the persons who derive title under the settlement. Then the only question remaining is, What is to become of the property in case the intention that the beneficial legatee or devisee should take cannot be carried out? That is a mere question of resulting trust. Resulting trust for whom? As already pointed out by Lord Justice James when Vice-Chancellor, it must be for the original settlor or for the appointor—one or the

other; and when you consider a general power of appointment, which is for almost all purposes equivalent to property, and especially is so dealt with by the Legislature in the Wills Act as regards testamentary appointments, the fair result and, in my opinion, the proper result, is to treat it as a resulting trust for the appointor, and consequently the property goes to the person or persons who would take his real or personal estate, as the case may be; or, to put it in the words of Vice-Chancellor Wickens, in the case of *Re Davies's Trust* (1), "It seems settled by the cases of *Chamberlain v. Hutchinson* (2) and *Wilkinson v. Schneider* (3), authorities which are binding on me, that a testamentary appointment under a general power to A. in trust for B., which lapses as to the beneficial interest by B.'s death before the appointor, operates as a good appointment in favour of A., who holds on the same trusts as if it had been the appointor's own property." There is, as I remarked during the argument, this also to be said, that the gift to trustees is rational, if the testator knew that it would make it part of his assets, and liable to the payment of debts. There does not seem to be any sufficient motive for interposing a trustee when the beneficiary takes absolutely in the case of real estate. But I do not rely on that. I prefer to rest my judgment on the general principle which I have already stated.

JAMES, L.J.—I am of the same opinion. I concur cordially with the observation of the Master of the Rolls that it would be very undesirable indeed to create any distinction between personal and real estate, and very desirable not to create any distinctions between property and a general power, which, to the common apprehension of mankind, is exactly the same thing as property, and has for many purposes been treated as property. With regard to the cases which have been cited, I have seen no reason whatever, having

(1) 41 Law J. Rep. Chanc. 97; Law Rep. 13 Eq. 163.

(2) 22 Beav. 444.

(3) 39 Law J. Rep. Chanc. 410; Law Rep. 9 Eq. 423.

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read the judgment of the Vice-Chancellor, and heard what has been said by the respondents, for doubting the accuracy of my previous decisions in the two cases which have been referred to—*Brickenden v. Williams* (4) and *Wilkinson v. Schneider* (3)—that it is not in these cases a question so much of intention as to what is to be done with the property, as a question of resulting trust. Of course the intention is to execute the power, and to take it out of the settlement; but when you have once got the power fully executed it is not a question of intention, because nobody can reasonably attribute any particular intention to a testator as to what was to be done in an event that was never in contemplation. It is a question simply of a resulting trust, which is, after all, only another mode of saying what would the law do in the state of things which has happened, and as to which the individual has not made any express provision. Then if the person having property, or that which is equivalent to property, which he could make his own at any moment if he liked, puts that property into the hands of a trustee for a purpose which fails or is only partially carried into effect, then the resulting trust, in my opinion, is for the person who appointed the trustee and who created the trust. They are trustees for him or her who appointed them trustees; and if there is anything which prevents the whole thing being disposed of according to the trusts, it is their duty to hand it back to the person who created the trust.

COTTON, L.J.—In this case we have all had an opportunity of reading the judgment of the Vice-Chancellor, although it has not been read in open Court. We are therefore fully acquainted with the grounds of his decision. Now I agree with the other members of the Court that it would be unfortunate to make another distinction between real and personal estate. As I understand the judgment of the Vice-Chancellor, he decided this case on a distinction between real and personal estate in cases like the present. Certainly there is no case which justifies such a

(4) 38 Law J. Rep. Chanc. 222; Law Rep. 7 Eq. 310.

distinction; and I agree with the rest of the Court that we ought not to make such a distinction, and that there is no ground for holding such a distinction. Now then, on what ground ought the case to be decided? It is said to be a question of intention, and in some cases decided by the Lord Justice James and the Master of the Rolls, who are sitting with me, it has been said that to a certain extent it is a question of intention; that is to say, you must see in the instrument exercising the power whether there is an intention expressed in the instrument absolutely to dispose of the property by an exercise of the power of appointment. If you can shew that although there is an intention in the instrument to exercise the power, yet that in the event of the beneficiaries not taking the property under the exercise of the power there is to be no exercise of the power, and the original settlement is to remain, of course it will remain. That is a partial appointment only; that is to say, a partial appointment, with an intention shewn that in the event of those purposes coming to an end, or for any reason failing, then the original settlement is to remain. But here it is rather absurd to say that one is to look to see what the intention of the appointor was in the events which have happened. The events were never contemplated, because she appointed the property absolutely to a person whom she thought would survive her, and who, surviving her, would put an end to all question by taking the property absolutely, to the exclusion of everybody. What we have to see, where there is no expressed intention that the exercise of the power shall be for the limited purposes only, not disturbing, except for those limited purposes, the trusts of the original settlement, is, whether she intended (and this is of course a question of intention) to exercise, both as regards the legal and beneficial ownership, the power absolutely. Here, as regards this share of the property, she did, because she gave it to her trustees for the use of a person absolutely, who no doubt she thought would survive her. Then, that being so, it is a question of intention. The event that has happened was not within her contemplation, and it is only

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a question of what the law, under those circumstances, will do. The power was properly executed, and the property was entirely taken, both as regards the legal and beneficial interest, out of the original settlement. This being so, and the property being appointed by the testatrix to her trustees, and the purpose for which it was given to them, as expressed in her will, having failed by the death during her lifetime of the beneficial devisee, it becomes a matter of resulting trust, and goes to the person who would be entitled to her real estate, which, so far as she could, she disposed of. That being so, the decision of the Vice-Chancellor, in my opinion, cannot be supported, and the parties claiming under the original settlement are not entitled to this property.

JESSEL, M.R.—The order will be that the surviving trustee is entitled as devisee, subject to a resulting trust for the heir-at-law (if any), so that if there is no heir-at-law, he will take as against the Crown.

JAMES, L.J., and COTTON, L.J., concurred.

Solicitors—E. J. Rickards, for appellants; Milne, Riddle & Mellor, for respondents.

MALINS, V.C. } *In re JENNENS. WILLIS v.*
1880. }
Nov. 3. } EARL HOWE.

Demurrers—Will—Intestacy—Real and Personal Estate—Statute of Limitations—3 & 4 Will. 4. c. 27. s. 26; 23 & 24 Vict. c. 38. s. 13.

The plaintiffs sued to recover property, both real and personal, to which, as alleged, their predecessors in title had become entitled upon the death of a testator, in 1798, who had died intestate as to the whole property comprised in his will; and alleged fraud and concealment on the part of the defendants and their predecessors in title,

which could not, with reasonable diligence, have been discovered prior to 1879:—Held, upon demurrer, that, as to the real estate, the alleged fraud might, with reasonable diligence, have been sooner discovered, and that, therefore, the plaintiff's title was barred by the 26th section of 3 & 4 Will. 4. c. 27; and that, as regarded the personal estate, the 13th section of 23 & 24 Vict. c. 38 was an absolute bar to the plaintiff's claim, that section being held to be retrospective.

William Jennens, by his will dated in 1726, after directing his just debts to be paid, gave all his estates whatsoever in Suffolk and Essex, which were purchased by his father, to his mother for life, and made no other disposition of his property.

The testator's mother died in his lifetime, and he died in 1798.

The statement of claim alleged that at the death of the testator, Mary Blythe, widow, was his sole heiress, and that she and one William Jennens were his sole next-of-kin; and that soon after the death of Mary Blythe, which happened in 1799, Richard Curzon, pretending and representing that he was the son of Penn Curzon, and as such heir of the testator William Jennens, while he was in fact and to his own knowledge an illegitimate child of one Ann Oakes, spinster, took possession of the freehold estates of the testator; and that his devisee and the succeeding devisees, including the defendant, Earl Howe, successively knew of and concealed the above facts, and successively with such knowledge and by such concealment entered into possession of the estates. The claim alleged that Ann Oakes had made a statement of the facts as to the birth of Richard Curzon, which was concealed from the plaintiffs and their predecessors in right and that such facts were only discovered by the plaintiffs in 1879 by means of a communication made to them by a daughter of Ann Oakes; and that the fraud could not, with reasonable diligence, have been discovered by them prior to that time.

The statement of claim further alleged

In re Jennens.

that letters of administration to the estate of the testator William Jennens had been granted to two persons who fraudulently alleged that they were next-of-kin of the testator; and that the residuary personal estate of the testator had been got in by them and persons claiming through them, down to the defendants, Upton and Coe, who were in possession of one moiety of the personal estate, and Earl Beauchamp, who was in possession of the other moiety; and that they were all, including the last-named defendants, aware that it was impressed with a trust for the next-of-kin, and that it was always treated as a distinct fund, and that separate accounts of it had been always kept, and that no account had ever been come to in respect thereof with Mary Blythe or William Jennens, the other next-of-kin of the testator. The plaintiffs, who claimed through Mary Blythe and the last-named William Jennens, claimed that it might be declared that the defendant, Earl Howe, was a trustee for one of the plaintiffs of the freehold estates, and that the amount of the residue of the personal estate come to the hands of the other defendants might be ascertained and paid to the plaintiffs.

To this statement of claim Earl Howe demurred.

Mr. Lewin, in support of the demurrer.—The fraud, if there was any, might, with reasonable diligence, have been discovered in 1799. The plaintiff's claim is barred by the 26th section of the Statute of Limitations.

Chetham v. Hoare, 39 Law J. Rep.

Chanc. 376; Law Rep. 9 Eq. 571, which was a case before your Lordship, is directly in point.

Mr. Bristowe and *Mr. Mulligan*, in support of the claim as to the real estate.—We say that the predecessors in right of the plaintiff were misled by the assertion of Richard Curzon, and that they could not, with reasonable diligence, have discovered the fraud which had been committed prior to 1879.

They referred to

Petre v. Petre, 1 Drew. 371;

Sturgis v. Morse, 3 De Gex & J. 1; 24 Beav. 541;

Vane v. Vane, 42 Law J. Rep. Chanc. 299; Law Rep. 8 Chanc. 383.

MALINS, V.C.—I am of opinion that this demurrer must be allowed; to overrule it would tend to make all titles unsafe. [His Lordship stated the facts as set out above, down to Richard Curzon entering into possession, and proceeded:] Now, this very Richard Curzon was made an earl in 1821, and if I look at the probabilities of the case—I do not wish to decide on probabilities—yet I think it does seem improbable that he should have been an impostor, and that through all that number of years it should never have come to the knowledge of any person that he was not the rightful heir, but the illegitimate son of Ann Oakes. But taking the facts to be as they are alleged, that this man was a wrongdoer, the true owners were nevertheless bound to know their own title; and when a person claiming adversely to them entered into possession, they were bound to ascertain under what title he entered, and to bring their action within twenty years. Even assuming that there was a fraud, and that it was concealed by Richard Curzon saying that which he knew to be false, yet the question still remains, whether the fraud might not, with reasonable diligence, have been discovered within a less time than eighty-two years.

In *Chetham v. Hoare* I said it was most important that the 26th section of the Statute of Limitations should, in the interests of society, receive the very strictest interpretation.

Now, with reasonable diligence, might the fraud have been discovered within the time limited by the statute? This family has been in possession of these estates, which are of vast extent, and worth millions sterling, for more than eighty years, during which time no question has been raised as to their title except by the plaintiffs. If they were in possession by a wrongful title has there been due diligence? If I am to suppose that anyone in the year 1799, having a

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valid title, would, without enquiry, allow a person having no title to enter and remain in possession for this number of years, then I say such facts shew gross neglect and want of diligence.

Assuming, therefore, that there was a fraud and concealment, I decide that time began to run at the death of the testator William Jennens, and therefore that at the expiration of twenty years from that time the title of the plaintiffs was barred. The demurrer must, therefore, be allowed with costs.

The defendants, Upton & Coe and Earl Beauchamp, also demurred to the statement of claim, so far as the same related to the personal estate.

Mr. Higgins and Mr. C. H. Turner, for Upton & Coe.—We rely upon the 13th section of 23 & 24 Vict. c. 38.

Mr. Pearson and Mr. Cecil Russell, for Earl Beauchamp, referred to an unreported case of

Baylis v. Howard, which was before Vice-Chancellor James in 1869, which related to the same property as that in the present action, and the bill in which case contained substantially the same allegations with regard to the personal estate as were contained in the statement of claim in this action, and upon the hearing of which cause the same statute, 23 & 24 Vict. c. 38, having been relied upon, the Vice-Chancellor held as follows: "It appears to me utterly impossible to entertain this bill. The words of the Act are too clear. It is the very case which the Act meant to provide against."

Mr. Bristowe and Mr. Mulligan, for the plaintiffs.—The parties who have successively been in possession of the personal estate have never treated it as their own, but have treated it as impressed with a trust, and have always kept separate and distinct accounts with regard to it.

We submit that the 13th section of 23 & 24 Vict. c. 38 is not retrospective, but only applies to persons dying intestate after the passing of the Act; but, even if it is retrospective, then we say that the words "dying intestate" are to be con-

strued strictly, and to mean dying without a will, and must not be taken to apply to a person who makes a will, and happens to die intestate as to the property comprised in the will. They referred to

Reed v. Fenn, 35 Law J. Rep. Chanc. 464;

and to

Shelford's Real Property Statutes, 8th ed. p. 244.

MALINS, V.C.—For the same reasons that led Vice-Chancellor James to decide that the bill in *Baylis v. Howard* was unsustainable, I also decide that this action cannot be sustained. Personal estate is claimed by certain persons as next-of-kin of the testator, eighty years after his death, and it is argued that the 13th section of the Act of 23 & 24 Vict. c. 38 (which was passed to meet this very case) does not apply, because it is said that it is not retrospective; and, moreover, that as Mr. Jennens made a will he did not die intestate, and that the Act is to be construed strictly. No doubt Mr. Jennens did make a will, but it is also clear that he died intestate as to this property, and therefore he was an intestate. I am clearly of opinion that the word "dying" does not mean dying after the passing of the Act, but that it refers to persons who have died or shall die, otherwise the twenty years might elapse before the Act had any effect whatever. The plaintiffs have shewn no case of the fund being impressed with a trust. The bill in *Baylis v. Howard* contained the same allegations as are contained in this statement of claim, and Vice-Chancellor James decided that it was impossible to sustain it. I entirely agree with him, and both these demurrers must be allowed, and with costs.

Solicitors—S. E. Lambert, for plaintiffs; Parkin, Pagden & Woodhouse, for Earl Howe; Walfords, for Earl Beauchamp; A. F. Coe, for the other defendants.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.	} REPUBLIC OF COSTA RICA
JAMES, L.J.	
COTTON, L.J.	
1880.	
Nov. 4.	v. STROUSBERG.

Practice—Judgment Debtor—Examination—Order XLV.

A judgment creditor having obtained an order under Order XLV. for the examination of his judgment debtor "as to whether any and what debts were due to him," the latter attended before the special examiner, but declined to answer any question other than whether any and what debts were due to him:—Held, that the examination was intended by the order to be a cross-examination of the most stringent character, and that the debtor was bound to answer all questions pertinent or relevant to the subject-matter of the examination.

This was an appeal from the decision of Malins, V.C., reported 49 Law J. Rep. 701.

Mr. Glasse, Mr. Kekewich and Mr. H. A. Giffard, for the appellants.

Mr. Higgins and Mr. Medd, for the respondent.

The arguments were the same as in the Court below.

JESSEL, M.R.—I think this appeal must succeed. As I understand the rule the examination is to be "as to whether any and what debts are owing to the judgment debtor," which is exactly the same thing as "touching the debts owing to the judgment debtor," which was the order formerly issued under section 60 of the Common Law Procedure Act, 1854. Any question, therefore, fairly pertinent to the subject-matter of the enquiry—that is to say, put with a view to ascertain so far as possible from a reluctant defendant what debts are owing to him—ought to be answered by him. I am of opinion that all the questions asked were fair questions, and in that sense fairly pertinent and properly asked with a view of ascertaining from the defendant what debts were owing to him, and that they ought all to have been an-

swered. I am further of opinion that he ought to answer all similar questions fairly directed to that end, and that the order asked ought to have been made by the Vice-Chancellor. He must answer all questions fairly directed to ascertain from him what amount of debts is due, from whom due, and all necessary particulars to enable the plaintiff to recover them under a garnishee order. I think, therefore, that the order asked for below should be made now, and that the respondent should pay the costs of the appeal.

JAMES, L.J.—I am of the same opinion. The examination is intended to be not merely an examination, but a cross-examination, and that of the severest kind.

COTTON, L.J.—I agree.

Solicitors—Freshfields & Williams, for appellants;
Lee, Houseman & Brodie, for respondent.

MALINS, V.C.	} In re THE ALEXANDRA PALACE COMPANY.
1880.	
Nov. 6.	

Practice — Company — Winding-up — Public Officer—Documents—Interrogatories — Rules of Court, Order XXXI. rules 1 and 4.

The provisions of Order XXXI. of the Rules of Court with regard to discovery are applicable to proceedings in a winding-up, and leave will be given to serve interrogatories on a public officer or other member of a company carrying in a claim in a winding-up, where the Judge is satisfied that such public officer or member is likely to be able to give the information required.

Adjourned summons.

This was an adjourned summons on behalf of the official liquidator of the above company for leave to serve interrogatories upon the secretary of the London Financial Association.

Upon the formation of the Alexandra Palace Company a large number of shares were taken by the Financial Association, and in July, 1879, they took out a sum-

In re Alexandra Palace Co.

mons for the removal of their names from the register of shareholders of the Alexandra Palace Company, upon the ground that the shares were taken by the directors *ultra vires*, and they also claimed leave to prove as creditors of the company for 86,000*l.*, the amount paid upon the shares and for a large arrear of interest.

An affidavit of documents had been put in by the accountant of the Financial Association, and that not being deemed sufficient a summons was taken out for a further affidavit, which, however, was afterwards abandoned and this summons taken out.

The question had been before the Judge in chambers, and was by him adjourned into Court.

Mr. Higgins and Mr. Speed, in support of the summons.—If this were an ordinary action our right to deliver interrogatories is clear. Order XXXI. rules 1 and 4 are explicit on that. We say that by the Judicature Act the proceedings in the case of windings-up are assimilated to the proceeding in actions. This claim is in fact an action. The secretary may refuse to answer or he may move to strike the interrogatories out if they are objectionable. They referred to

Saunders v. Jones, 47 Law J. Rep. Chanc. 440; Law Rep. 7 Ch. D. 435;

Berkeley v. The Standard Discount Company, 48 Law J. Rep. Chanc. 797; Law Rep. 12 Ch. D. 295; *Ibid.* 13 Ch. D. 97;

Jones v. The Monte Video Gas Company, 49 Law J. Rep. Q.B. 627.

Mr. Everitt, for the London Financial Association.—The order asked for is not a pure matter of right, it is a question for the discretion of the Court, even if this were an action; but we say that Order XXXI. has no application to windings-up. Rule 4 only provides for interrogating a corporation which is a party to an action.

If the Court makes the order it will be introducing an entirely new practice.

MALINS, V.C.—I have no doubt in my own mind about this case. The London

Financial Association allege that the shares in the Alexandra Palace Company were taken by their directors *ultra vires*, and they claim to be creditors of the Palace Company in the winding-up to the amount of 86,000*l.*, the money paid on the shares, as well as for interest since 1872, making up the sum to 150,000*l.* If it were not for the fact that the Palace Company is being wound up, this claim would most undoubtedly have been the subject of an action, but as no action can be brought after the announcement of the winding-up, the claim must be substantiated in chambers in the winding-up.

If this claim had formed the subject of an action, instead of its being, as it is now, a claim in a winding-up, it would have been, under rule 4 of Order XXXI., a mere matter of course for the Palace Company to serve interrogatories upon any officer or other person connected with the Financial Association who would be likely or able to afford information on the subject. If this is so in an action only, should it not be equally so in a winding-up? I have always treated a claim of this description in a winding-up as an action for debt, and that being so, in my opinion a company in liquidation should have the right to issue interrogatories.

It appears to me that there is nothing unreasonable in this course being adopted, and it would be most unjust that parties should be deprived of the right of discovery simply because the claim, instead of being commenced by action, is in the form of a summons in a winding-up. The official liquidator of the Palace Company has established his right to the discovery, and therefore, on every principle, I am of opinion that he ought to be at liberty to deliver interrogatories to the secretary of the Financial Association, and that will be my order; and the Financial Association must pay the costs of this summons.

Solicitors—Dawes & Son, for the Palace Company;
Harrison, Beal & Harrison, for the Financial Association.

MALINS, V.C. } In re LONDESBOROUGH.
1880. } BRIDGEMAN v. FITZGERALD.
Nov. 6, 8. }

Will—Construction—Pictures—“Objects of Vertu or Taste.”

A testator, by his will, gave to his wife absolutely all his gold and silver plate, ornamental and other china, and all objects of vertu or taste; and he declared that his wife should be entitled during her life to his leasehold house in O. Terrace, and the furniture and other effects therein. At the death of the testator there were in his house in O. Terrace ten valuable pictures:—Held, that these pictures did not pass under the words “objects of vertu or taste,” but passed with the furniture.

SPECIAL CASE.

The late Albert Denison, Baron Londesborough, by his will dated the 16th of May, 1855 (amongst other dispositions), gave and bequeathed unto his wife, the defendant Ursula Grace, Lady Fitzgerald (then Ursula Grace, Lady Londesborough), absolutely all his and her jewels, trinkets, gold and silver plate, ornamental and other china, and all objects of vertu or taste. And the testator declared that his wife should be entitled during her life to the leasehold messuage, with the appurtenances, in Carlton House Terrace, and the statuary, furniture and other effects purchased by him therewith, or which might be therein at the time of his decease, she paying the ground rent, taxes, rates and other outgoings in respect of the same premises, and performing the covenants in the lease under which the leasehold premises were then holden. And he directed that, after the death of his wife, or sooner, if she should be desirous of surrendering and relinquishing the interest thereinbefore given to her for her life, his executors should sell the leasehold premises, furniture, statuary and effects as and when they should consider most convenient, and the produce of sale of the premises should be considered as forming part of his residuary personal estate.

By a third codicil to his will, dated the 5th of September, 1859, the testator,

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after reciting that he had by his will given unto his wife absolutely all his and her jewels, trinkets, gold and silver plate, ornamental and other china, and all objects of vertu or taste, revoked the bequest so made by his will; and, in lieu thereof, bequeathed unto his son, the defendant Albert Denison, his Ascot prize cup, and unto each of his other children one piece of plate, to be selected by him or her according to seniority; and, subject thereto, he bequeathed “unto his wife absolutely all his and her jewels, trinkets, gold and silver plate, ornamental and other china, and all objects of vertu and taste.”

The testator died in January, 1860; and in 1861 his widow married the defendant Lord Otho Fitzgerald.

At the death of the testator there were in his house in Carlton House Terrace ten valuable paintings, represented to be of the value of 15,000*l.*, which belonged to him, but which were not purchased by him with the house.

The question submitted by the Special Case for the opinion of the Court was, whether these paintings belonged absolutely to the defendant Lady Otho Fitzgerald, or the defendant Lord Otho Fitzgerald in her right, under the bequest in the third codicil, or whether they passed under the description in the will of the leasehold messuage in Carlton House Terrace, and the statuary, furniture and other effects therein.

Mr. Langworthy, for the plaintiffs, the trustees.

Mr. Bristowe and *Mr. B. B. Rogers*, for the first two defendants, Lord and Lady Otho Fitzgerald.—The testator does not use the word “pictures” either in the will or the codicil. These ten paintings are certainly objects of taste; and we submit that they pass under the words “objects of vertu or taste” to Lady Otho Fitzgerald—

Johnson's Dictionary, ed. 1827,
“virtu;”

Nuttall's Standard Dictionary,
“taste.”

Mr. John Pearson and *Mr. Renshaw*, for the other defendants, persons interested in the residue.—It is clear that these

In re Londesborough.

pictures will pass under the words "furniture and other effects," if they are not included in the previous clause—

Kelly v. Powlet, Amb. 605.

The words "objects of vertu or taste" are only used in their ordinary sense, and do not include these pictures. They referred to

The Imperial Dictionary, "virtuoso."

Mr. Bristowe, in reply.—We admit that these pictures will pass under the word "furniture," if they do not pass under the prior gift. He referred to

Jarman on Wills, 3rd ed. vol. i. p. 716;

and

Rawlings v. Jennings, 13 Ves. 39.

MALINS, V.C.—The case is one of considerable importance. All the counsel seem to agree that no case is reported in which pictures have been given under the words "objects of vertu or taste."

The will which I have to construe is that of Lord Londesborough, who died in the year 1860. He was a nobleman of very large fortune, a man of great taste and a patron of the arts, and lived in a large house in Carlton House Terrace. After disposing of his collection of armour, autographs and other things, he says, "I bequeath to my wife absolutely all my and her jewels, trinkets, gold and silver plate, ornamental and other china, and all objects of vertu or taste." Then the question arises, whether by this clause he gave to her the pictures which he had in the house. The case states, and all parties agree, that he had in his house ten pictures by very eminent artists, which were of the value of 15,000*l.* Did he intend to give these pictures to his wife absolutely, or did he intend them to be (as in point of fact they were) part of the furniture of the house? It is perfectly clear, as was decided in *Kelly v. Powlet*, that where there is nothing to shew the contrary, pictures will pass as part of the furniture of a house.

If he did not intend to give these pictures to his wife absolutely, the next clause in the will certainly gives them to her for her life; for it proceeds, "And I declare that my wife shall be entitled during her life to the leasehold messuage,

with the appurtenances, in Carlton House Terrace, and the statuary, furniture and other effects purchased by me therewith, or which may be therein at the time of my decease."

It seems to me very improbable that a man possessed of a collection of very valuable pictures should omit to use the word "pictures" if he intended to give them absolutely. *Mr. Bristowe* has argued that pictures are "objects of vertu or taste," and that a virtuoso is a man who loves pictures as well as other works of art. Pictures are undoubtedly articles of taste; but I suppose that this is the first will under which pictures are to pass—if they do pass—by the words "objects of vertu or taste." There is a rule of construction always acted upon, and which was acted upon in the last case cited of *Rawlings v. Jennings*, that where words are used which would pass the whole property of the testator, they will, when immediately associated with less comprehensive words, be construed to mean things *ejusdem generis*—things of the same nature as those the testator has just disposed of. *Mr. Bristowe* argues that these pictures are of the same nature as ornamental china, which the testator disposes of as "objects of vertu or taste." I do not say that these words are insufficient to pass pictures; but whether they do so or not must depend upon the particular circumstances of the case.

The third codicil, which was made four years after the date of the will, does not appear to me to alter the effect of the will in the slightest degree. [His Lordship, after reading the third codicil, continued:] He simply repeats the gift to his wife. Both sides, I think, agree that it makes no difference whether the words are "vertu and taste" or "vertu or taste."

On the whole, I come to the conclusion that the testator used these words "vertu or taste" as comprehending everything of the same sort—as lawyers say, *ejusdem generis*—with those before enumerated; and I cannot consider that by such words he intended to pass this valuable collection of pictures. I am, therefore, of opinion that Lady Londesborough did not take these pictures absolutely; but that, under the next clause in the will, she is

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entitled to the enjoyment of them during her life.

There is one point which I ought not to pass over. One of the pictures, "a child in a circular frame," is said to be a portrait of Lord Londesborough's daughter; and it was argued that it was very improbable that he could have intended the painting of his daughter to be sold. I quite agree that it is very improbable; but, on the other hand, he may have forgotten all about it. I cannot think that that circumstance sufficiently controls the construction of the will to make these words, "objects of vertu or taste," have an operation which they would not otherwise have.

Solicitors—Benbow, Saltwell & Tryon, for all parties.

HALL, V.C. } *In re THE MAMMOTH*
1880. } *COPPEROPOLIS OF UTAH.*
Nov. 6, 12, 15. }

Company — Directors — Claim against Directors for Misfeasance—Claim where no Creditors — Lapse of Time — Companies Act, 1862, s. 165.

The position of a liquidator making a claim against directors under section 165 of the Companies Act for misapplication of moneys in improperly paying a dividend otherwise than out of profits, is, with regard to the duty of promptitude, the same as that of an ordinary claimant.

Where, therefore, the liquidator in a winding-up which commenced in 1876 applied in 1879 for an order against directors to repay a dividend declared by them at the close of 1872 and paid soon after, the application was dismissed as a stale demand.

It was held to be also a material fact against the liquidator that there were no existing unsatisfied creditors, except one who had as a shareholder received the dividend.

The company was formed in December, 1871. On the 7th of December, 1872, the respondents, Lord Claud Hamilton, John Elliott, Charles Cooch and Morris King, the then directors, issued a circular

or report to the shareholders, declaring a dividend at the rate of ten per cent. per annum for the quarter ending Michaelmas, 1872. The report had been adopted by the directors on the 5th of December, 1872; the dividend was paid on, or soon after, the 1st of January, 1873.

The company was ordered to be wound up in November, 1876, and the official liquidator appointed in December, 1876.

For a year or more after this date he employed the same solicitors who had been employed by the company.

The official liquidator, on the 7th of July, 1879, took out the present summons, asking that the respondents might be ordered jointly and severally to repay to him the sum of 3,452l. 5s., applied by them in payment of the dividend, with interest.

It appeared that the only unsatisfied creditor of the company was Dr. Bishop, who had a claim for about 80l. He had been a shareholder, and received the dividend in question. It was stated on behalf of the liquidator that his own costs in the winding-up were unpaid.

The defence of the directors on the merits was, that the dividend was declared by them under a discretion expressly vested in them by the articles; and was honestly declared in respect of clear estimated profits.

A quantity of evidence was gone into upon the facts.

Mr. W. Pearson and Mr. Northmore Lawrence, for the liquidator, referred to

In re The National Funds Assurance Company, 48 Law J. Rep. Chanc. 163; Law Rep. 10 Ch. D. 118;
Rance's Case, 40 Law J. Rep. Chanc. 277; Law Rep. 6 Chanc. 104;

and

Stringer's Case, 38 Law J. Rep. Chanc. 698; Law Rep. 4 Chanc. 475.

Mr. Graham Hastings and Mr. Brooks-bank, for the directors.—Independently of the defence on the merits, this application is made too late.

HALL, V.C.—In the view which I take of this case it is not necessary to deal with more than one question. I need not

In re Mammoth Copperopolis of Utah.

touch upon the various questions which have been raised with reference to the state of the assets, the balance sheets and the duty of the directors as to keeping separate accounts, the duty of trustees as to declaring dividends, or whether the directors could declare a dividend without the sanction of a general meeting. Whatever may be the duties of directors as to realising assets on behalf of shareholders and creditors, I consider that the position of the official liquidator in taking a proceeding for the purpose of recovering those assets must be looked on as that of a claimant in the ordinary way, making his claim on behalf of the company, standing in the place of, and having duties to perform on behalf of, the company; and that such claims must be made in reasonable time. I look upon this as a stale demand, which the liquidator has not excused himself for not taking at an earlier stage. More than six years elapsed from the time of declaring the dividend to the date when the present summons was taken out. Considering the nature of the demand, and considering the difficulty put upon the directors after such a lapse of time in justifying their proceedings by reference to accounts and books, and the further difficulty they would have in getting indemnified by those who ought to indemnify them, and might have been able to do so if the claim had been made in reasonable time, but might now be unable—having regard to these considerations, I think no proper excuse is made out for the claim not having been put forward before. The directors have under the circumstances a right to say that it is a stale demand, even if their duty was not performed, and if they would have been responsible, supposing proceedings had been taken in a reasonable time. It is a sufficient answer now that it is too late to make them responsible. The summons being taken out in 1879, the directors have relied, and do rely, on the objection that it was not done before. As to them, it is no excuse that for eighteen months of the intervening time the liquidator employed the same solicitor whom they had employed. There is no evidence who was the person that first discovered this claim—that it was the present solicitor or

the counsel employed by him. In *Stringer's Case*, Lord Justice Giffard says, "I think it would be a gross injustice if at this distance of time, when a dividend has been made and paid in this way so long ago as the year 1864, because things turn out adversely afterwards, and the company is wound up in 1867 at the instance of a creditor, such a dividend should be repaid." The lapse of time in that case was less than has been here. I rest my judgment on that ground; and without saying at all that it is necessary in this case to fortify my judgment on the circumstances with reference to the existence of creditors—I certainly do not consider it dependent on those circumstances—yet it does appear to me that those circumstances are very strong against the Court giving judgment in favour of this claim. The facts as regards creditors are, that nothing has come of one of the claims; another is now non-existing (and I rather collect must have been arranged before this summons was taken out, which would make the case stronger); and the third creditor, a creditor for a small amount, having been himself a shareholder and received his dividend, must be taken individually to have adopted and approved of it. He cannot now complain of it; I should not allow a man who acquiesced in and adopted a transaction of that kind, at this distance of time, to sever his character of shareholder and creditor, and say that as creditor he has a right to support the present application. As to the claim of the liquidator in respect of his own costs, which, it is said, form a first charge upon the assets, his case, for the present purpose, cannot be bettered by there being costs unpaid in the liquidation. He is no better off with regard to the defence, which I think is sustained, founded on the lapse of time. That defence applies against every person who could claim the benefit of the order desired, on whatever ground it might be made.

On the whole, I think that after the lapse of time which has intervened, the summons upon the materials which have been put before me was misconceived; and I will add, that nothing has been elicited in the long argument and discus-

In re Mammoth Copperopolis of Utah.

sion that the case has received which I consider to show anything like collusion or fraud on the part of these gentlemen in the popular sense. The summons will be dismissed with costs.

Solicitors—F. L. Soames, for liquidator; Sheppard & Riley, for respondents.

JESSEL, M.R. }
1880. }
Nov. 11. } COPE v. COPE.

Administrator durante Minore Estate—Mortgage and Sale of Assets—Prejudice of Infant.

An administrator durante minore estate has for the time being all the powers of an ordinary administrator, and assignees from him of his intestate's assets are in precisely the same position as if they were dealing with an ordinary administrator.

Godfrey Cope died intestate in the year 1875, leaving a widow and infant children. Letters of administration to his estate and effects were granted to Frederick Cope, for the use and benefit of the children until one of them should attain twenty-one. Godfrey Cope, at the time of his death, was entitled to a share in the residuary personal estate of W. Slark, and had mortgaged such share during his lifetime. In September, 1876, Frederick Cope, the administrator, mortgaged the above-mentioned share to T. E. Smith. By another deed, made in October, 1876, in which all the prior mortgagees joined, Frederick Cope mortgaged the same share to the defendants, the Equitable Reversionary Interest Society, freed from the previous mortgages which had been created by Godfrey Cope and himself; and in February, 1877, Frederick Cope assigned the share absolutely to the society.

This was an action brought by the children of Godfrey Cope, who claimed administration of their father's estate, and also that the mortgages and assignment made by Frederick Cope might be set aside as not being for their benefit, but,

on the contrary, to their prejudice. The statement of claim alleged that Frederick Cope applied exclusively for his own benefit the moneys received by him under these deeds, but there was no allegation that the defendant society knew of this.

The society demurred.

Mr. B. B. Rogers, for the demurrer.

Mr. T. L. Wilkinson, for the plaintiffs, referred to

Prince's Case, 5 Co. 29 (b), and

Williams on Executors, 490, as shewing that it was the duty of the defendants to have seen that the moneys received by Frederick Cope were duly applied by him in payment of the debts of the intestate.

THE MASTER OF THE ROLLS.—The question in this case is raised by reason of some obscure dicta in some musty old law books about the power of administrator *durante minoritate*. There can be no question that the limit to the administration is the minority of the person; but there is no other limit. He is an ordinary administrator. He is appointed for the very purpose of getting in the estate and paying the debts and selling in the usual way, and the property vests in him. I am of opinion that he clearly can sell for the purpose of paying the debts. In this case there is no doubt about there being debts, and there is no allegation that he sold for any other purpose except their payment. The other point raised is that the sale must be beneficial. That may be. It very often is beneficial for a man to pay his debts. It is said that the administrator applied the money to his own use. I am afraid that not only administrators but other trustees do that sometimes, but that does not affect the sale.

In my opinion there is no sufficient ground to support the statement of claim, and the demurrer must be allowed.

Solicitors—G. R. Pilgrim, for plaintiffs; Clayton, Sons & Fergus, for the defendant society.

MALINS, V.C. }
1880. }
July 23. }

PAUL v. PAUL.

*Marriage Settlement—Wife's Property—
Next-of-kin of Wife—Creditors of Wife—
Volunteers.*

By a marriage settlement moneys in the funds were covenanted to be paid to trustees, to be held by them in trust for the wife for life, then for the husband for life, and then for the children of the marriage, and if no children, then, if the wife died in the lifetime of her husband, for such persons as she should by will appoint, and in default of appointment, for her next-of-kin according to the statute, and if she should survive him, upon trust for her. The husband and wife were separated, and the wife had contracted debts. There were no children of the marriage and no possibility of any:—Held, that the corpus of the fund might be applied in payment of the debts of the wife, the next-of-kin being mere volunteers and not within the marriage consideration.

By a settlement made upon the marriage of John Paul and Barbara Lawson Coventry, dated the 2nd of December, 1845, certain moneys to which the intended wife was entitled were covenanted to be paid to trustees upon trust to pay the income to the husband for life, then to the wife for life, and upon the death of the survivor upon trust for the children of the marriage as therein mentioned; and in case there should be no children, then after the death of the husband, should he survive the wife, for such persons as the wife should by will direct or appoint, and in default of such direction or appointment, in trust for such persons as at the death of the wife would have become entitled thereto under the Statute of Distributions, in case she had died intestate and unmarried; and if the husband should die in the lifetime of the wife, then from and after the death of the husband, and such failure of children, in trust for the wife, her executors, administrators and assigns.

The sums which became payable to the trustees amounted to 11,570*l.*

In March, 1864, a deed of separation

was executed, and by that deed John Paul assigned to trustees the income of all the settled funds in trust as to one moiety for himself, for life, and as to the other moiety for his wife for her separate use for her life.

There had been no children of the marriage, and by reason of Mrs. Paul's age there was no possibility of there being any.

In February, 1865, the trustees of the settlement advanced the sum of 600*l.*, part of the trust funds, to John Paul, upon the security of his life interest and of a policy of assurance on his life.

This action was commenced by Mrs. Paul for the purpose of having the trusts of the settlement and of the separation deed carried into execution.

By an order dated the 5th of July, 1878, made upon the petition of the plaintiff, it was ordered that on Mrs. Paul assuring her life against that of her husband for 1,300*l.*, the trustees should by a sale of part of the moiety of the trust funds, to the income whereof Mrs. Paul was entitled for her life, raise a sum sufficient to pay the costs of the action, and the further sum of 1,300*l.*, and that out of the last-mentioned sum they should pay the debts of Mrs. Paul, not exceeding 1,100*l.*, and pay the residue to Mrs. Paul, and that the residue of the income of the moiety should be charged with the payment of the premiums necessary to keep up the policy.

The trustees raised the 1,300*l.*, and paid 200*l.* to Mrs. Paul and a portion of the debts, but having discovered that a certain debt charged upon the trust funds under the decree in a suit of *Jackson v. Paul* had not been provided for, they declined to apply the residue of the 1,100*l.*, except under the sanction of the Court.

On the 28th of November, 1878, an order was made directing the payment of the debts therein mentioned, and also an enquiry whether it would be for the benefit of Mrs. Paul that any sum should be raised out of the trust funds for the payment of any further debts.

The trust funds were subsequently paid into Court, and on the 3rd of July, 1880, the chief clerk certified that it

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would be for the benefit of the plaintiff that the debts mentioned in the schedule, amounting to 1,145*l.*, should be raised and paid out of the income and *corpus* of the moiety of the funds, to which the plaintiff was entitled for her life, and that the defendant, John Paul, was willing, on receiving 300*l.* cash out of the like funds, to waive any further policy of assurance and to consent to the existing policy for 1,300*l.* being surrendered and to give up all his interest (if any) in the policy for 600*l.*

The trustees, however, objecting to this arrangement being carried out, on the ground that the plaintiff had only a testamentary power of appointment in the event of her husband surviving her, and that the funds would go at her death, in default of appointment, to her next-of-kin as if she had died intestate and unmarried, and that such next-of-kin could not now be ascertained, the plaintiff now moved that the trustees of the settlement might be ordered to surrender the policy for 1,300*l.*, and that the sum to be received, and the cash in Court to the credit of the action, and the cash to the credit of the trust funds, subject to the life interest of the plaintiff, might be applied, so far as the same would extend, in payment of the debts mentioned in the certificate, and of the 300*l.* to the defendant, John Paul, and that the balance might be raised and paid out of the *corpus* of the trust funds standing to the like credit and account.

Mr. Glasse and *Mr. Romer*, in support of the motion.—By the terms of this settlement the plaintiff is bound to preserve the property for the benefit of the next-of-kin, for persons who may be unknown to her, and who may not now even be in existence, and for their sakes the creditors are to go unpaid.

The next-of-kin are mere volunteers—

Smith v. Cherrill, 36 Law J. Rep. Chanc. 738; Law Rep. 4 Eq. 390;

Johnson v. Legard, 6 M. & S. 60;

Otterell v. Horner, 13 Sim. 506.

Settlements in favour of children of a former marriage—

Newstead v. Searles, 1 Atk. 265.

This settlement we submit ought to be set aside to the extent of applying so

much of the trust funds as may be necessary for the payment of the plaintiff's debts.

They also cited—

Heatley v. Thomas, 15 Ves. 596;

Wollaston v. Tribe, Law Rep. 9 Eq. 44;

Everitt v. Everitt, 39 Law J. Rep.

Chanc. 777; Law Rep. 10 Eq. 405;

Smith v. Iliffe, 44 Law J. Rep. Chanc.

755; Law Rep. 20 Eq. 666;

Hanley v. Pearson, Law Rep. 13 Ch. D. 545.

Mr. Higgins and *Mr. Whitehorse*, for the defendant, John Paul, consented to the application.

Mr. Pearson and *Mr. W. Barber*, for the trustees of the settlement.—This is an action to administer the trusts of the settlement and not an action to rectify the settlement, and the Court is asked to set aside the settlement so far as regards the ultimate trust for the benefit of the next-of-kin of the plaintiff, and to deal with the funds as if there were no such limitation whatever. If the Court accedes to this application, which we submit it has no power to do, it will be doing a very strong thing indeed.

Limitations in favour of collaterals are binding—

Davenport v. Bishop, 2 You. & C.C.C.

451; 1 Ph. 698; 12 Law J. Rep.

Chanc. 492.

They also referred to

Johns v. Dickinson, 5 Hare, 130;

Ellison v. Ellison, 6 Ves. 656, 661;

Kekewich v. Manning, 1 De Gex, M.

& G. 176; 21 Law J. Rep. Chanc.

577;

Dart's Vendors and Purchasers, 5th ed.

p. 893;

Davidson's Precedents, vol. iii. p. 670.

Mr. Gover, for the creditors of Mrs. Paul.

MALINS, V.C.—The point is to my mind reasonably free from doubt. The question arises in this way. [His Lordship read the terms of the settlement, and proceeded:] The only persons interested in the settlement are the husband and wife, for it appears that there have been no children of the marriage, and that there is no probability of there now being

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any. Mr. and Mrs. Paul are living apart under a separation deed, and the lady has incurred debts which she has no way of meeting except by means of the funds comprised in the settlement; and the question which I have to decide is, whether the trust funds can now be applied in payment of those debts. I referred it to chambers to enquire whether it would be for Mrs. Paul's benefit that these debts should be paid, and my chief clerk has certified that it would be for her benefit that debts amounting to 1,145*l.* 15*s.* should be paid out of the income and the *corpus* of the moiety of the fund to which she is entitled.

Now the trustees object to this on the ground that if Mrs. Paul should die in the lifetime of her husband, her next-of-kin would, under the settlement, become entitled to the funds. The next-of-kin may not now be in existence, but at all events they cannot now be ascertained, since they must be the next-of-kin living at the death of Mrs. Paul, and yet I am gravely told that I shall be doing an act of great injustice if I accede to this application.

Now upon what grounds is the limitation to the next-of-kin to be supported? Under the settlement Mrs. Paul has a general power of appointment, and in case she does not exercise the power, then the property is to go over to the next-of-kin to the exclusion of her husband; the only object, therefore, of the limitation is to prevent the husband becoming entitled to the fund. Now as Mrs. Paul has no children, and cannot possibly have any, she is the only person interested in the property, and yet if this settlement is to stand she is entitled to no share in it; she is to go about the world in a state of insolvency for the sake of persons who may not even be in existence. Why is she not to have the property absolutely if she dies in the lifetime of her husband as well as if she survives him? If the law is as I am told it is by the counsel for the trustees, that I cannot alter this settlement, and that this fund belongs to a class of persons who may be unknown, to the exclusion of the creditors, all I can say is, it is much to be regretted. But every proposition, however absurd,

can be supported by some authority, and so I am referred to *Ellison v. Ellison*, where Lord Eldon draws the distinction between entering into a voluntary covenant to do a thing, and where the act is perfected, and lays it down that a voluntary settlement, when actually carried into effect, is as binding as if there were consideration.

Then again in *Davenport v. Bishop* the property was the wife's, and the contract was that the after-acquired property should be conveyed to the wife for life, then to the husband for life, and then to the children; if no children, then to the wife's niece. During the coverture real property descended to the wife which was not settled in pursuance of the covenant; the wife died without issue. In a suit commenced by the husband against the trustees of the settlement to enforce the covenant, it was held that in order to satisfy the terms of the contract, the covenant must be carried into execution *in toto* as against the heir of the settlor, and, therefore, that not only the limitation to the husband for his life, but the ultimate limitation to the niece, though a stranger to the settlement, must take effect.

In the case of *Kekewich v. Manning* the settlement was in favour of a collateral relative by name, not an unascertained person as in this case, and there that person was declared entitled.

But in the case of *Wollaston v. Tribe*, Lord Romilly said that the trusts in a marriage settlement, in favour of the children of a future marriage and of collaterals, were purely voluntary, and declared that the clauses in the settlement were void as against the settlor; and it was only the other day in the case of *Welman v. Welman* (1), where a settlement had been executed by a father and son, in which there were no powers for jointuring wives and for raising portions for younger children, I scouted the idea of not having the power to rectify such a settlement, and directed a new settlement to be prepared under the direction of the Court.

The case of *Heatley v. Thomas* was

(1) 49 Law J. Rep. Chanc. 786.

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similar to the present case. There the wife had a power of appointment by will if she predeceased her husband, and in default of appointment her property was to go to her next-of-kin. But Sir William Grant decided that there was no consideration to support the gift to her next-of-kin, and a bond was enforced against his wife's separate estate.

I think that the objection raised by the trustees in this case is wholly unsustainable, and I have no hesitation in deciding that the surplus of the fund must be applied in payment of Mrs. Paul's debts, instead of its being retained for the benefit of her next-of-kin.

Solicitors—Bradford & Hare, for plaintiff; Meynell & Pemberton, for trustees; Munns and Longden, for Paul; H. Gover, for George Jackson, a creditor.

MALINS, V.C. }
1880. }
July 22. }

ORTNER v. FITZGIBBON.

Practice—Special Indorsement—Rules of Court, Order III. rule 6—Final Judgment—Order XIV. rule 1—Feme Covert—Separate Estate.

In an action against the defendant, who was a widow, in respect of bills of exchange given by her while under coverture, the writ being specially indorsed under Order III. rule 6, a summons was taken out by the plaintiffs, under Order XIV. rule 1, for liberty to sign final judgment:—Held, that the defendant being under coverture when the bills were given, and there being nothing to shew she had any separate estate, the order could not be made.

Motion.

This was an action commenced against Lady Louisa Fitzgibbon, who was a widow, in respect of certain bills of exchange given by her to the plaintiffs while under coverture for goods supplied.

The writ was specially indorsed under Order III. rule 6, and claimed a declaration and judgment charging the amount

claimed upon all the separate estate of the defendant which, at the date of the judgment, should be vested in her or in any person or persons in trust for her.

Under the provisions of Order XIV. rule 1, the plaintiffs took out a summons for liberty to sign final judgment, and on that summons being heard before the chief clerk he directed that the order should go unless the defendant paid the amount claimed into Court within seven days.

This was a motion on behalf of the defendant to discharge the order made in chambers.

Mr. Ingle Joyce, in support of the motion.—The defendant is not personally liable, as the bills were given when she was under coverture. The most the plaintiffs can have is a charge on her separate estate, and the trustees of her separate estate are not before the Court. The defendant has an absolute defence to the action against her personally.

He referred to

Aylett v. Ashton, 1 Myl. & Cr. 105;
Runnacles v. Mesquita, 45 Law J.
Rep. Q.B. 407; Law Rep. 1 Q.B.
D. 416.

Mr. Glasse and Mr. Begg, for the plaintiffs.—The words "final judgment" in the order may in this case mean such judgment as is final where a married woman is concerned. The order should be similar to the decree in

Picard v. Hine, Law Rep. 5 Chanc.
274.

They also referred to

The Anglo-Italian Bank v. Wells,
Law Rep. W.N. 1877, p. 263.

Mr. Joyce, in reply.

MALINS, V.C.—I am of opinion that this order made in chambers cannot stand. I am asked to treat this defendant as if she were an ordinary debtor. If this lady had been a *feme sole* at the time she gave these bills, which it is clearly proved were given for value, there could have been no possible defence to the action; but she was a married woman when they were given, and if I affirmed the order I should be treating her as a *feme sole* at the time, which I

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am not at liberty to do. She must therefore be allowed to defend the action, to which I am told she has a complete defence. There is no *constat* that she has any separate estate. I cannot oblige her to pay the money into Court, and the action must take its usual course. The order made in chambers must therefore be discharged.

Solicitors—Lumley & Lumley, for plaintiffs;
Harting & Son, for defendant.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.

JAMES, L.J.

COTTON, L.J.

THESIGER, L.J.

1880.

June 10, 17.

July 13.

In re FOX, WALKER AND
COMPANY; *ex parte*
BISHOP.

Bankruptcy—Liquidation—Bills of Exchange—Indorsement—Right of Proof against Acceptor's Estate—General Guarantee for Payment of Bills in the Place of Indorsement—Voluntary Payment.

F. & H. drew bills on F., W. & Co., which the latter accepted, and which the drawers indorsed and discounted with S. & Co., bill brokers. S. & Co. rediscounted the bills with the London and Westminster Bank, with which bank they were in the habit of rediscounting bills. According to a general well-recognised custom, S. & Co. did not on each occasion of discounting bills with the bank indorse the bills, but had given the bank a general guarantee, under which, in consideration of the bank discounting for them bills from time to time, they guaranteed due payment of the bills when they respectively became due. Before the bills became due the drawers went into liquidation, and in consequence S. & Co., the next day, suspended payment. Under a composition in the liquidation of S. & Co. the bank received dividends in respect of the bills held by them. The bank afterwards, under a deed of arrangement, received further sums towards discharge of the balance remaining

unpaid on the bills from the estate of the drawers, and also from F., W. & Co., the acceptors. On F., W. & Co. going into liquidation the trustees of S. & Co. claimed to prove in the liquidation against the estate of F., W. & Co. for the amount of the dividend paid out of S. & Co.'s estate to the bank, and for interest at five per cent. on that amount of dividend:—Held (affirming BACON, C.J.), that the proof in respect of the amount of dividend must be admitted, and (reversing BACON, C.J.) that the proof must also be admitted in respect of the interest.

The practice of giving such a guarantee is well known, and there is no principle or authority on which the liability on such guarantee differs from the liability on an indorsement.

In the month of January, 1875, Messrs. Fothergill & Hankey, ironmasters in South Wales, drew bills of exchange upon Messrs. Fox, Walker & Co., engineers at Bristol, to the amount of 22,501*l.* 6*s.* 4*d.*, which the latter accepted. The bills, seven in number, all became due during the month of July, 1875. The bills, to the amount of 19,958*l.* 7*s.* 10*d.*, were immediately indorsed generally by the drawers, and then discounted with Messrs. Sanderson & Co., bill brokers in the City of London, who while the bills were still running rediscounted them with the London and Westminster Bank. Messrs. Sanderson & Co. did not indorse the bills, but they had given a general guarantee to the London and Westminster Bank, dated the 11th of April, 1871, in these terms:—

"To the London and Westminster Bank.

"69 Lombard Street, London.

"April 11, 1871.

"In consideration of your discounting for us any bills you may approve and think fit from time to time, we hereby guarantee the due payment of them as they respectively fall due.

"(Signed) Sanderson & Co."

It was proved that it was a very ordinary practice of bill brokers, on rediscounting bills, instead of indorsing every bill rediscounted to give such a general guarantee.

The bills in question were accommo-

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dation bills and were accepted under an arrangement that the drawers should hold the acceptors harmless except as to a sum of 5,000*l.* reserved by the acceptors out of the proceeds of the bills. Sanderson & Co., when they received and discounted and rediscounted the bills, did not know that they were accommodation bills, but believed them to be ordinary trade bills.

The other bill for 2,542*l.* 18*s.* 6*d.* was indorsed by the drawers to Glyn, Mills, Currie & Co.

Messrs. Fothergill & Hankey suspended payment on the 31st of May, 1875, and Messrs. Sanderson & Co. suspended payment immediately afterwards. Sanderson & Co. executed a deed, dated the 28th of December, 1875, assigning to Turquand all their partnership property and assets in trust for sale and collection and distribution among their creditors in certain proportions. The London and Westminster Bank were scheduled to the deed as creditors holding bills.

Messrs. Fox, Walker & Co. were unable to pay the bills at maturity, and consequently the London and Westminster Bank claimed, as creditors, against the estate of Messrs. Sanderson & Co. for the full amount of the bills, and received a dividend of 3*s.* 7*d.* in the pound, amounting in all to 3,575*l.* 17*s.* 2*d.* For this sum, with 515*l.* 5*s.* 1*d.* interest, or 4,091*l.* 2*s.* 3*d.* in all, Wm. Turquand, the trustee of Messrs. Sanderson's estate, now claimed to prove against the estate of Messrs. Fox, Walker & Co., which was in liquidation.

In addition to the facts above stated, it appeared that by an indenture dated the 3rd of March, 1876, and made between Messrs. Fox, Walker & Co., of the first part, the London and Westminster Bank of the second part, and Messrs. Glyn, Mills & Co., of the third part, after a recital that the bank and Glyn & Co. held the bills above mentioned, and as follows: "And whereas the bank and Glyn & Co. have respectively proved in Fothergill & Hankey's liquidation in respect of the bills so held by them respectively as aforesaid, and are entitled to B debentures of Fothergill, Hankey & Co." (a company started to take over Fothergill

& Hankey's business) "for the amount thereof: And whereas Fox, Walker & Co. have, on or before the execution hereof, paid to the bank and Glyn & Co., in proportion to the amount of bills so held by them respectively as aforesaid, the sum of 5,625*l.* 5*s.* 9*d.*, on account and in part payment of the said sum of 22,501*l.* 6*s.* 4*d.*, leaving the sum of 16,876*l.* 0*s.* 7*d.* still due: And whereas the bank and Glyn & Co. have agreed to accept the security hereinafter expressed for discharge of the remainder of the said sum of 22,501*l.* 6*s.* 4*d.*."—It was witnessed that Messrs. Fox, Walker & Co. covenanted with the bank and Glyn & Co. (1) to pay instalments of 2,000*l.* twice a year in discharge of the above-mentioned debt of 16,876*l.* 0*s.* 7*d.*, and to give them promissory notes in respect of the instalments; (3) to apply the sums received in respect of the bills from the drawers in payment of the balance remaining unpaid; (4) that all the debentures of the company issued in respect of the 22,501*l.* 6*s.* 4*d.* should be handed over to the bank as security, with power of sale.

By clause 6, Fox, Walker & Co. assigned the lease of their business premises as further security.

Clause 9 provided that nothing therein contained, nor the receipt or acceptance by the bank or Glyn & Co. of any sum of money or security thereunder, was to release or discharge the drawer or any other person liable in respect of the bills or any of them or in any manner prejudice or affect any claims, rights or remedies which the bank or Glyn & Co. then had, or but for the deed would or could have against any such person, nor any security held in respect thereof, and the same claims, rights, remedies and securities were to be and remain as absolutely inviolable and intact as if the deed had not been executed.

This deed was prepared some time before it was executed, and between the dates of the preparation and execution a further sum was paid by Fox, Walker & Co. to the bank on account of the sum owing on the bills.

On the 11th of December, 1878, the London and Westminster Bank issued a

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writ against Fox, Walker & Co. as acceptors of the bills. The indorsement on the writ was as follows:—

	£	s.	d.
Balance of principal due . . .	7,123	6	5
Interest to date of writ . . .	1,804	12	3
	8,927	18	8

The principal was made up in the following manner:—

	£	s.	d.
Original amount of bills . . .	19,958	7	10
Paid by Sanderson & Co.	3,575	17	2
Paid by Fothergill & Hankey	1,995	16	0
Paid by Fox, Walker & Co.	7,263	8	3
	12,835	1	5
	7,123	6	5

Glyn, Mills, Currie & Co. at the same time commenced an action on their bill.

On the 13th of December, 1878, Fox, Walker & Co. filed a liquidation petition in the Bristol County Court, and on the next day obtained an injunction restraining the above-mentioned actions.

Among their liabilities in their statement of affairs they inserted the claim of the bank and Glyn and Co. for the amounts claimed in their writs, and also inserted an amount of 4,089*l.* 12*s.* 11*d.* in respect of dividends paid by Sanderson & Co. on bills held by the bank and Glyn & Co.

The bank and Glyn & Co. did not prove in the liquidation of Fox, Walker & Co., they being secured creditors under the deed of the 3rd of March, 1876, and the trustees of Fox, Walker & Co. offered 2,000*l.* in cash in discharge of the claims and for release of the security. An order was obtained in the Bristol County Court authorising the settlement of the claim on payment of the 2,000*l.*, but the bank, Glyn & Co. and Turquand were no parties to these proceedings, and prior to the payment to the bank the bank's solicitor stated that the payment to them would be without prejudice to the rights of the bank and Glyn & Co. against any of the parties liable, irrespective of Turquand's proof as trustee of Sanderson & Co., in respect of payments made by them on account of the bills, and claimed to retain the bills. On payment of the 2,000*l.*,

the bank and Glyn & Co. delivered up the securities and promissory notes held by them but retained the bills.

Turquand, as trustee for Sanderson & Co., claimed to prove in the liquidation of Fox, Walker & Co. for the sum of 4,091*l.* 2*s.* 3*d.*, as above mentioned, but the trustee of their estate refused to admit the proof, and the County Court Judge confirmed his refusal.

Turquand therefore appealed to the Chief Judge, and the appeal came on on the 1st of March, 1880.

Mr. Winslow and *Mr. Linklater*, for the appellant.—Although Messrs. Sanderson & Co. did not indorse the bills, the guarantee given by them to the bank had the same effect. Bankers in London habitually take such a guarantee from their customers in respect of bills discounted with them instead of requiring an indorsement.

But if that is not so, Messrs. Sanderson at least paid the 3,575*l.* 17*s.* 2*d.* as the agents of Fox, Walker & Co. at their request—

Simpson v. Egginton, 10 Exch. Rep. 845; 24 Law J. Rep. Exch. 312.

We are entitled to prove against the estate of the acceptor though we have not paid the whole amount due on the bills—

Re Fothergill; ex parte Corry, 45 Law J. Rep. Bankr. 153; *sub nom.*

Re Fothergill; ex parte Turquand, Law Rep. 3 Ch. D. 445.

The cases of

Mertens v. Winnington, 1 Esp. 112;

Ex parte Weil, 2 De Gex, F. & J. 642; 30 Law J. Rep. Bankr. 10,

were also referred to.

Mr. Bompas and *Mr. Romer*, for the respondent, the trustee of the estate of Fox, Walker & Co.

1. A surety has no right to prove against the estate of his principal, unless he has paid the whole amount for which he was surety. That very point was decided in

Re Fothergill; ex parte Turquand (*ubi supra*).

See also

Ellis v. Emmanuel, Law Rep. 1 Ex. D. 157.

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2. But Messrs. Sandersons were not sureties for the acceptors, for they did not indorse the bill. Their guarantee to the bank cannot put them in the position of parties to the bill. Nor did they pay the money for the benefit of the acceptors, or at their request—

England v. Marsden, H. & R. 560;
35 Law J. Rep. C.P. 259; Law
Rep. 1 C.P. 52.

The arrangements between other parties to the bills behind our backs cannot affect us.

If this proof is admitted there will be a double proof in respect of the same debt.

Bacon, C.J., discharged the order of the County Court Judge, and held that the proof should be admitted to the extent of the 3,575*l.* 17*s.* 2*d.*, the amount of principal, but rejected to the extent of the 515*l.* 5*s.* 1*d.*, the sum due for interest.

The trustee of Fox, Walker & Co. gave notice of appeal from this decision, and the respondent Turquand gave notice to the appellant that on the hearing of the appeal he would apply to the Court to vary the order of the Chief Judge with regard to the proof for interest, and that the proof should be admitted for the total amount of 4,091*l.* 2*s.* 3*d.*

Fox, Walker & Co. had no notice of the guarantee.

Mr. Romer (*Mr. Benjamin* with him), for the appellant.—The guarantee given by Sanderson & Co. gave the bank greater security than a mere indorsement would have done, the undertaking of an indorser being merely to pay on notice of dishonour, while this was an absolute guarantee; they are claiming to prove in respect of that guarantee; but the payment made by them under it was, as far as we are concerned, an officious and voluntary payment, and was not made at our request, and whatever their rights as indorsers would have been, such voluntary payment gave them no right as against us. They could not have sued us for it at the time of our liquidation, and therefore they cannot prove for it—

Sleigh v. Sleigh, 5 Exch. Rep. 514;
19 Law J. Rep. Exch. 945.

Fox, Walker and Co. knew nothing of the guarantee having been given, and a private arrangement made between San-

derson & Co. and their bank cannot affect the acceptors.

Mr. Winslow and *Mr. Linklater*, for the trustee of Sanderson & Co.—The trustee has a right to prove for what has been paid to the bank.

[JAMES, L.J.—Can the acceptors be sued for the whole amount if part has been paid by the indorser before writ issued?]

Yes. The plaintiff, the holder of the bill, is trustee for the indorser for the amount paid by him.

It is the custom of bill brokers to give the guarantee, and Fox, Walker & Co. must be taken to have been cognisant of it, and they cannot treat Sanderson & Co. as other than indorsers.

An indorser is in the position of a surety.

An acceptor's duty to pay arises when the bill is due, and if he does not pay and the indorser is sued, or otherwise compelled to pay and does pay, he may recover from the acceptors what he has paid in an action for money paid to his use—

Pownall v. Ferrand, 6 B. & C. 437;
5 Law J. Rep. (o.s.) K.B. 176.

Then Bailey, J. says (p. 443), "The law is that a party by voluntarily paying the debt of another does not acquire any right of action against that other; but if I pay your debt because I am forced to do so, then I may recover the same, for the law raises a promise, on the part of the person whose debt I pay to reimburse me. That principle was fully established in the case of

Exall v. Partridge, 8 Term Rep. 308. In this case the plaintiff (the indorser) paid by compulsion part of the debt due from the acceptor. It is said the plaintiff has no remedy because he has not paid the whole amount of the bill; but I think he is entitled to recover the part which he has paid for to that extent the defendant (the acceptor) has been benefited."

We say our payment was compulsory, but if not the case of

Ex parte Mutton; re Cole, 41 Law J. Rep. Bankr. 57; Law Rep. 13 Eq.
178, 183,

is an authority that a payment, even

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gratuitous, if it relieves the estate from a burden which otherwise it would have had to bear, must be repaid by the trustee.

[JAMES, L.J.—Sanderson & Co. might have added to the guarantee the words, "and, if necessary, we authorise the bank to put our name as indorsers," and that would have removed the difficulty.]

Ratification may be made after action brought, and that relates back and forms a good defence to the action—

Simpson v. Egginton (ubi supra) ; and they also cited

In re Fothergill ; ex parte Turquand (ubi supra).

Mr. Romer, in reply.—We have never recognised any payment by Sanderson & Co. on our behalf. There was no ratification of such payment by the arrangement. We never authorised Sanderson & Co. to rediscount the bills.

We cannot be made liable by law merchant. By law merchant only as between indorser and acceptor is a right of suretyship implied. In all other cases it must be created by a request, express or implied—

Addison Cont. 6th ed. p. 573.

Then they say there was compulsion ; but it is not compulsion when a person puts himself voluntarily into a position in which he becomes subject to compulsion. If they were compelled by the guarantee, the giving of the guarantee was voluntary—

England v. Marsden (ubi supra).

JAMES, L.J.—I am of opinion that the decision of the Chief Judge ought to be affirmed. It would be contrary to the ordinary rules of justice if the trustee of the estate of Sanderson & Co. were not allowed to prove against the estate of Fox, Walker & Co. for the amount paid by the former estate to the bank in respect of bills for which Fox, Walker & Co. were liable. A sum of money was paid by Sanderson & Co., who made themselves liable by rediscounting them to the bank, and the trustee now claims to prove for the balance owing on the bills. But it is said the bills were not indorsed by Sanderson & Co. They were drawn and accepted as accommodation bills for the

purpose of making negotiable instruments, the money to be raised partly for the benefit of one and partly of the other, and the bills to be put into circulation for the benefit of both. It is immaterial which took the bills to the brokers. It is the same thing as if both drawers and acceptors went personally to the brokers to get the bills discounted. It must have been known to both firms that Sanderson & Co. discounted them by getting advances in their turn from bankers. It was clearly known and expected that they would rediscount the bills. If Sanderson & Co. had actually put their names on the back of the bills there would have been no doubt as to the liability of the estate of Fox, Walker & Co. in respect of the bills. But it has been proved that it is, according to well-established financial usage, the common and almost invariable practice for gentlemen in the position of Sanderson & Co., instead of going through the form of indorsing every bill, to give a general letter of guarantee to bankers undertaking to be liable in the same manner and to the same extent as if they had indorsed each bill. That is a practice well known to persons who are concerned in the manufacture of bills like these. There is no authority and no principle on which the liability on such a guarantee differs from the liability arising from indorsement. The bill broker has raised money on the bills in the ordinary mode of business, and it is quite clear that they could not have obtained money on these bills without rendering themselves liable in some way and to some extent. There is, therefore, sufficient authority given by or on behalf of the persons who discounted the bills to the bill broker to do as they have done. Sanderson & Co. paid the bank under compulsion just as if they had indorsed the bills, and the mere accident that the guarantee did not give the holders the right to put the name of the givers of the guarantee as indorsers, does not make any difference. That is sufficient to shew a request by the drawers and acceptors to the brokers to pay the money on the bills. But all the other facts shew that the payment to the bank was recognised by Fox, Walker & Co. and their trustee. The effect of that

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ratification is not taken away by the suggestion now made, "As we did not know that there was no indorsement, we now see there is only a guarantee." No bargain was made which could have excluded the right of the bank. The only thing compromised was the balance which the bank claimed after giving credit for payment made by Sanderson & Co.'s estate. No compromise was made as to the bills, and the bills were never satisfied. The bank would be entitled to prove for what was unsatisfied, and the only question would be whether the bank should prove as trustees for Sanderson & Co. It seems unnecessary to go through that form, and enough for the trustee of Sanderson & Co. to prove as such. The money paid by the estate of Sanderson & Co. was paid for the benefit of the estate of Fox, Walker & Co., and there is no rule or technicality of law which prevents us saying that the estate which has been benefited is now liable to reimburse the other estate the amount paid out of it.

COTTON, L.J.—I also am of opinion that the proof has been rightly admitted for the sum of 3,575*l.* 17*s.* 2*d.*, the amount paid by the estate of Sanderson & Co. to the holders of certain bills of which Fox, Walker & Co. were the acceptors. The letter of guarantee given by Sanderson & Co. to the bank did not apply to these bills in particular but included them. It is conceded, and it could not be disputed, that if Sanderson & Co. had indorsed the bills to the bank they would have been obliged to pay, and could have sued in an action against the acceptors for indemnity. The case of *Pownall v. Ferrand* is an authority in favour of that proposition, and that liability of the acceptor to indemnify the indorser is the result of the rule of law laid down by Mr. Justice Keating in his judgment in the case of *England v. Marsden*: "Where one man is compelled to pay a debt for which another is legally responsible, the law will imply a promise by the latter to indemnify the former." But it has been rightly urged that every compulsion will not do. There is no compulsion unless the liability to pay is incurred at the request, express or implied, of the person prima-

rily liable. How is it that an indorser can claim the benefit of the rule? It is because everyone who accepts a bill and puts it in circulation authorises everyone who takes it to indorse it—that is, to transfer a right of action on it to the indorsee. When this compulsion arises under such a liability the rule applies, and the indorser shall recover the amount paid against the person who authorised him to incur this liability. Here an implied authority was given by Fox, Walker & Co. to Sanderson & Co. to do what they did. These bills were accepted by Fox, Walker & Co. for the benefit of themselves and Fothergill & Hankey. There is no evidence that Fox, Walker & Co. authorised the drawers expressly to go to these bill discounters, but there was an implied authority given them to deal with the bills in the ordinary way of business for the purpose of getting the money. They gave an implied authority to Sanderson & Co. to deal with the bills according to the ordinary custom in force in the City of London, not necessarily by indorsement, but to hand over the bills without indorsement under a general guarantee. That being so, we have here a payment on compulsion under a liability incurred under the implied authority of Fox, Walker & Co. I decide the question on this ground alone; it is unnecessary to decide on the question of any arrangement between the bank and Fox, Walker & Co. and their trustee; I do not rely on that as a ratification or approval of what has been done, but no such arrangement as proved can interfere with or defeat the right of the trustee of Sanderson & Co. to prove.

THESIGER, L.J.—This is a question of facts. I will assume that the civil law as to payment does not apply. I will assume that a voluntary payment gives no right to sue. I will assume also that the case of *Sleigh v. Sleigh* was rightly decided, and that payment by the indorser of a bill, without having received notice of dishonour, and without any request from the acceptor, cannot give him a right to recover from the acceptor the amount he has paid. I will go further and assume that the decision in the

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case of *England v. Marsden* is a correct decision, and that although a person compelled to pay a debt has ordinarily a right of action against the person for whom he has paid it, yet that is not the case when he has voluntarily put himself into the position of becoming compellable by law to pay.

Those decisions are worthy of being considered when the occasion arises; and when that time does arrive the observations of Mr. Justice Willes in the case of *Oook v. Lister* (1) are also worthy of consideration in connection with those cases; and it will be worthy of consideration whether they are not inconsistent with those decisions.

Here it is admitted that if Sanderson & Co. had indorsed the bills and had paid in respect of such bills, then their right of proof would have been clear; and it is equally clear, if they had given the guarantee to the bank under an arrangement to which the acceptors were parties, or if they had paid, without any guarantee, under an arrangement with the acceptors, their right of proof must have been admitted. It is also clear that if Sanderson & Co. had been sureties their right of proof must have been admitted. They did not, however, indorse the bills, but it is clear from the evidence that they became sureties by the authority, implied if not expressed, of the acceptors, that the payment made by them was adopted by the acceptors; and the acceptors having taken the benefit must bear the burden. The evidence at every stage points to this view. The bills were accepted and put into the market, money was to be raised on them, partly for the benefit of the drawer and partly of acceptor; and even if it was not expressly arranged that the bills should be discounted, there is no doubt that such was the intention. At all events, the Court may infer an authority on the part of Fothergill & Hankey to Sanderson & Co., to take the bills, and get them discounted in the ordinary way. That being so, it is the invariable practice of bill discounters, for the purpose of convenience, not to indorse bills on re-discounting them, but to give to the bank

(1) 13 Com. B. Rep. N.S. 543; 32 Law J. Rep. C.P. 121, 126.

a floating guarantee; and the proper inference to be drawn from that custom and the facts is, that there was an authority from the drawer, and also an authority from the acceptors, to Sanderson & Co., to deal with those bills in the ordinary way. If so, it follows that although Sanderson & Co. did not indorse them, there was authority to them from the acceptors, or a request to be implied on the part of the acceptors, to pay on the bill when due. But, even if that were not the case, we have a clear assent to Sanderson & Co.'s paying on the bills, because when we come to the arrangement between Fox, Walker & Co. and the bank, at the time the negotiations were carried on, it was clearly contemplated by all parties that there would be payments made by Sanderson & Co.—and putting a reasonable construction on the 3rd clause of the deed, it covers the case; therefore the inference which I draw from that deed, and what passed at the time, is that there was at the time of the deed a request or authority to Sanderson & Co. to pay money in respect of the bill; and that is borne out by the conduct of the parties, because, when we come to 1878, when 3,000*l.* had been paid to the bank on the bills by Sanderson & Co., we find an action brought by the bank to recover the balance—an order made restraining the action—that is followed by a statement of affairs made by Fox, Walker & Co., in which we find the debtors treating the bank as creditors for the balance, and Sanderson & Co. as creditors in respect of the part paid by them on the bills. The trustee of Fox, Walker & Co. recognised that payment; and then, finally, there is the arrangement between the trustee of Fox, Walker & Co. and the bank, and it is clear that was only a settlement as to 2,000*l.* after giving credit. It appears to me that it would be acting improperly to take advantage of a settlement, which was a settlement of a lesser sum, against the proof now claimed to be made.

Taking the whole matter into consideration, I conclude that there was an original authority to Sanderson & Co. to rediscount the bills, and there is also evidence from which I conclude that there

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was a request, or, at all events, a subsequent assent on the part of the acceptors to the payments made by Sanderson & Co.

Mr. Winslow and Mr. Linklater then claimed to prove for 51*l.* 5*s.* 1*d.*, for interest on the amount paid.

Mr. Romer, contra, referred to *Byles on Bills*, p. 304.

Our. adv. vult.

COTTON, L.J. (on July 13).—The only question remaining was, whether or not, the proof being allowed, there should be any proof for interest. That was a point which unfortunately, perhaps, was not at all argued on the main appeal. It was the subject of a cross appeal given by the respondent, and I think that probably it would have been better and have disposed of the matter more quickly, if it had been mentioned earlier and been argued, because then possibly the authorities which exist on the subject would have been brought before the Court and discussed. We reserved our judgment on that question. We are now of opinion that the proof for interest ought to be allowed. If there had been no authority at all on the point the matter would have been possibly more doubtful, but in several cases interest has been allowed, both on an expressed and an implied contract to indemnify. The cases to which I will refer (I will not refer to all of them) are, first, a case in the Common Law Courts—*Petre v. Duncombe* (2), where on a contract of indemnity interest was allowed by way of damages, it being held that in such a contract the person to be indemnified should be put in the same position, as if the one who had contracted to indemnify him had, in fact, done what he had contracted to do—that is, paid the money at the time.

Vice-Chancellor Kindersley, in a very careful judgment in *Hitchman v. Stewart* (3), came to the same result where there was an implied contract by one co-surety

to indemnify or repay another co-surety the amount which the plaintiff had paid in excess of his fair proportion. There the Vice-Chancellor allowed interest, on the ground that there was an implied contract to indemnify, following an old case of *Lawson v. Wright* (4), where the case had not been argued, but where interest had been allowed under somewhat similar circumstances.

That decision has been acted upon or followed in a case in Ireland of *In re Swan's Estate* (5), where Lord Justice Christian allowed interest under similar circumstances, on the same principle, on an implied contract to indemnify. Having regard to those circumstances, and that where there is a contract to indemnify expressed or implied the person to be indemnified ought to be put in the same position as if the act had been done by the party, we are of opinion that the proof for interest in this case ought to be allowed. That, of course, will be up to the date of adjudication.

Solicitors—Lawrence, Plews & Baker, agents for Henry Brittan, Pears & Inskip, Bristol, for appellants; Travers, Smith & Braithwaite, for respondents.

HALL, V.C. }
1880.
Nov. 13. }

In re ORPEN'S ESTATE.
BESWICK v. ORPEN.

Bankruptcy Act, 1869, ss. 28, 81, 12—Acceptance of Composition and Annulment of Adjudication—Remedy for Provable Debt—Set-off in Administration—Effect of Composition and Annulment of Bankruptcy under Section 28—Statute of Limitations.

Where a composition is accepted and a bankruptcy annulled under section 28 of the Bankruptcy Act, the amount of the composition on a provable debt is substituted for the debt, whether the creditor proves or not:—Held, therefore, that debts anterior

(2) 2 L. M. & P. 107; 20 Law J. Rep. Q.B. 242.

(3) 3 Drew. 271.

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(4) 1 Cox, 275.

(5) Ir. Rep. 4 Eq. 209.

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in date to a bankruptcy which was so annulled could not be set off against a benefit afterwards coming to the debtor under the will of the creditor.

One of the debts in question was for money lent more than six years before the bankruptcy. The Court refused to infer from the date that the debt had at the time of the bankruptcy been barred by the Statute of Limitations so as to be not provable.

Adjourned summons.

This action was brought by the assignee of a share of residue to administer the real and personal estate of Lawrence Orpen, who died on the 24th of May, 1874, having by his will dated the 5th of April, 1865, given his estate to his executors in trust for his children in equal shares. An order for accounts and enquiries was made; and the question arose in chambers, to determine which the present summons was taken out, whether the executors were, under the circumstances mentioned below, entitled to set off against the share of one of the sons, Daniel Orpen, certain sums in which he had been indebted to the testator. For the purpose of determining this question on the present summons, the parties had agreed on a statement of facts from which the following facts are taken.

In May, 1855, the testator lent Daniel Orpen 100*l.* upon a promissory note. In December, 1861, he lent a further 250*l.*, and took as security for the aggregate 350*l.* a bill of sale under seal, which contained a covenant for payment. In December, 1863, he lent a further 200*l.* on a promissory note.

In August, 1868, Daniel Orpen executed a composition deed to which the testator was not scheduled as a creditor. In June, 1872, Daniel Orpen was adjudicated a bankrupt; and on the 4th of September, 1872, a resolution was passed by the creditors under the 28th section of the Bankruptcy Act, 1869, for the acceptance of a composition of 2*s.* 6*d.* in the pound, upon condition of the adjudication being annulled; and providing that the composition was to be payable within fourteen days after the approval of the

Court to the resolution and the order annulling the bankruptcy. The composition was approved by the Court, and by an order dated the 18th of September, 1872, the adjudication was annulled. The testator did not prove in the bankruptcy, and did not receive any composition.

Daniel Orpen charged his share in the testator's estate in favour of the plaintiff on the 15th of December, 1874; and on the 31st of July, 1875, he was again adjudicated bankrupt.

The case contained a statement that the composition in 1872 was paid to all the creditors who proved in that bankruptcy, but it was stated at the bar that this fact was not admitted, having been agreed to conditionally on production of vouchers which were not produced.

Mr. W. Pearson and Mr. Methold, for the plaintiff.—The executors cannot set off if the debt was extinguished in bankruptcy—

Cherry v. Boulthée, 4 Myl. & Cr. 442; 7 Law J. Rep. Chanc. 178; 9 Law J. Rep. Chanc. 118;

In re Hodgson, 48 Law J. Rep. Chanc. 52; Law Rep. 9 Ch. D. 673;

Armstrong v. Armstrong, Law Rep. 12 Eq. 614.

That the creditor did not prove is immaterial—

Elmslie v. Corrie, 48 Law J. Rep. Q.B. 462; Law Rep. 4 Q.B. D. 295;

Heather v. Webb, 46 Law J. Rep. C.P. 89; Law Rep. 7 C.P. D. 1.

Mr. Graham Hastings and Mr. Romer, for the executors.—We never proved, and therefore can set off the whole debt—

Stammers v. Elliott, 37 Law J. Rep. Chanc. 353; Law Rep. 3 Chanc. 195;

Bailey v. Johnson, 41 Law J. Rep. Exch. 211; Law Rep. 7 Exch. 263.

Our right does not depend on whether the testator could have sued Daniel Orpen, for a debt barred by time may be set off. The bankruptcy cannot be relied on, for it was annulled. The claim on the promissory note of 1863 was clearly not provable, being barred by time.

In re Orpen's Estate.

HALL, V.C.—I cannot distinguish this case in principle from *Cherry v. Boulbee*. Ingenious arguments have been suggested with reference to the position of this particular creditor, having regard to the fact that the testator never proved his debt. First, it is said that the bankruptcy being annulled things are in the same position as if there had been no bankruptcy. Now, under such circumstances things are, generally speaking, in the same position as if there had been no bankruptcy, subject to this—that something has occurred with reference to the creditors and the debts which, having occurred, takes the place of, and is in substitution for, the remedies which the creditors would otherwise have in reference to their debts. The creditors have something substituted for their debts; and that change having taken place, and the composition proceeding, the debtor's position was that he was liable in respect of the composition to every creditor who could have come in under the bankruptcy. The creditor's former debts had ceased to be debts at all. No doubt the word "annul" is a flexible word, which sometimes means superseding and sometimes destroying the bankruptcy from the beginning; but what is done must be subject to what was rightfully done under the bankruptcy, which, for the purposes of this case, means subject to the substitution of a right to be paid the composition for the original debt. It was said that this particular creditor was in some better position by reason of his not having sent in his claim. But that is not so. His rights are controlled by the resolution passed by the other creditors.

Then it was argued that if this creditor had attempted to come in he would have been barred by the Statute of Limitations. I cannot say that that would be so. That is an issue which I cannot try. The Statute of Limitations might have been met by proof of acknowledgment or in some other way; for the present purpose I must take it that the claim was a provable debt within the Bankruptcy Act. If it was barred, it would be an assumption in the creditor's favour to take it that he could have come in and shared in the composition. On these

grounds I hold that this debt was within the resolution, and was bound by it. Then, if the man does not choose to bring in his debt, he cannot be paid; but he can be in no better position for not bringing it in. He cannot make any case bettering his situation on the ground that the composition has not been paid. The remaining point is, whether the amount of the composition upon the claim ought now to be paid; and with regard to that I will hear Mr. Pearson.

Mr. Pearson.—The original debts are now all clearly barred by the statute, except the covenant of December, 1861. But the executors ought to have proved in the bankruptcy of 1875, if they were to recover at all. They did not go in under that because they had not under the composition.

HALL, V.C.—I will allow the deduction of the unpaid composition of 2s. 6d., for that was properly payable and claimable at the death of the testator in 1874, and nothing which has taken place since that date destroys or impairs the right then existing. Treating it as so payable, the Statute of Limitations has nothing to do with it, for a right of retainer is not barred by the statute. I cannot draw any inference, from the testator having omitted to go in and prove, that he abandoned the debt. I will therefore allow that 2s. 6d. Interest on the whole debt being calculated up to the bankruptcy (but under the promissory note only six years' arrears of interest), the composition will be on the principal and interest so due at the date of the bankruptcy.

Solicitors—Bolton & Co., for plaintiff; Joseph Plaskitt, agent for F. Smoothery, Braintree, for executors.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
JAMES, L.J.
COTTON, L.J. }
1880.
Nov. 4. } WARNER v. MOSSES.

Practice—Agreement to take Evidence by Affidavit—Examination of Witnesses de bene esse—Order XXXVII. rule 4—Order XXXVIII.

When the parties to an action agree under Order XXXVIII. to take the evidence in the action by affidavit, and either party subsequently finds himself unable to procure affidavit evidence, either by reason of the refusal of witnesses to make affidavits or other good cause, the Court, on his application for leave to be relieved from the agreement, will, on good cause shewn, direct the reluctant witnesses, who must be named, to be examined *viva voce*, or, at the option of the other party, discharge the agreement and order all the evidence to be taken *viva voce*, at the trial.

Whenever it is shewn that a necessary witness is either going abroad, or is from illness, age or other infirmity likely to be unable to attend the trial, an order can be obtained under Order XXXVII. rule 4 for his examination before an officer of the Court. A like order can be obtained whenever it shall appear to the Court necessary for the purposes of justice.

Appeal from the decision of Bacon, V.C.

On the 24th of February, 1880, the parties in this action agreed to take the evidence in the action by affidavit, but after the agreement, the plaintiff's solicitor ascertained that several witnesses, whose evidence was most material to support the plaintiff's case, declined to make affidavits. Thereupon he obtained an order in chambers, under Order XXXVII. rule 4, for liberty to examine witnesses *ex parte* upon oath touching the matters in question in the action, on the ground that the only way in which the evidence of the reluctant witnesses could be taken was by summoning them before an examiner.

The defendant appealed against the order.

Mr. S. Dickinson, for the appellant.—The plaintiff is bound to take the evidence by affidavit. If he finds he cannot do so he should take out a summons for leave to be relieved from the agreement. At any rate he is not entitled to examine unwilling witnesses *ex parte*—

Smith v. Baker, 4 N.R. 321.

[He was stopped.]

Sir H. M. Jackson and *Mr. G. Wood*, for the respondent.—The Vice-Chancellor had abundant jurisdiction to make this order, and under the circumstances he was justified in making it. It could have been obtained under the old Chancery practice, and it is only superseded by the new rules, if at all, by implication. We admit the order may have gone too far in not giving the names of the witnesses, but that defect we are willing to make good.

JESSEL, M.R.—In this particular case it appears to me that there was no jurisdiction to make the order, and, even if there had been jurisdiction, I should still have been of opinion that the order could not be maintained. In the first place, it must be recollected that, under Order XXXVII. rule 1, evidence in any action is to be given by witnesses examined *viva voce* in open Court. The only exceptions are those mentioned in the 4th rule of the same Order, and where, under Order XXXVIII., by consent of the parties, the evidence is to be taken by affidavit. In this case there has been consent to take evidence by affidavit, and, consequently, in no other way can the evidence be taken for this trial. If, however, it should appear that one of the parties has given the consent by mistake, there is a mode by which that party can be released from the consequence of that mistake.

I have had several cases before me in which application has been made to be released from the consequences of such a mistake. The solicitor has in those cases made an affidavit somewhat to this effect—that at the time he gave the consent to take the evidence by affidavit, he believed his witnesses would make affidavits; he has since ascertained that one or more of the witnesses whom he had expected to make affidavits, and whose names and

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addresses he gave, were reluctant to make affidavits and refused to do so, and he, therefore, applied that those witnesses might be examined *viva voce* at the trial, or, at the option of the other party, that the agreement should be put an end to and all the witnesses should be examined *viva voce* at the trial; and if those facts were made out, then, under the general jurisdiction of the Court to relieve from a slip or mistake in practice, I have made an order giving the other side the option of having all the witnesses examined at the trial or only those who refuse to make their affidavits. But in the present instance there is no such application. The agreement stands and is binding on the other side to get affidavits from these witnesses; and yet an order has been made allowing the plaintiff to examine any witnesses he pleases (including, therefore, the defendant's witnesses) *ex parte*, before any examiner of his own choosing. Now the 4th rule is in general terms: "The Court or the Judge may, in any cause or matter where it shall appear necessary for the purpose of justice, make any order for the examination upon oath before any officer of the Court, or any other person or persons, and at any place, of any witness or person, and may order any deposition so taken to be filed in the Court, and may empower any party to any such cause or matter to give such depositions in evidence therein on such terms (if any) as the Court or Judge may direct." That is general in terms, but in regard to the provisions of an Act of Parliament, one must recollect what the practice was it was intended to meet. I do not intend to cut down the generality of its terms, but it is confined to cases in which it appears "necessary for the purposes of justice." Now it cannot be necessary for the purposes of justice to examine witnesses before the trial who can attend at the trial, and accordingly, this rule of the Order has been used in cases mentioned in Mr. Wilson's book (1), where witnesses are going abroad, or who from age or illness or other infirmity are likely to be unable to attend the trial, and then they examine the witnesses *de bene esse*, and they are examined in the usual

way; but to have such an order you must have evidence that the witness cannot attend the trial. I do not wish to confine the object of this rule to the cases I have mentioned. It does extend, no doubt, as it says, to all cases where "it shall appear necessary for the purposes of justice."

Now, having said this much, I am not aware of any case where it can be necessary for the purposes of justice that witnesses should be examined *ex parte*; I do not say a case cannot arise, but as a general rule a witness should not be examined *ex parte*. That is not the practice under the rule. A witness examined *de bene esse* is examined by both parties. There might be a case of imminent danger of death, in which either party should be at liberty to attend, and therefore it would not be necessary that both parties should attend; but it must be shewn to be necessary for the purposes of justice. But if there were power to make this order, still I think it should not have been made *ex parte*.

There is another objection to the order: it should state the names of the witnesses to be examined, but it allows the plaintiff to examine any witnesses he pleases, and to subpoena every one of the defendant's witnesses and examine them accordingly. Of course no such power should be given to either side. If the learned Judge's attention had been called to the possible effect of the order, he would not have made it in that shape.

I think the right course is simply to discharge the order with costs, without prejudice to any application which the plaintiff may make as to the mode of giving evidence at the trial.

JAMES, L.J., and COTTON, L.J., concurred.

Solicitors—Janson, Cobb & Pearson, for appellant; J. W. Sykes, for respondent.

FRY, J.
1880.
June 19, 21, 29. }

In re MEAD.
AUSTIN v. MEAD.

Donatio Mortis Causa—Bill of Exchange—Deposit—Cheque.

*M., while in contemplation of death, signed a cheque for 500*l.*, part of a larger sum on deposit at seven days' notice, and gave it to A. that he might give notice and get cash for the donor's wife. M. died before the notice expired:—Held, that there was not a good donatio mortis causa.*

M., while in contemplation of death, gave two bills of exchange to A. to realise when due for M.'s wife. M. died before the bills became due:—Held, there was a good donatio mortis causa.

Job Mead, the testator in this action, about a fortnight before he died, when in his last illness and in contemplation of death, gave two bills of exchange to one John Anderson, and asked him to take the bills and present them at maturity, and get the money and hand it to his, the testator's, wife, Hannah Mead. Anderson promised to obtain the money when the bills matured, but handed them to Mrs. Mead for custody, to be kept in the meanwhile where they had previously been. The testator died before the bills matured.

The testator had deposited a sum of 2,700*l.* at interest with the London and Westminster Bank, subject to be withdrawn on giving the bank seven days' notice. The deposit note or receipt he held of the bank had on the back a form of cheque, and attached to it a form of notice. Two days before his death the testator sent for Anderson, and stated that he wished to give his wife 500*l.*, part of the 2,700*l.* The form of notice to withdraw was handed to Anderson by the testator, and due notice to withdraw 500*l.* in seven days was given by Anderson to the bank, who informed him that the cheque must be signed. He returned to the testator, and the cheque at the back of the receipt was filled up for 500*l.*, and was signed by the testator and handed to Mrs. Mead.

The questions in the action were, whether there was a good *donatio mortis*

causa of the 500*l.*, and whether a good *donatio mortis causa* of the bills of exchange.

Mr. Joyce, for the plaintiffs, the executors.

Mr. North and *Mr. T. O. Jarvis*, for Mrs. Mead, contended that the testator intended an out-and-out gift, and could at that time have done nothing more to fulfil it, and that the case was within the principles of the cases,

Moore v. Moore, 43 Law J. Rep. Chanc. 617; Law Rep. 18 Eq. 489;

Rolls v. Pearce, 45 Law J. Rep. Chanc. 791; Law Rep. 5 Ch. D. 730;

Veal v. Veal, 27 Beav. 308; 29 Law J. Rep. Chanc. 321.

Mr. Fraser, for the residuary legatees, argued that neither in the case of the cheque for the part of the money on deposit nor of the bills of exchange was there an intention by the testator to make an immediate gift, and in both cases the gift was incomplete as a *donatio mortis causa*, and was within the principle of the cases,

Beak v. Beak, 41 Law J. Rep. Chanc. 470; Law Rep. 13 Eq. 469;

Hewitt v. Kaye, 37 Law J. Rep. Chanc. 683; Law Rep. 6 Eq. 198.

The following authorities were also referred to:—

Rankin v. Weguelin, 27 Beav. 309; 29 Law J. Rep. Chanc. 323 n;

Bouts v. Ellis, 4 De Gex, M. & G. 249; 17 Beav. 121; 22 Law J. Rep. Chanc. 716;

Amis v. Witt, 33 Beav. 619;

Bromley v. Brunton, 37 Law J. Rep. Chanc. 902; Law Rep. 6 Eq. 275;

Byles on Bills, 4th ed. p. 176.

FRY, J., stated the facts in relation to the 500*l.*, and said—Had the testator given the deposit note with a view to give immediate right to receive the whole money, it would be a good *donatio mortis causa*. In my judgment, looking at the whole of the circumstances of the case, it does not appear that the delivery to Mr. Anderson or to the wife was with the intention of making the gift otherwise than by virtue of the notice and

In re Mead.

cheque, and in consequence of the death of the testator before the cheque was payable it was not a good *donatio mortis causa*. With regard to the other part of the case, I reserve that for further consideration.

Fry, J. (on June 29), with respect to the bills of exchange, said he thought the case was governed by the case of *Veal v. Veal*, and he should hold there was a good *donatio mortis causa*.

Solicitor—T. Noton, for all parties.

JESSIE, M.B. } ASLATT v. THE MAYOR AND
1880. } CORPORATION OF SOUTH-
Nov. 8. } AMPTON.

Alderman—Private Arrangement with Creditors — Disqualification — Municipal Corporations Act, 1835, s. 52—Debtors Act, 1869, s. 21.

An alderman of a borough made a proposal, by circular letter, to his creditors, that they should accept a composition on his debts. This was assented to, and the alderman borrowed a sum of money for the purpose of paying the composition, and gave a bill of sale, to which the general body of creditors were not parties, to secure the amount borrowed:—Held, that he had not become disqualified under the provisions of the Municipal Corporations Act, 1835, s. 52, or of the Debtors Act, 1869, s. 21.

The Chancery Division of the High Court has, since the passing of the Judicature Acts, jurisdiction to restrain, by injunction, persons improperly threatening to remove an alderman from his office.

The plaintiff, an alderman of the borough of Southampton, in January, 1880, being then also an alderman, sent to his creditors a circular letter containing proposals for the composition of his debts, which proposals were, in most instances, accepted by them. He then borrowed the money necessary for the purpose, and paid the creditors, and gave a bill of sale of his stock-in-trade to secure

the money so borrowed. But the general body of creditors were no party to this deed, and no composition deed was executed by him, nor did he take any proceedings for liquidation.

The Municipal Corporations Act, 1835, s. 52, enacts that if any alderman of any borough shall (*inter alia*) "compound by deed" with his creditors, he shall thereupon immediately become disqualified, and shall cease to hold his office. And the Debtors Act, 1869, s. 21, provides that this disqualification "shall extend to every arrangement or composition by a mayor, alderman or town councillor with his creditors under the Bankruptcy Act, 1869, whether the same is made by deed or otherwise." On the 4th of November, the mayor of Southampton summoned a meeting of the corporation to declare the office of alderman held by the plaintiff void, and to elect another alderman in his place. The plaintiff now applied by motion to restrain them from so doing.

Mr. Ohitty and Mr. Maidlow, for the plaintiff, stated the facts of the case.

*Mr. Ince and Mr. Thurstan Holland, for the defendants, the mayor and corporation.—First, we submit that your Lordship has no jurisdiction, the case being one of the class assigned to the Queen's Bench Division. The Act 9 Anne, c. 20, gave to a person improperly kept out of a municipal office the peculiar remedy of applying for a writ of *quo warranto*, application for which could be made to the Court of Queen's Bench only. That Act is still in force, and the Judicature Act, 1873, s. 34, specially reserves to the Queen's Bench Division all causes and matters, civil and criminal, which would have been within the exclusive cognisance of the Court of Queen's Bench in the exercise of its original jurisdiction if the Act had not been passed. The proper remedy, therefore, is by writ of *quo warranto*.*

The next point is, that the plaintiff comes within the provisions of the Municipal Corporations Act, 1835, s. 52, and the Debtors Act, 1869, s. 21. The object of those Acts was to prevent an insolvent person from being an alderman.

[The plaintiff was called and cross-

Aslatt v. Mayor &c. of Southampton.

examined on an affidavit which he had made in support of the motion, and admitted that he had given a bill of sale of his stock-in-trade; but it turned out to have been executed only for the benefit of the person who had advanced him the money wherewith to pay the composition, and the general body of creditors were not parties to it.]

Mr. W. F. Hamilton appeared for the burgesses of Southampton.

The following cases were referred to:—

The Queen v. The Councillors of the Borough of Derby, 7 Ad. & E. 419;

The Attorney-General v. The Mayor of Liverpool, 1 Myl. & Cr. 171;

and

Hedley v. Bates, 49 Law J. Rep. Chanc. 170; Law Rep. 13 Ch. D. 498.

THE MASTER OF THE ROLLS.—In a case of this great importance I should have been very glad if an opportunity could have been afforded, in the first instance, to counsel to make themselves more thoroughly familiar with the whole of the subject than it has been possible for them to do in the short time allowed; and, in the next place, for the Court also to consider the various serious and important questions which have been raised, before delivering a judgment which, from the nature of the case—though it is on an interlocutory application—must be final; because, if the matter is not disposed of to-day, it can never be disposed of in any way whatever, as far as the corporation is concerned, with regard to the use they intend to make of the resolution which they propose to pass. However, I am not entitled to deny justice simply because the time allowed me to make up my mind on the difficult questions involved is limited, where the necessity of the case compels me to adjudicate to-day or not at all; and I must say, if any miscarriage of justice should take place, it is the defendants who are to blame, because this gentleman, having made a partial composition with his creditors in January of this year (a fact which, in my opinion, must have been known in the town of Southampton, this gentleman being an

alderman of the town, and the composition which was proposed having been submitted to the meeting of creditors, and circulars having been issued to all the creditors, seventy in number), no step is taken by the corporation, with a view to forfeiting the office of alderman which he held, until the notice of the 4th of this month; and then a meeting is to be called to-day, the 8th of November, to declare the office void. Consequently the pressure of time comes from the delay on the part of the corporation in taking any steps from January of this year until the 4th of November.

The facts of the case appear to me to be clear beyond controversy. There was a proposal for a composition in January last made by the plaintiff to his creditors. This was accepted by a considerable number of them, but not by all. The proposal seems to have been made by circular letter. There was no deed. The only deed executed was a bill of sale on the plaintiff's stock-in-trade, which appears to have been duly registered, by which he assigned his stock-in-trade as a security for a sum of money which he raised for the purpose of paying off the creditors, to which deed the creditors are not parties. It appears to me, therefore, that what took place last January is not a composition within the 52nd section of the Municipal Corporations Act, 1835. The words are, "or shall compound by deed with his creditors." Nor is it a composition within the Act 32 & 33 Vict. c. 62, which extended the provisions of the Municipal Corporations Act to every arrangement or composition by a mayor, alderman or town councillor "with his creditors" under the Bankruptcy Act, "whether the same is made by deed or otherwise," it not being a composition under the Bankruptcy Act of 1869. The result is, that, according to the plain meaning of these sections, the plaintiff is not liable to the penalty imposed upon him, or to a forfeiture of the office; and whatever I may think as to the spirit or meaning of the section, I am not entitled to get rid of the limitation imposed by the Legislature, because, if it was intended that a man compounding in any way with his creditors should be subject to the dis-

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ability mentioned in the section, nothing could have been easier than to have said so, especially when you look to the last Act, which is still limited to "under the Bankruptcy Act of 1869." Those words are evidently put in intentionally, according to some view, which I do not profess to understand, that a composition with creditors was not a disability unless it took place under the Bankruptcy Act of 1869. The result, therefore, is that this gentleman has not become disqualified, and has not ceased to hold office as an alderman.

Now, that being so, the corporation had no right to call a meeting to declare the office void, nor have they any right to impede the plaintiff in his exercise of the office of alderman. The statement that the meeting itself will do him no harm is not, in my opinion, a sufficient answer. It is no doubt an injury to him to declare the office void if it is not void, and it is still more an injury to elect some one else to fill the office, and thereby impede him in the exercise of that office. On the merits, therefore, if they can be called merits—that is, on the legal aspects—of the case, I have no doubt whatever that what is proposed to be done on the part of the corporation is not warranted by the Act of Parliament.

Then a further question is raised as to whether I ought to interfere by injunction. It is said, and I believe with perfect truth, that no such injunction was ever heard of formerly, and there was a very good reason for it, namely, that the Courts of Common Law which exercised jurisdiction over cases of this kind had no power to grant an injunction, because the Judicature Act which enabled them to do so was not passed until a very recent date, and therefore you could not have an injunction, as far as the Common Law Courts were concerned; nor was it the habit of the Court of Chancery to grant an injunction in aid of a legal right where the man was in possession of an office. He was not turned out, and the mere fact that they were taking some proceeding to test his right to continue in the office was never considered a ground for interfering by injunction. The result would have been a very singular one if it had

been, because the Court of Chancery might have restrained persons from interfering with another in the exercise of an office, and then a trial would have been directed, which nobody could initiate, because the person who held the office could not take any proceeding by *quo warranto* or otherwise, and there could be no application to compel the other party who disputed his title to take any such proceeding. One can, therefore, well understand from the mode in which the jurisdiction was then exercised, that a precedent cannot be found for such a case as this. I mentioned in the course of the argument a case within my own experience—the case of *The Queen v. The Mayor of Dover* (not reported)—in which the Court of Queen's Bench solemnly decided two years after the writ was issued, and one year after the mayor was out of office, that he had no right to be mayor at all. One cannot help thinking that such a state of things loudly called for a remedy; and, in my opinion, that remedy was given by the 25th section, sub-section 8, of the Judicature Act, 1873, which says, "A *mandamus* or an injunction may be granted, or a receiver appointed, by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made." Of course the words "just or convenient" do not mean that the Court is to grant an injunction merely because it thinks it convenient. It means that the Court is to grant an injunction for the protection of rights, or for the prevention of injury, according to legal principles; but the moment you find that a man is about to suffer a serious injury, and there is no pretence for inflicting that injury upon him, it appears to me that the Court ought to interfere.

It has been said, and I think truly said, that as a general rule the Court only interferes where there is some question of property. I do not think that the interference of the Court is absolutely confined to that now; there may be cases in which the Court would interfere where personal status is the only thing in question, but it is not necessary for me to decide that at the present moment. Even if the limited rule only were to apply, it is admitted on

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the part of the defendants, the Corporation of Southampton, that there is property; and of course they must have property independent of the borough rates, they being an old corporation, and therefore the gentleman is in a sense a trustee, or one of the governing body, and has a part in the disposal of that property; and in that sense he has a right to say, "You are not to expel me or to deprive me of the right of attending and voting in the town council as an alderman of the borough, or from taking that share in the government of the borough which I am legally entitled to take." It seems to me, therefore, that there is no reasonable ground on which I can be fairly asked to withhold the exercise of the jurisdiction which I decide is conferred on me.

The only other point raised was this: It was said that this was business assigned to the Court of Queen's Bench, and that I ought not to interfere. Now there are two answers to that. In the first place, I think it is not assigned. It is an action for an injunction. The power of granting injunctions was given to all the Courts of law by the Common Law Procedure Act of 1854, and was not confined to any one Court. An action might be brought for injury—that is, if an alderman had been turned out he could have brought an action against those who turned him out wrongfully; and that action might have been brought in any one of the three Courts—the Court of Queen's Bench, the Court of Common Pleas or the Court of Exchequer. Therefore this is not within the 34th section, as being business exclusively assigned to the Court of Queen's Bench.

There is another answer. Even if it were, where an action has been brought in a wrong division the Judge has still jurisdiction to retain the action, and to grant the relief asked if he thinks it is a case which imperatively requires it. Now in the present case the meeting is to take place at half-past two o'clock to-day, and therefore if I did not restrain the corporation, but ordered the action to be transferred to the Queen's Bench Division, it would be equivalent to a total denial of justice, and, in my view, having regard to the provision which I have last referred

to, I ought to retain the action here and decide it.

On the whole it appears to me a clear case for granting an injunction; and I therefore make an order to restrain the defendants from avoiding or declaring void the office of alderman of the borough of Southampton now held by the plaintiff, or from taking any steps for that purpose, or from in any way interfering with the exercise by the plaintiff of his rights or privileges of alderman, until trial or further notice.

The injunction was, by consent, made perpetual against the defendants, but without prejudice to their right to appeal.

Solicitors—Stocken & Jupp, agents for W. A. Lomer & Son, Southampton; Walker, Belward & Whitfield, agents for Pearce & Co., Southampton.

[IN THE COURT OF APPEAL.]

JAMES, L.J. }
COTTON, L.J. }
1880. }
July 10, 17. }

In re SMYTH.

Lunacy—Inspection of Proceedings in Lunacy—Production of Documents.

The inspection of proceedings in lunacy is not a matter of right, and any person, other than the parties to the proceedings, or those claiming under them, must make out a case to the satisfaction of the Court of his right to such inspection.

G. E. Smyth was found a lunatic in 1834, and certain documents relating to his real estate were deposited with the Master in Lunacy. He died in the year 1878 intestate as to his real estate.

An action was commenced shortly after his death, in which both the plaintiff and defendant claimed to be heir-at-law.

The plaintiff in the action now presented a petition asking for permission to inspect the proceedings in the lunacy and to take copies of the documents, and for production thereof at the trial of the action.

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The plaintiff had not filed an affidavit, verifying his claim in the action, relying on the authority of

In re Wood, as reported 33 [Law J. Rep. Chanc. 334.

The case is also reported 4 De Gex, J. & S. 134.

Mr. Yate Lee, for the petitioner.

COTTON, L.J., said that the case as reported in 4 De Gex, J. & S. differed from the report in the Law Journal, and that from the former it appeared that any person, other than the parties to the proceedings in the lunacy and those claiming under them, seeking inspection of the proceedings in lunacy, must make out a case to the satisfaction of the Court.

He accordingly required the plaintiff to file an affidavit verifying his claim to be the heir-at-law of the intestate lunatic.

JAMES, L.J., concurred.

Solicitors—Peacock & Goddard.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.	}	BENLOW v. LOW.
JAMES, L.J.		
COTTON, L.J.		
1880.		
Nov. 4.		

Practice—Discovery—Interrogatories—Accounts—Rules of Court, 1875, Order XXXI. rules 5, 8, 9.

In an action to restrain the defendants from using a trade name and from selling their goods as the plaintiffs', the defendants, by counter-claim, claimed the same relief, and also an account of all the goods sold by the plaintiffs as and for the goods of the defendants, and of the profits of such sales. Both parties claimed to derive their title to the trade name under a partnership that had been dissolved in the year 1861, since which time both had carried on the same business. An interrogatory exhibited by

the defendants required the plaintiffs to set forth the quantities of goods sold by them since 1861, distinguishing the quantities sold in each year:—Held (affirming the decision of BACON, V.C.), that the interrogatory was rightly disallowed, for that it was not put for the ordinary purpose of discovery, but was directed to the details of the plaintiffs' evidence.

Saunders v. Jones (47 Law J. Rep. Chanc. 440; Law Rep. 7 Ch. D. 435) discussed and explained.

This was an appeal from the decision of BACON, V.C.

The action was brought to restrain the defendants from using a trade name—namely, "Low's highly perfumed Brown Windsor Soap"—either with or without certain labels or wrappers, and from selling their soap as the plaintiffs'. The defendants, by their counter-claim, claimed similar relief, and also claimed an account of all soap sold by the plaintiffs as and for soap of the defendants', and of the profits of such sale.

Both the plaintiffs and the defendants claimed their right under two persons who were in business in co-partnership up to the year 1861, and made and sold this particular soap. In that year the partnership was dissolved, and the respective predecessors of the plaintiffs and of the defendants respectively set up separate businesses for the manufacture of soap, &c. The question in dispute was, who was entitled to use the trade name and wrappers originally applied to and used with the soap.

The defendants, among other interrogatories, exhibited the following: Let the plaintiffs set forth the respective quantities of soap sold by them and their predecessors in business in connection with their labels and wrappers bearing the plaintiffs' alleged trade mark, from the year 1862 to the year 1879, both inclusive, distinguishing between the quantities sold in each year, and distinguishing between the quantities sold in England and in the United States of America, and on the continent of Europe respectively.

The plaintiffs declined to answer this interrogatory on the following amongst

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other grounds—that the accounts here asked for form part of the relief sought by the defendants' counter-claim, and that the defendants are not entitled to such accounts until after they have obtained judgment in their favour on their counter-claim; that such accounts are not necessary for the trial of the action, and that the interrogatory is not material at this stage of the action.

The defendants took out a summons to compel the plaintiffs to answer the interrogatory.

The Vice-Chancellor dismissed the summons with costs, being of opinion that the interrogatory was unreasonable and an attempt to see the plaintiffs' brief.

The defendants appealed.

Sir H. M. Jackson and Mr. Byrne, for the appellants.—This case is within the principle of

Saunders v. Jones (ubi supra).

[JESSET, M.R.—I have always considered that

Saunders v. Jones (ubi supra) means only this, that where at common law you would take out a summons for further and better particulars, you could in equity put an interrogatory to obtain the same information. That is all. JAMES, L.J.—The question is, Is it a summons for better particulars; or is it an attempt to get at the evidence of the other side?]

Admitting that to be so, we submit that the information we require is material to us at the trial of the action, and may enable us to obtain an immediate order for payment; and further, that the plaintiffs will in no way be injured by giving the required discovery.

Mr. Aston and Willis-Bund, for the respondents, were not heard.

JESSET, M.R.—I think there is no doubt as to what the construction of the rules in this case ought to be. The construction ought to be such as to prevent dishonest persons taking advantage of the rules, because, if all men were honest, the rules would not be wanted at all. If you give one side the opportunity of knowing the particulars of the evidence

that is to be brought against them, then you give a rogue an enormous advantage. He then may be able to shape his case and his evidence altogether in such a way as to defeat entirely the ends of justice. Therefore it does appear to me that the rule in question should be strictly adhered to. On the other hand, there is a well-established rule that discovery of the nature of the case that is to be made against you and of the written documents in the possession of the parties in support of that case, should be allowed to both sides. In the present instance the plaintiffs' claim is one which is quite simple. They say, We have used a trade mark belonging to the defendants for many years; we have used it in carrying on our trade, openly and with the knowledge and consent of the predecessors in title of the defendants. The defendants simply deny it. They deny the user, and they deny the knowledge or acquiescence; and upon that issue is joined. The plaintiffs, therefore, have to prove the user and the knowledge or acquiescence. The whole obligation of proof is on the plaintiffs. The defendants seek to destroy the plaintiffs' case, and, for that purpose, they have two modes. They may either wait for the trial and watch the plaintiffs' evidence and say it is insufficient, or they may make enquiries before the trial as to the mode in which the plaintiffs' trade has been conducted, and they may bring evidence to shew how it has been conducted, and to shew that it has not been conducted in the manner alleged. But they want to do more than that: they want the plaintiffs to give them the details, or a portion of the details, of the evidence which they are going to bring forward in support of their case. Now, no doubt the mode of carrying on the trade of the plaintiffs, whether it has been openly carried on in the usual course of business; whether the goods have been openly offered for sale; whether they have been frequently sold; whether they have been sold in larger or smaller quantities,—are all questions which have more or less bearing upon the issue to be decided, and are more or less material to the decision of the issue; but it does not follow from that that the defendants are entitled to

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all those particulars. They may be surprised at the trial—that is, they may find evidence brought forward which they were not prepared to meet, but which, if they had time given them, they would be able to meet. If such a case should arise, it is provided for in two ways by the rules. They may either apply to the Judge, at the trial, to adjourn the trial, in order to enable them to meet it, or they may afterwards apply for a new trial on the ground of surprise. All that has been provided for, but it does not entitle them to get from the plaintiffs these particulars of their evidence before the trial comes on. Then it has been said, “But these are not particulars of evidence.” I think they are. What they ask is this: one of the details which will have to be proved is the respective quantities of soap sold by them in connection with the labels in question during every year for a great number of years. Now the plaintiffs need not prove this at all at the trial. They need not shew the quantity sold in every year. It will be sufficient for them to shew considerable—that is to say, substantial—quantities sold during the whole period at reasonable intervals. They need not actually prove the quantity so sold in each year, and it may be difficult to ascertain. But what the defendants want further is to shew that they have only sold small quantities; the answer is, if they have only sold small quantities they will only prove small quantities at the trial. But the defendants say, “It may turn out that they have sold nothing, and then we shall have occasion to go into no evidence.” Well, if the plaintiffs cannot prove any sales at the trial the defendants will not have occasion to go into evidence. But then it is said, “If they prove they have sold nothing we shall be able to defeat them altogether without taking any further trouble.” All I can say is, that their advisers must be very sanguine indeed if they think that that will be the answer, and that that will be the result. One must look at it as a reasonable man, and I can only say that it is entirely beside the point, and could only have been thrown out as a suggestion arising from the ingenuity of counsel in the course of the argument, for they really cannot ex-

pect anything of that kind. That being the position of matters, it seems to me the Vice-Chancellor was quite correct in the conclusion at which he arrived, that this was an interrogatory directed to the detail of the plaintiffs' evidence, and not to the ordinary purposes of discovery.

Before parting with this case I should wish to say a word or two upon the decision in the case of *Saunders v. Jones* in the Appeal Court, as I was not a party to that decision, although I have acted upon it very often. As I understand that decision, the main portion of it applied to what have been called the four first interrogatories, and that decision amounted simply to this: Whereas at common law, in an action for wrongful dismissal, if the defendant pleaded that he dismissed the plaintiff for misconduct, the plaintiff would have a right to the particulars of the misconduct, so that he might be able to shew at the trial that there was no misconduct, and could obtain that under a summons for better particulars; but there being a practice coming to the Chancery Division from the old Court of Chancery, not as a rule to give better particulars, although of course it could be done, but to allow the particulars to be obtained by interrogatories, especially when you have to interrogate for other purposes, there was no reason, then, for departing from the practice, it being a cheaper course of procedure and better; and therefore, where there was among the interrogatories one or more interrogatory simply asking for better particulars, those interrogatories should be allowed without putting the applicant to the trouble of taking a summons for better particulars. That is all that was decided, and it is as plain as possible, because when you look at the observations of the late lamented Lord Justice Thesiger (page 447), and of Lord Justice James, on the same page, they are to have the particulars of the alleged misconduct; and when you look at the judgment of Lord Justice James, at page 449, he says, “He is entitled to particulars like the particulars of breaches or infringement, and it is no sufficient answer to say, ‘You have not taken the right course; you ought to have applied to the Vice-Chancellor for particulars’—

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other grounds—that the accounts here asked for form part of the relief sought by the defendants' counter-claim, and that the defendants are not entitled to such accounts until after they have obtained judgment in their favour on their counter-claim; that such accounts are not necessary for the trial of the action, and that the interrogatory is not material at this stage of the action.

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Mr. Aston and Willis-Bund, for the respondents, were not heard.

JESSEL, M.R.—I think there is no doubt as to what the construction of the rules in this case ought to be. The construction ought to be such as to prevent dishonest persons taking advantage of the rules, because, if all men were honest, the rules would not be wanted at all. If you give one side the opportunity of knowing the particulars of the evidence

that is to be brought against them, then you give a rogue an enormous advantage. He then may be able to shape his case and his evidence altogether in such a way as to defeat entirely the ends of justice. Therefore it does appear to me that the rule in question should be strictly adhered to. On the other hand, there is a well-established rule that discovery of the nature of the case that is to be made against you and of the written documents in the possession of the parties in support of that case, should be allowed to both sides. In the present instance the plaintiffs' claim is one which is quite simple. They say, We have used a trade mark belonging to the defendants for many years; we have used it in carrying on our trade, openly and with the knowledge and consent of the predecessors in title of the defendants. The defendants simply deny it. They deny the user, and they deny the knowledge or acquiescence; and upon that issue is joined. The plaintiffs, therefore, have to prove the user and the knowledge or acquiescence. The whole obligation of proof is on the plaintiffs. The defendants seek to destroy the plaintiffs' case, and, for that purpose, they have two modes. They may either wait for the trial and watch the plaintiffs' evidence and say it is insufficient, or they may make enquiries before the trial as to the mode in which the plaintiffs' trade has been conducted, and they may bring evidence to shew how it has been conducted, and to shew that it has not been conducted in the manner alleged. But they want to do more than that: they want the plaintiffs to give them the details, or a portion of the details, of the evidence which they are going to bring forward in support of their case. Now, no doubt the mode of carrying on the trade of the plaintiffs, whether it has been openly carried on in the usual course of business; whether the goods have been openly offered for sale; whether they have been frequently sold; whether they have been sold in larger or smaller quantities,—are all questions which have more or less bearing upon the issue to be decided, and are more or less material to the decision of the issue; but it does not follow from that that the defendants are entitled to

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all those particulars. They may be surprised at the trial—that is, they may find evidence brought forward which they were not prepared to meet, but which, if they had time given them, they would be able to meet. If such a case should arise, it is provided for in two ways by the rules. They may either apply to the Judge, at the trial, to adjourn the trial, in order to enable them to meet it, or they may afterwards apply for a new trial on the ground of surprise. All that has been provided for, but it does not entitle them to get from the plaintiffs these particulars of their evidence before the trial comes on. Then it has been said, “But these are not particulars of evidence.” I think they are. What they ask is this: one of the details which will have to be proved is the respective quantities of soap sold by them in connection with the labels in question during every year for a great number of years. Now the plaintiffs need not prove this at all at the trial. They need not shew the quantity sold in every year. It will be sufficient for them to shew considerable—that is to say, substantial—quantities sold during the whole period at reasonable intervals. They need not actually prove the quantity so sold in each year, and it may be difficult to ascertain. But what the defendants want further is to shew that they have only sold small quantities; the answer is, if they have only sold small quantities they will only prove small quantities at the trial. But the defendants say, “It may turn out that they have sold nothing, and then we shall have occasion to go into no evidence.” Well, if the plaintiffs cannot prove any sales at the trial the defendants will not have occasion to go into evidence. But then it is said, “If they prove they have sold nothing we shall be able to defeat them altogether without taking any further trouble.” All I can say is, that their advisers must be very sanguine indeed if they think that that will be the answer, and that that will be the result. One must look at it as a reasonable man, and I can only say that it is entirely beside the point, and could only have been thrown out as a suggestion arising from the ingenuity of counsel in the course of the argument, for they really cannot ex-

pect anything of that kind. That being the position of matters, it seems to me the Vice-Chancellor was quite correct in the conclusion at which he arrived, that this was an interrogatory directed to the detail of the plaintiffs' evidence, and not to the ordinary purposes of discovery.

Before parting with this case I should wish to say a word or two upon the decision in the case of *Saunders v. Jones* in the Appeal Court, as I was not a party to that decision, although I have acted upon it very often. As I understand that decision, the main portion of it applied to what have been called the four first interrogatories, and that decision amounted simply to this: Whereas at common law, in an action for wrongful dismissal, if the defendant pleaded that he dismissed the plaintiff for misconduct, the plaintiff would have a right to the particulars of the misconduct, so that he might be able to shew at the trial that there was no misconduct, and could obtain that under a summons for better particulars; but there being a practice coming to the Chancery Division from the old Court of Chancery, not as a rule to give better particulars, although of course it could be done, but to allow the particulars to be obtained by interrogatories, especially when you have to interrogate for other purposes, there was no reason, then, for departing from the practice, it being a cheaper course of procedure and better; and therefore, where there was among the interrogatories one or more interrogatory simply asking for better particulars, those interrogatories should be allowed without putting the applicant to the trouble of taking a summons for better particulars. That is all that was decided, and it is as plain as possible, because when you look at the observations of the late lamented Lord Justice Thesiger (page 447), and of Lord Justice James, on the same page, they are to have the particulars of the alleged misconduct; and when you look at the judgment of Lord Justice James, at page 449, he says, “He is entitled to particulars like the particulars of breaches or infringement, and it is no sufficient answer to say, ‘You have not taken the right course; you ought to have applied to the Vice-Chancellor for particulars’—

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which is not according to the practice of the Chancery Division. The only mode by which particulars would be got in the Chancery Division was by administering interrogatories; and I am of opinion that a party may still adopt that course"—not "must," but "may"—"and that the interrogatories must be answered." If a party is interrogating for other purposes, he may add an interrogatory for this purpose, and that is all that is decided on the point.

The other point has nothing to do with the case before us. It was this, that as regards the 5th interrogatory there was a question of modified accounts, and that the Court has a discretion in requiring a defendant to answer as to the result of an account before the trial. There are cases in which the account would be complicated, and in which, the plaintiff's title being denied, it would be refused; and there are cases in which the plaintiff's title to it may be denied as a title which is fairly open to trial, and which has to be affirmed at the trial, but where the giving of the account would occasion little trouble to the defendant, and would be of immense advantage to the plaintiff by enabling him to get an immediate decree or order at the trial, and where the Judge in the exercise of his discretion may allow it. In the particular instance of *Saunders v. Jones* the Judge was pleased to allow it, and the Court above not only approved the exercise of the discretion and declined to interfere, but, as I read it, expressed an opinion that they should have exercised the same discretion if it had been vested in them in the first instance in the same way. As I have already said, it has no bearing whatever upon the case before us. It appears to me that the appeal should be dismissed.

JAMES, L.J.—I am of the same opinion. It appears to me the question is, whether this is really asking to see the brief of the other side in order to know exactly what is the evidence they are going to produce, which is not permitted, or whether it is a question which comes within the exceptional instance which has been referred to, where a man says, "Give me particulars of the misconduct which you allege against

me"—which I always thought was an exceptional and particular case, and which was decided by the Court by analogy to that which is done at common law, where a man pleads justification to a libel and where you are obliged to give particulars. If a man says, "I am entitled to recover an estate because you have committed breaches of covenant," you are entitled to ask, "What breaches of covenant have I committed?" The party is not allowed to see the brief beyond that, but only to know what are the particulars on which the other side are going to rely—that is, the substantial particulars. That is all he is entitled to. It appears to me that the quantities here are nothing but evidence in support of the plaintiffs' case.

COTTON, L.J.—I agree. I am of opinion that upon the pleadings as they stand the defendants are not entitled to enforce discovery in answer to their interrogatory. The interrogatory asks for the quantities sold in each of several years. That is not in support of any case raised by the defendants in their pleadings in answer to the plaintiff, nor is it discovery that is wanted in order to shew the nature and character of the acts relied on by the plaintiffs, and of the things relied on by the plaintiff, who states by his pleadings that he has sold soap to a large extent, and indeed both in Europe and America; so that it does not at all come within the principle of *Saunders v. Jones*, where discovery was granted in order to shew what the nature of the acts of misconduct were which were relied on by the person refusing to give discovery. Now, that being so, it does come to what has been stated by Lord Justice James, namely, simply a desire to know what evidence will be given by the plaintiffs in support of their statements, and of the acts which they allege make out their case. It may be very convenient for the defence to have such discovery, and it may enable them to prepare for trial with less apprehension and with less expense; but the question which we have to consider is, whether he is entitled, as a matter of right, to discovery from the opposing party; and, however much it would save them from

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trouble and expense, in my opinion he is not, because it comes within the principle that you are not entitled to see what evidence your opponent is prepared to give in support of his own case. In my opinion, therefore, the discovery in this case has been properly refused.

JAMES, L.J.—There was one ground upon which discovery might properly and reasonably have been asked for, which was not put in the course of argument—that is, “If you make out a very strong case, I will knock under.” The appeal will be dismissed with costs.

Solicitors—Lucas & Co., for appellants; C. E. Withall, for respondents.

[IN THE COURT OF APPEAL.]

JAMES, L.J.	}	SMITH v. ANDERSON.
BRETT, L.J.		
COTTON, L.J.		
1880.		
July 13, 16.		

Company—Association or Partnership for investing Capital—“Carrying on Business”—Acquisition of Gain—Companies Act, 1862, s. 4.

A deed was made between the defendants, called trustees, of the one part, and a coveantee on behalf of the holders of certificates of the other part, reciting subscriptions by numerous persons for the purchase by the trustees of the stocks, shares and debentures of certain submarine telegraph companies, which had been transferred into the trustees' names, and that it was intended to issue to the subscribers certificates of the nominal amount of 100l. in respect of every subscription of 90l., and to issue as part of the certificate coupons of reversion, one coupon for each subscription of 90l., in addition to the certificates for 100l., and the deed contained provisions by way of trust for application of the annual produce in payment of expenses and interest, and in the redemption of the certificates according to a scheme, and for distribution of the available moneys *pari passu* among the certificate-holders; and that the certificates to be redeemed should

be selected by lot; and for ultimate division of any surplus between the holders of the coupons of reversion; and for sale or conversion of the securities at the discretion of the trustees, the produce to be applied in the redemption of certificates, or with the assent of the certificate-holders, in the purchase of similar securities; and for remuneration of the trustees; and for an annual meeting of the certificate-holders, the proceedings thereat to be in manner prescribed by Table A.; the business of the meeting to be (a) to receive a report of the trustees on the condition of the trust; (b) to appoint auditors; (c) to elect new trustees.

The 4,200 certificates were issued, and the holders were more than twenty:—

Held (reversing the decision of THE MASTER OF THE ROLLS), that the certificate-holders did not form an association which, under section 4 of the Companies Act, 1862, was illegal for want of registration. That the object of the deed was not the carrying on a business for the acquisition of gain within the section, but the holding and management of a trust fund, and that the powers given by the deed of selling and re-investing in certain cases were merely provisions similar to those found in ordinary settlements, and as being merely incidental to the management of the trust fund did not bring the case within the section. That the business (if any) authorised by the deed to be carried on was carried on by the trustees as trustees, and not as directors, and that they being under twenty, the case did not fall within the section.

Sykes v. Beadon (48 Law J. Rep. Chanc. 522; Law Rep. 11 Ch. D. 170) disapproved; and *In re The Arthur Average Association* (44 Law J. Rep. Chanc. 569; Law Rep. 10 Chanc. 542), doubted by BRETT, L.J.

Per BRETT, L.J.—No transaction within the association or company between the members of it can be taken into consideration to determine whether the company or association was one formed to carry on a business within the meaning of section 4.

This was an appeal from the decision of Jessel, M.R., who, following the case of—

Sykes v. Beadon (ubi supra),

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decided by himself, held the body constituting the Submarine Cables Trust an illegal association.

The trust was created by a deed dated the 6th of September, 1871, and made between Sir James Anderson and five other persons, therein called the said trustees of the one part, and the defendant, Sir Philip Rose, therein called the covenantee, for and on behalf of all the holders for the time being of the certificates thereafter mentioned of the other part.

The deed recited: First. That divers persons had subscribed in or for the purchase by the said trustees of the stocks, shares and debentures of certain submarine telegraph companies specified in the schedule to the deed. Second. That the said stock, shares and debentures had been transferred to, and then stood registered in the names of the said trustees in the books of the said companies. Third. That it was intended to issue to the subscribers 4,200 certificates, a certificate of the nominal amount of 100*l.* being delivered in respect of every subscription of 90*l.* Fourth. That it was intended to issue as part of the certificates, coupons of reversion, one of such coupons being delivered in respect of every subscription for 90*l.* in addition to the certificate of 100*l.*

It was witnessed that the said trustees and every combination and single one of them covenanted for themselves and himself with the covenantee, his executors, administrators and assigns, for and on behalf of all the holders for the time being of the certificates.

First. The trustees shall hold the stock, shares and debentures so transferred as aforesaid, and the annual produce upon trust to give effect to the provisions of these presents.

Second. The annual produce of the scheduled securities shall be applied—

1. In payment of all expenses during the preceding year.

2. In payment of interest at six per cent. on the nominal amount of the certificates to the holders thereof for the time being.

3. In the redemption, as hereinafter provided, of so many of the said certi-

ficates as the surplus income arising from the said sections should be competent to redeem.

Third. The interest was to be paid half-yearly.

Fourth. If in any year the annual produce of the scheduled securities shall, after payment of all expenses, be insufficient for payment of interest at six per cent. on the nominal amount of the certificates, the available moneys shall be divided amongst the holders of the certificates *pari passu*, and the deficiency of such interest shall form a first charge upon all subsequent receipts, subject only to the annual allowance for expenses.

Fifth. The trustees shall, as soon as conveniently may be after the 15th day of April, 1872, and thenceforward after the 15th day of April and 15th day of October in every year, apply any surplus income remaining in their hands, after payment of such expenses and interest, in redeeming as many of the certificates as they shall be able by either of the following methods, or partly by one and partly by the other, to redeem:—

(a) By purchase of the certificate in the open market, provided the price paid for each certificate be less than 120*l.*

(b) By tender from the certificate-holders for the redemption of the certificates held by them, provided no tender be accepted at a higher price than 120*l.*

Sixth. Notice of the intention of the trustees to receive tenders for the redemption of certificates shall be given by advertisement in such newspapers as the trustees shall select.

Seventh. If at the expiration of any year after the redemption of as many certificates as possible, by either or both of the said methods, the trustees shall have surplus funds applicable to the redemption of certificates, they shall redeem, in the manner hereinafter contained, as many certificates as such surplus funds shall be competent to redeem at the price of 120*l.* for each certificate.

The 8th clause provided that the certificates to be redeemed should be selected by lot in the presence of a notary public, and the 9th and 10th clauses contained provisions as to the manner of proceeding by lot.

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Thirteenth. So soon as all the certificates shall have been redeemed, the securities remaining subject to the trusts of the deed shall be realised under the directions of the trustees, and the net proceeds thereof shall be divided between the holders for the time being of the coupons of reversion in the proportion of the nominal value of the coupon held by them respectively.

The 14th clause provided for the termination of the trusts in the event of the purchase by Government of the telegraph companies, and the subsequent redemption of the trust securities.

The 16th clause provided for the deposit of the securities in the names of the trustees at the bank of Glyn & Co., or some other bank.

Seventeenth. The trustees were to keep proper accounts of receipts and payments, and of all other matter proper to shew the positions of the trust securities.

Eighteenth. It shall be lawful for the trustees at their discretion to sell any of the securities, if and when they shall be capable of being sold in the market, and shall be sold at a premium of not less than thirty per cent. over the price at which the same were purchased and taken over by the trustees, and the proceeds of such sale shall be applied by the trustees as hereinafter provided.

Nineteenth. Except as in clause 18 provided, none of the securities shall be sold or converted into money, unless at a meeting of the trustees, called with express notice of the object, at which there are present not less than four trustees, it shall be unanimously resolved by the trustees present that it is expedient for the interest of the certificate-holders that certain of the securities to be specified in the resolution shall be sold and converted into money or otherwise dealt with or disposed of.

Twentieth. The produce of every sale or conversion shall be applied as the surplus income arising from the annual produce of the securities; provided always that it shall be lawful for the trustees, if it shall be so decided by a unanimous resolution of the trustees, at a meeting called with express notice of the object, at which all the trustees are present in

person or by proxy, and such resolution shall be confirmed at a meeting of the certificate-holders summoned for that purpose by advertisement, to re-invest the produce of any such sale or conversion, or any part of the same, in the purchase of such securities of the same character as the scheduled securities as they shall select; and all securities so purchased shall be held subject to the trusts of this deed as if they had formed part of the original securities.

The 22nd clause enabled the trustees to deduct for the year 1871, and in every subsequent year, by way of remuneration to them, . . . any sum not exceeding in the aggregate 1,200*l.* per annum.

By the 23rd clause the trustees were directed once in every year, by advertisement in some two public daily newspapers printed in London, to call together a meeting of the holders for the time being of the certificates.

Twenty-fifth. The proceedings of the meeting shall, so far as may be, be conducted in the manner prescribed in Table A in the Companies Act, 1862.

Twenty-sixth. The business of the meeting shall be (a) To receive and consider a report from the trustees on the condition and affairs of the trust; (b) To appoint auditors to audit the accounts of the trustees, and to report to the next meeting of the holders of certificates; (c) To elect new trustees to supply any vacancies in that body.

Twenty-eighth. If it shall be unanimously decided by the trustees at a meeting called with express notice of the object, at which not less than four trustees are present in person or by proxy, that any extraordinary expenses should be incurred, they may incur the same accordingly, subject to the same being confirmed by resolution of the certificate-holders assembled at any general meeting.

The deed contained clauses (29, 30, 31, 32) enabling the trustees to vote by proxy for the appointment of new trustees, and providing that every new trustee should enter into a covenant with a covenantee to be named by the remaining trustees for the time being, covenanting for the acts of himself and his co-trustees.

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By the 33rd clause, the trustees were declared not to be under any obligation to sell, call in or convert into money any of the securities.

The form of the certificate in the 2nd schedule was as follows:—

“The Submarine Cables Trust Certificate for 100*l*.

“No.

“This is to certify that the holder of this certificate is entitled to the sum of 100*l*., part of the nominal amount of 420,000*l*. forming the Submarine Cables Trust, and to all the benefits secured to holders of certificates by the deed of trust, of which a copy is hereon indorsed.”

The form of the coupon of reversion in the 3rd schedule was as follows:—

“The Submarine Cables Trust Coupon of Reversion.

“No.

“This is to certify that the holder of this coupon will, on the final division of the funds of the above-mentioned trust, after satisfaction of all certificates and interest, be entitled to one equal four thousand two hundredth part of the net proceeds of such funds, in accordance with the terms of the deed of trust, a copy of which is indorsed on the certificate to which this coupon is attached.”

A prospectus was issued inviting subscriptions. The more important clauses are referred to in the judgment of the Master of the Rolls, but the Court of Appeal declined to admit the document.

The 4,200 certificates were issued by the trustees, each certificate representing the nominal value of 100*l*. The plaintiff was the holder of one of the certificates, and the holders were more than twenty in number.

The plaintiff, in March, 1879, brought an action on behalf of himself and all other the certificate-holders against the trustees of the deed, and by his statement of claim alleged:—

That the Submarine Cables Trust was, and the defendants, the trustees and the said holders of the certificates were, and as such contrary to law, an association consisting of more than twenty persons

formed after the passing of the Companies Act of 1862, for the purpose of carrying on business that had for its object the acquisition of gain by the association or by the individual members thereof, without being registered as a company.

That the drawing by lot of the certificates, as provided, was in effect a lottery or a transaction of the nature of a lottery, and was contrary to law.

The plaintiff claimed, That the trusts of the deed, or such of them as were not contrary to law, might be carried into execution under the direction of the Court; a division of the securities alleged to be subject to the trust of the deed among the plaintiff and other certificate-holders in proportion to the amount subscribed and paid by them respectively.

An injunction to restrain the defendants from parting or dealing with any of the securities subject to the trusts of the deed, and from drawing by lot for the purposes of purchasing the same certificates.

The securities specified in the schedule to the trust deed consisted of stock and shares in eleven telegraph companies, and were of the nominal value of 400,036*l*.

Nine of the companies became subsequently to the date of the deed amalgamated and eventually constituted three companies, and upon each amalgamation the trustees received in exchange for the nominal amount of the shares or stock of the original company shares in the amalgamated company.

In one instance the trustees sold 2,000 of the shares in an amalgamated company and also 2,000 of the shares in one of the original companies prior to its amalgamation, under the power vested in them by the 18th article of the deed, and invested the proceeds in the purchase of certificates pursuant to the 5th article.

No other sales had been made by the trustees. No certificates had ever been selected for redemption by lot, and the provisions of the deed with respect thereto had not been and were not intended to be acted on.

The trustees had received large sums for income, which had been applied according to the terms of the deed.

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The case was heard before the Master of the Rolls, who, on the 13th day of January, 1880, gave judgment thereon (1).

(1) JESSE, M.R.—This case has been argued before me, nominally with a view to distinguish it from *Sykes v. Beadon*, but, of course, that is not the real meaning of the argument. It is, as Mr. Chitty told me candidly, and I am very glad of it, in order that the case may be taken to the Court of Appeal, where of course the decision of *Sykes v. Beadon* itself will be reviewed. There really are no substantial differences between that case and the present. As regards the only point which was not elaborately discussed in *Sykes v. Beadon*, the meaning of the word "business," I must say a few words, because I have given an opinion upon that in other cases which have not been reported. I believe this is something like the twelfth case of the kind which has come before me, and the point has been raised in other cases, which was not discussed in *Sykes v. Beadon*, as to whether the words, "any other business," made any difference. If anybody looks at what I said in the *Arthur Average Association* and in *Sykes v. Beadon*, they will see that the point was not considered. In *Sykes v. Beadon* the only point I had to consider was, whether it was an association formed for the purpose of gain. The supposed distinction between an association formed for the purpose of gain and an association formed for the purpose of taking upon itself a business having for its object the purpose of gain, was not argued in *Sykes v. Beadon*, but it was argued since, and I have given an opinion upon it which I will repeat. First of all, what is the meaning of "any other business"? Now "business" itself is a word of very large and indefinite import. When you look at the dictionary you will see how large it is. I have got the last edition of Johnson's Dictionary before me edited by Dr. Latham, and there he says the first meaning of it is "employment"—"transaction of affairs." The second is "an affair." The third is "subject of business; affair or object which engages the care." Then there are some other meanings, and the sixth is, "something to be transacted." The seventh is, "something required to be done." Nothing can be larger. Then taking the last edition of the Imperial Dictionary, which is a very good dictionary, we find it a little more definite, but with a remark which is worth reading—"Business, employment; that which occupies the time and attention and labour of men for the purpose of profit or improvement." That is to say, anything which occupies the time and attention and labour of a man for the purpose of profit is business. It is a word of extensive use and indefinite signification. Then "business is a particular occupation, as agriculture, trade, mechanics, art or profession, and when used in connection with particular employments, it admits of the plural, that is, businesses." Therefore the Legislature could not have used a larger word.

Now, in addition to the two dictionaries, I have also looked at the case of *Harris v. Amory* (35 Law J. Rep. O.P. 89; Law Rep. 1 C.P.

The order made was as follows:—

"And the defendants by their counsel

148), in which forty-six people hired some land to carry on a farm between them. A single man carrying on a farm may farm his own land, but he is carrying on a business. Sometimes he is called a gentleman farmer, but he is still carrying on a business, and of course these forty-six persons were carrying on a business, and it was held that it was an illegal association under this very Act of Parliament, because there were more than twenty of them. The passage I am about to read is from the judgment of that very eminent and lamented Judge, Mr. Justice Willes, at p. 154: "It should seem by the 25 & 26 Vict. c. 89, s. 4, that the Legislature, viewing the frauds which had been committed by large companies, and the great inconvenience which was found to arise by reason of the difficulty of enforcing claims and settling accounts between surviving members and executors of deceased members, and otherwise, have thought fit to determine that no company, association or partnership, consisting of more than twenty persons, shall be formed for the purpose of carrying on any business that has for its object the acquisition of gain by the company or its members, unless registered under the Act. And I think it has done that by language which does not admit of any reasonable doubt. It is unnecessary to refer to authorities to shew that 'business' has a more extensive signification than 'trade.'" The earlier Bankrupt Acts did not embrace farmers, but it was never doubted that farming was a 'business' though not a 'trade.' Banking is not strictly a trade. Where land comes to a number of persons by operation of law they cannot be said to be partners, and they may consistently with the Act farm it. But when we find an association like this, which is rendered illegal by an Act of Parliament, we cannot take notice of the agreement under which they became tenants, for the purpose of establishing a right in a Court of law, or hold that the occupation by one of their body is an occupation by all the members of the illegal association." Now, knowing what "business" means, is there any distinction between a person carrying on "any other business which has for its object the acquisition of gain," and the words "formed for the purpose of the acquisition of gain"? It must be a business to acquire gain, and really the words add nothing to it. "Formed for the purpose of gain," as I put it in *Sykes v. Beadon*, is the same thing. You cannot acquire gain by a company except by carrying on some business or other, and I have no doubt if anyone formed a company or association for the purpose of acquiring gain, he must form it for the purpose of carrying on a business by which gain is to be obtained. But, whether that be so or not, I am clearly of opinion that where investment is made a business, or where the dealing in securities is made a business, it is a business within the purview of this Act. There are many things which in common colloquial English would not be called a business, even when carried on by a single person, which

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admitting that the holders of certificates known as certificates of the trust called

would be so called when carried on by a number of persons. That is a distinction not to be forgotten, even if we were trying it by the ordinary use of the English language. For instance, a man who is the owner of offices—that is, of a house divided into several floors, and used for commercial purposes—would not be said to carry on a business because he let the offices as such; but suppose a company was formed for the purpose of buying a building, or leasing a house, to be divided into offices, and to be let out, should not we say, if that was the object of the company, that the company was carrying on business for the purpose of letting offices, or was an office-letting company, trying it by the use of ordinary colloquial language? The same observation may be made as regards a single individual buying or selling land, with this addition, that he may make it a business, and then it is a question of continuity. A man occasionally buys and sells land, as many land-owners generally do, and nobody would say he was a land jobber or a jobber in land; but if a man made it his particular business to buy and sell land to obtain profit, he would be designated as a land jobber or dealer in land.

When you come to an association or company formed for a purpose, you would say at once that it is a business, because there you have that from which you would infer continuity: it is formed to do that and nothing else, and therefore at once you would say they carried on a business. So in the ordinary case of investments, a man who has money to invest, the object being to obtain his income, invests his money, and he may occasionally sell the investments and buy others, but he is not carrying on a business. But when you have an association formed, or where an individual makes it his continuous occupation—the business of his life—to buy and sell securities, he is called a stock jobber or share jobber, or what not, and nobody doubts for a moment that he is carrying on business. So if a company is formed for doing the very same thing—that is, for investing money belonging to persons in the purchase of stocks and shares, and changing them from time to time, either with limited or unlimited powers—I should say there can be no question that they are carrying on a business, whether you call it a business of investment or a business of dealing in securities, or, as in the case before me, both the business of investment and the business of dealing in securities.

Upon the other point, as to this company being formed for the acquisition of gain, can there be any doubt about it? In the first place, I will say a word or two as to the mode in which this case came before me. The prospectus was not stated in the statement of claim, but it was admitted, and Mr. Chitty admitted it as if it were stated, so that it is before the Court and may properly be looked into. Now the real question I have to decide is, whether this association was formed for that purpose; and therefore, in ascertaining

'The Submarine Cables Trust' are more than twenty in number, and that the

whether it was formed for that purpose, nothing could be more important than the prospectus. It is not to be formed for the purpose unless registered as a company under this Act, and the prospectus tells me exactly what it was formed for. The prospectus is as good or better evidence upon that point than the deed, but of course they must be both looked at, to ascertain for what purpose the company was formed. Was it for the acquisition of gain? I have discussed that question so fully in so many cases, and two of them are reported—*The Arthur Average Company and Sykes v. Beadon*—that it is not necessary for me to say anything more upon the view I take of the Act. But I must look at the prospectus as well as the deed to see whether the acquisition of gain is really the purpose of the company. Now I have no doubt about it at all. To my mind it is as clear as anything can be, but it does not follow that it may not be equally clear the other way to some other mind or minds. The public are invited to subscribe their money to buy the shares of the submarine cable companies. They are told that they are to buy them at 90*l.* a certificate. "The certificate is to bear six per cent. per annum, payable half-yearly, making 6*l.* 13*s.* 4*d.* on the amount paid." That is a very accurate calculation. Therefore they are to get 6*l.* 13*s.* 4*d.* upon their money. "Certificates to be redeemed half-yearly out of surplus income to the extent of the available funds, by purchase in the open market or tender, or, failing these means, by yearly drawings at 120*l.*" So that you are to get a profit of 30*l.* upon your 90*l.* if you are lucky enough to be a drawer or if they are bought by tender. "An equal reversionary distribution of the securities of the trust among the certificate-holders as soon as the certificates have been redeemed." Therefore, over and above 6*l.* 13*s.* 4*d.* per cent., which is itself a very handsome profit, and not the ordinary rate of income derivable from investments, a certificate-holder is to get 30*l.* profit upon his 90*l.*, and to get also the equal reversion in distribution of the balance when the certificates are all paid for. Those are the three first paragraphs of the prospectus. It is not an ordinary investment in any sense of the word—it is a speculation with a view to a profit, by means, no doubt, of the purchase of submarine cable shares. If this were treated as an investment I should call it an abuse of the term. The purchase of speculative property in a sense, and in a very wide and lax sense, may be termed an investment. Then, after naming the trustees, I come to the next paragraph, which is a very good illustration of what kind of investments we are dealing with. "The advantage of this form of investment, by distributing the risk over a number of kindred undertakings, and making one insure the other, is peculiarly applicable to the class of property to be embraced in this trust." That is, the public are told it is risky property.

The next sentence is, "The public has already shewn its appreciation of the principle in the case

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certificates of the said trust were issued in pursuance of and subject to the pro-

visions of the said trust deed of the 6th of September, 1871, this Court doth

of foreign and colonial government securities, and it is believed that many would gladly avail themselves of the high returns yielded by telegraph cable companies, if they were relieved from the fear of exceptional losses from accident or other causes, which would be greatly lessened by such a combination." Now, we have it exactly. It is no ordinary investment. The public are afraid to touch it because it is risky, but if you distribute it in the shape of insurance by associating together, you will diminish your risk, and thereby get a profit. Now, the next sentence but one is instructive: "The trust will consist solely of the stocks, shares or debentures of submarine cable companies, which offer, apart from accidental interruptions, the prospect of a high rate of profit." Now, that was what the company was formed for. You are to get a high rate of profit—not only a profit, but a high rate of profit. Then there are other things referred to; and then it says, "The selection and acceptance of the several securities, the proportions in each company to be included, and any purchase to be made will be determined and undertaken by the trustees at their discretion, who will endeavour to secure a fair average, having regard to the ends in view." Then they say, how they are to apply the funds. First of all, they are to pay a limited amount of expenses; then pay interest on the certificates; then there is to be a sinking fund for their redemption; then they say how they will be redeemed. Then, "power will be reserved to the trustees to realise, at their discretion, any securities belonging to the trust which reach a premium of thirty per cent. on the purchase price." That is a dealing. They are not to sell unless they get a large profit, and they are to sell when they get to thirty premium. Then it is "subject to any special circumstances calling for an earlier dissolution under the terms of the trust deed, it is intended that the trust shall continue until all the certificates have been thus redeemed, when the trust securities will remain for distribution as a reversion. The trust will then be wound up, and the proceeds distributed, *pro rata*, among the holders of the coupons of reversion." Then there is the purpose for which it is formed; and the certificate-holders are not only to get the profit I have mentioned, but an ultimate profit—an ultimate distribution of the funds. That is no ordinary investment, where the property is to remain invested. On the contrary, you may pay off out of income—it being a very high income—a very large rate of profit, all your certificates, and then you will get the securities yourselves to divide. Then the coupons will give the right to reversion; and then it says this: "A person desirous of holding submarine cable shares can thus, by means of this trust, at a minimum of trouble and expense, diminish the risk of investing in any one particular undertaking, by spreading his investment over a number of different undertakings, and reserve a

portion of the extra interest as a sinking fund to pay off his capital; as for each 100*l.* invested he virtually becomes a holder of *pro rata* investments in some eight or ten different securities, and in addition receives a bonus when his certificate is redeemed, and a *pro rata* participation in the ultimate reversion which will remain when the return of his capital has been accomplished. The advantages are—"First, interest at 6*l.* 13*s.* 4*d.* per cent. on the amount subscribed; secondly, distribution of risk—not a term that persons use for ordinary investments; thirdly, provisions for redemption of certificates: if by purchase, securing for his property an enhanced market value, or if drawn, a gain of 30*l.* per certificate." The first which I read used the term "profit;" now we have the term "gain." Then, "fourthly, a reversion eventually divisible, equal to the whole of his original subscriptions." It further states that a draft of the trust deed may be seen—I do not know whether anybody wanted to see it—but it may be seen. Now I come to the trust deed. The trust deed was actually drawn after the investments were made, although I do not see that that makes much difference, after having read the prospectus to see what the company was formed for. The trustees are to hold the annual produce thereof in trust, "First, in payment of all expenses during the preceding year, but so that the ordinary expenses for the year 1871, or in any subsequent year, include all remunerations to the trustees and auditors." The fact is, they are called trustees; but their remuneration is not to exceed 2,000*l.* They are like all directors, commercial trustees; but they are intended to be paid, not improperly, because they really are directors and nothing else.

There are two or three clauses in the deed which it is necessary to shew that there was a dealing in shares by this company, as well as an ordinary investment. An association for that purpose would, in my opinion, be within the mischief of the Act and within the words of the Act. It must not be supposed that I decide this case simply on the addition of the dealing clauses; but an association for the purpose of dealing would also be, in my opinion, within the mischief of the Act and the words of the Act also; consequently, it is as well to refer to them, to shew that it is so. [His Lordship read the 18th clause.] So that the moment the shares rise to that, the trustees may sell and take the profit which is to be divided, as we shall see presently.

The 19th section provides [reads it]. Out of the six managing parties four must concur, at a meeting at which they are present, to sell them; but subject to that limitation they have a right to sell without any premium at all. Here, again, therefore, there is a second power of sale, not referred to in the prospectus. Then the produce is to be applied as surplus—that is, in payment of interest and in payment for and purchasing of the certificates. Then there is a proviso [reads

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declare that the said trust called 'The Submarine Cables Trust' is an association consisting of more than twenty persons, formed after the passing of the Companies Act, 1862, for the purpose of carrying on business that has for its object the acquisition of gain by the association, or by the individual members thereof, without being registered as a company under the said Act, or any other Act of Parliament.

the 20th clause]. So there is a power not only to sell but to repurchase. I agree that, inasmuch as in this large association there are more than twenty persons, for I see on the prospectus there is not to be a company formed unless 400,000*l.* is subscribed, you cannot get the assent of every individual; but power is given to the trustees at the general meeting. It is a part of their business, therefore, though, no doubt, not a primary object; but it is an object to deal in the securities in the way I have mentioned.

[Reads the 22nd clause.] So they are paid trustees—that is, they are directors of the company. They are persons who carry on the business of the company for payment; they employ their time and they are paid for it. I am not saying a word against that. I think it is a most rational thing that persons who employ their time for the benefit of others should be paid; but it shews their true character, for ordinary trustees of a settlement are not paid. [Reads clause 23.] That is to shew what the certificate-holders are. They are shareholders of the company and nothing else. They are called certificate-holders, but it is very clear that they might be called shareholders. Many shareholders, when they are paid, are paid, as we know, by warrants to bearer, and that is what these are. Nobody is to get anything unless he produces his certificate. [Reads clause 25.] Not only is it a meeting of shareholders, although the deed calls it a meeting of certificate-holders, but they actually adopt the provisions of the Act for the mode of conducting the business. [Reads clauses 26, 28, 30, 32.]

It does appear to me that this is as plain a company or association formed for the transaction of business for the purpose of gain as could be put fairly into words, if you change names, and nothing more. If you call the certificate-holders "shareholders," and call the trustees "directors," and call the association a "company," you have about as simple a description of an ordinary company under the Act as I think you can well have. I am satisfied, so far as I am concerned, that this is not only within the words of the Act, but is the very thing, as explained by the judgment of Mr. Justice Willes, which the Act intended to prohibit for various reasons; and this is a mere device, and a very transparent one, to endeavour to escape from the plain meaning of the enactment.

"And it is ordered that the affairs of the said association be wound up."

The defendants appealed.

Mr. Chitty and Mr. Speed (Mr. Benjamin with them), for the appellants.—This deed is a mere trust deed, constituting relationship between two sets of persons as trustees and *cestuis que trust*. This is not an association within the meaning of the 4th section; but if it is, it is not one consisting of twenty persons, nor is it one for the purpose of carrying on business.

There is no *societas* between the certificate-holders any more than there is between sixty-four part-owners of a ship. The "business" intended by the Act means a continuous occupation in the character of a trade. The only sections referring to the carrying on of a business are the 39th and 44th. But here A. buys shares in one company and B. buys shares in another, and both these sets of shares are transferred to trustees to receive the dividends to pay each a certain proportion. If anyone carries on business it is the trustees, not the subscribers.

The certificate-holders here hold a position similar to that of the scheduled creditors in

Cox v. Hickman, 8 H.L. Cas. 268;
30 Law J. Rep. C.P. 125,

which case negatives the idea of any partnership or association between the subscribers.

The case of

The Queen v. Whitmarsh, 15 Q.B.
Rep. 600; 19 Law J. Rep. Q.B.
469,

followed by

Bear v. Bromley, 18 Q.B. Rep. 271;
21 Law J. Rep. Q.B. 354

(cases under the 7 & 8 Vict. c. 110), are both in our favour on the point of this not being a business.

The words under that Act were "for any commercial purpose or purpose of profit."

And the two cases shew that where the making of profit was not the primary object of the company, it was immaterial whether the body have any subsidiary power of doing acts which might result in profit; and in the latter case Lord

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Campbell says, "The question is, whether the society, as such, is established for a purpose of profit; the fact that the individual members may be losers or gainers is immaterial. . . . It is clear the society itself does not derive a profit from its transactions."

In

Moore v. Rawlings, 6 Com. B. Rep. N.S. 289; 28 Law J. Rep. C.P. 247,

the association or body was invested with powers of doing various acts which gave its operations much more the character of the carrying on of business than in this case. One of the clauses of the deed there was, "The business of the company shall be to take on lease or purchase land or ground . . . and to make and sell bricks and to purchase and sell all kinds of building materials, &c." The object here was to make investments, from which the individual certificate-holders might be gainers or losers, and the investments are not to be disturbed except in particular cases. Articles 18, 19 and 20 shew that buying and selling shares, as a business from which the society itself was to get profit, was no part of the scheme. The power of sale was merely subsidiary.

They also referred to

In re The Stanton Iron Company, 21 Beav. 164; 25 Law J. Rep. Chanc. 142.

The case of

Sykes v. Beadon (ubi supra)

is similar to this case, but it is a decision of the same Judge and may be treated as under appeal; and the case of

Re The Arthur Average Association, 44 Law J. Rep. Chanc. 569; Law Rep. 10 Chanc. 542,

is different from this.

Any question arising upon the Lottery Acts as rendering this body illegal is precluded by the case before the House of Lords—

Wallingford v. The Mutual Society, Law Rep. 5 App. Cas. 685.

Mr. Ince and Mr. McLaren, for the respondent.—The words of the statute are, "No association shall be formed." This body is certainly an association; there are a large number of individuals joined

together for some purpose or other—the certificate-holders—who are all parties to the deed in this way, that the covenantee joins for and on behalf of all the holders for the time being: he contracts on their behalf.

[JAMES, L.J.—If 100 men join in subscribing to a church they are subscribers to a common object, but subscribers to a common object are not necessarily an association.]

There is no clause in the Act defining the meaning of the word "association," but we submit that whenever a series of persons associate themselves together for a purpose, whether benevolent or religious, they are an association for that purpose. The word "association" is not a partnership, nor is it a company: it was inserted to cover a body of persons who form strictly neither the one nor the other.

[BRETT, L.J.—Not strictly one nor the other, but something very like one or the other: the same *genus*.]

That would be to limit the word; and it is inserted not to diminish the effect of the rest, but is a wider word.

[JAMES, L.J.—It must be an association having some *nexus*.]

There are here a number of individuals joining in a common contract with each other—that is, through the covenantee.

Suppose that the trustees were committing a breach of trust with these securities and converting them to their own use. They must be taken to have become companions with each other in a certain enterprise. The trustees are made trustees for every individual who comes within that contract by reference to the coupon; and any person holding one for the time being would have a right to bring his action against the trustees for any breach of trust committed by them, and would bring his action on behalf of himself and all other the owners of coupons in this association.

A club consisting of a series of persons is an association associated for certain purposes, social or political, and is not within the meaning of this section, but it tests the meaning of the word. The word is so wide that it means a number of persons joined for any purpose, and here we have a number of persons joined

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together for a common purpose; and it is an association that is formed: it does not come into existence like a series of *cestuis que trust* under a deed or will.

In cases where each individual holder of a debenture is subscribing his money and receiving an individual mortgage for it, there is no bond of union between any one of them; but here each of the persons puts a certain amount of money or of stock into the hands of the trustees, and says, Deal with it in some way or other and make me a gain out of it. Every person who comes into this gathering or association or club, pays so much money, or subscribes for so many shares, and in return gets the benefit of the covenant which the covenantors entered into with the covenantee, and the object is gain.

The creditors, under old creditors' deeds, did not move into the concern—they only accepted the deed.

Here there is not a deed executed on behalf of any particular pre-existing class. To get the benefit here each subscriber must come with his money.

The foundation of the plaintiff's case is, that the person who chooses to take one of these certificates thereby gets a right not to any particular portion or piece of this stock which they hold, but a right in the common stock of the entire concern; they are so far associated together that they all are to get whatever they are to get out of the common fund.

Then it must be an association "formed"—that is, the coming together must be the result of some contract—and that distinguishes the case from that of numerous families of *cestuis que trust*; and it must be formed for the purpose of carrying on a business which has for its object the acquisition of gain—and gain has a wider meaning than profit—but here we have profit: there is the six per cent. interest; the chance of redemption; or the ultimate profit (if any) left after the expenses of carrying on the business of the concern.

The business here is the act of original investment and the continuous shifting and management of the investments and trafficking in these telegraph securities. It is not necessary that every individual member of the association should be

carrying on business; if a man goes into the market and buys stock in a railway company, he is not carrying on the business of a carrier, but the company of which he is a member is carrying on that business.

An association for the purpose of making gain must of necessity be an association "for the purpose of carrying on business."

The Master of the Rolls held that the latter words do not add much weight so long as there is the object of getting a gain by the company.

[JAMES, L.J.—Can people be said to carry on business who are never by themselves or any agent to enter into contracts in respect of which they can be plaintiffs or defendants?]

Here the members do by their agent enter into a limited contract when they buy and sell the shares, and the certificate-holders would be liable as undisclosed principals.

[JAMES, L.J.—The association is not liable for that. The association never entered into contracts; how could it be wound up?]

The object of gain may be for the benefit of the individuals and not for the united body; the trustees make the gain from outside the association and distribute it among the individual members, and that distinguishes the case from

Bear v. Bromley (ubi supra).

The Queen v. Whitmarsh (ubi supra) is not against us, for in all probability the words "or by the individual members thereof" were inserted to exclude that case (see *Buckley on Companies*, 3rd ed. p. 2); and there, and in the other cases referred to, the ground of the decision was that, although there might be profit to individual members there was none to the company as such.

They also referred to

Josephs v. Pebrer, 3 B. & C. 639;
5 Dowl. & Ry. 542; 1 Car. & P.
341, 507; 3 Law J. Rep. K.B. 102;
Duvergier v. Fellowes, 5 Bing. 248;
2 Mo. & P. 384; 7 Law J. Rep.
(O.S.) C.P. 15,

and

In re The Stanton Iron Company (ubi supra),

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as shewing the illegality of the association.

Mr. Speed, in reply.—

Sykes v. Beadon (ubi supra)

is decided rather on the ground that the association was formed for the purposes of buying, selling and dealing in stock.

Re The Arthur Average Association (ubi supra)

was the case of a commercial undertaking, which we are not.

What was intended to be prevented by the Act was the difficulty and expense incurred by persons who dealt with large fluctuating bodies in finding out of whom they were composed, if the necessity ever arose of taking legal proceedings in respect of the contracts.

JAMES, L.J. (on July 16).—This case has been very fully argued, and we have had an opportunity of considering it since the time it was first argued before us.

I am of opinion, with all deference to the very clear opinion to the contrary, often repeated, of the Master of the Rolls, that he has not put a construction upon this Act of Parliament which I find it possible, speaking for myself, to concur in.

The Act of Parliament, no doubt, was intended to prevent mischief of some kind, the mischief being (as was well put by Mr. Speed) that arising from large trading undertakings being carried on by large and fluctuating bodies of persons, so that persons dealing with them were put to great difficulty and expense from not knowing with whom they were contracting; which was, therefore, a public mischief to be repressed. That was the sort of mischief, as it strikes me, which was intended to be repressed by this enactment. Then we must see what the enactment is. [Reads the section.]

Now there are three words there—"company, association or partnership." It is very difficult to my mind to understand what the difference is between a company and an association. The word "association" in effect, though it has now commonly got into use, is etymologically an inaccurate word. "Association" does not describe the thing formed, but properly and etymologically the act of asso-

ciating together, from which act of associating there is formed a company or partnership—a body of what Mr. Ince called *socii*. But I believe the difference which was meant, as the difference according to the vernacular we use in these things between a company or association and an ordinary partnership, is this: An ordinary partnership is a partnership composed of definite individuals, bound together by contract between themselves to continue for some joint object, either during pleasure or during a limited time; but the partnership is essentially composed of the persons originally entering into the contract with one another. A company or association—and I take the terms to be really synonymous—is an arrangement by which parties intend to have a partnership which will be constantly changing; that is to say, to have a succession of partnerships—a partnership to-day consisting of certain members, and to-morrow of some of those members only and some others who have come in; so that there will be a constant shifting of the partnership, a determination of the old and a creation of a new partnership, and always formed with the intention that, so far as they could, by agreement between themselves, the new partnership should take upon itself the assets and liabilities of the old partnership—an object which, as regards liability, could not be effected in point of law by any arrangement between the persons themselves, unless the persons contracting with them by a *novatio* authorised the change, or unless by special provisions in the Acts of Parliament sanction was given to such an arrangement. That is the sole distinction between association and partnership.

But now it says that no company, association or partnership consisting of more than twenty persons shall be formed after the commencement of this Act. What for? "For the purpose of carrying on any business." Now the deed of settlement—the trust deed before us—is said to constitute an association of more than twenty persons formed after the commencement of this Act "for the purpose of carrying on business." Now I am unable myself to agree with the

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Master of the Rolls in the conclusion that it comes within any part of that definition. I cannot myself find in this any association whatever between the persons who are supposed to be *socii*. I cannot conceive how there can be an association unless there are persons of whom that company or association is formed.

But here one man goes with 90*l.* in his hands and buys from the trustees who have got the property in them a 100*l.* certificate with all the chance of profit attaching to it. Another man goes the next day and takes his 90*l.* to the same people, and gets from them another certificate by which he gets from them a right to share in the funds which they have in their hands. The first man knows nothing of the second, and the second nothing of the first; they have never come into any arrangement whatever as between themselves. There never has been anything amounting to any mutual rights or obligations as between those persons. The man who takes it to-day, or who may have it to-day, the man who took it yesterday and who may be selling to somebody else a week hence, are from the first entire strangers, who have entered into no contract whatever with themselves, nor have they entered into any contract with the trustees or any trustee on behalf of the other—there being nothing pointing to any mandate or delegation of authority to anybody to act for the shareholders between themselves, and nothing, as it appears to me, by which any liability could ever be cast upon the shareholders, either as between themselves or as between themselves and anybody else. Therefore I cannot myself arrive at the conclusion that this is an association within the meaning of this Act of Parliament any more than that the persons who subscribe for debentures in a railway, or the Bolivian bondholders, or the creditors in the case of *Cox v. Hickman*, were an association. Persons who have no mutual rights and obligations do not, according to my view, constitute an association because they happen to have a common interest or an interest severally in something which is to be divided between them.

But now, even assuming this to be an association, it does not appear to me that it can in any practical sense of the word "business" be said that they were formed for the purpose of carrying on any business. The association—that is to say, the body of subscribers or the body of certificate-holders—do not, as it appears to me, carry on any business. They cannot be said to carry on any business by themselves or by any agent. I am unable to conceive any state of circumstances in which the law would give any right to the body of shareholders as such, or fix any liability upon them as such.

I cannot conceive any state of circumstances in which it could be averred that any contract had been made by or on behalf of the body of certificate-holders either by any member of themselves or by any other agent or manager for them. If so, I cannot conceive how people can be said to carry on business when they cannot enter into contracts. They can hardly be said to carry on business when it is utterly inconsistent with what they have done and with what they have said, and inconsistent with the whole thing, that they should be parties directly or indirectly, either themselves or through any agent for them, to any contract or be liable for any act of misfeasance or neglect of any manager, agent or servant. They could not employ a servant.

More than that. If there is any business at all, it is to be carried on by the trustees. Whatever is to be done, is to be done by the trustees. Now the Master of the Rolls, in the course of his judgment, considered that these trustees were in substance and in law directors. With all deference to the Master of the Rolls, I cannot help thinking that the fallacy of his judgment arises from that fallacy. To my mind the distinction between a director and a trustee is an essential distinction. It is a distinction which lies in the very nature of things. A trustee is a man who is the owner of the property, who is the principal, who deals with it as principal, as owner and as master, subject only to an equitable obligation to account to some persons to whom he stands in the relation of trustee, and who are his *cestuis que trust*. The same individual

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may fill the office of director and be a trustee having property, but that is a rare, exceptional and casual circumstance. The office of director is that of a paid servant of the company. He never enters into a contract for himself. He cannot sue or be suable unless he exceeds his authority, like any other agent, but he enters into contracts for his principal, and that principal is the company of whom he is a director and for whom he is acting. That seems to me to be the broad distinction between the two.

Then, supposing that what is to be done here is to be done by trustees, is what the trustees are to do under this deed a business? In my opinion it is not a business at all, nothing which comes within the ordinary meaning of the word "business," nor anything more than what is done by trustees under a marriage settlement, who have large properties vested in them, and who have very extensive powers of disposing of the investments, changing the investments and selling them and re-investing in other investments, according to their discretion and judgment, with or without the consent of their *cestuis que trust*. That is not a business. It appears to me that this is no more a business. This is a very large amount. There is 400,000*l.* worth of stock of this kind, and I can easily conceive that a person—a millionaire or some other person in this country—might have 400,000*l.* of similar securities, and might vest them in his trustees with every trust which is contained in this instrument, with every power and every control; and everything would be applicable to that trust—just as applicable as to the trust contained and expressed in this instrument. No doubt there is power in the 18th, 19th, and 20th clauses of disposing of the investments and of selling and re-investing in some security with the assent of the certificate-holders.

It appears to me to be no more than a power of varying investments with the assent of a general meeting, as in an ordinary trust deed would be done with the assent of the *cestuis que trust* themselves.

That seems to me to be the literal meaning of the deed; that is to say, a

trust deed of property for investment so as to secure a good investment spread over a great number of things, in order that the one may equalise the other, so as to enable persons who choose to invest their money in this way to avail themselves of that which is, I believe, one of the most certain things in the world of all uncertain things—what is called the doctrine of averages; that is to say, that out of a certain number of things of this kind some will lose and some will gain, some will pay large dividends and some will pay small dividends; and it appears to me that the object, and the legitimate object, of the persons who were invited to join in this alleged company was to have an investment of their money under such circumstances that they might look to have a high dividend with a very considerable security for the capital which they were investing in it. I can see nothing like an attempt at evading or avoiding the Act, or being anything but what the deed upon the face of it purports to be—a mode by which people are to make their investments with security, and so as to produce a high rate of dividend. Under these circumstances, I am of opinion that the judgment of the Master of the Rolls must be discharged.

BRETT, L.J.—In this case it becomes necessary carefully to construe the Act of Parliament, and in so doing we are obliged to consider almost every word and almost every phrase in it, and, as one often has to do, to translate, if possible, into the most accurately scientific form the idiomatic English which is used even in an Act of Parliament not in its strictly grammatical sense, but in a business sense.

This section is in a negative form, and it begins by saying that "no company, association or partnership consisting of more than twenty persons shall be formed; that is to say, that there must be a joint relation of more than twenty persons for a common purpose, which common purpose seems to me to be the performing jointly a succession of acts. It will not be sufficient if their relation exists for a purpose which is to be completed by the performance of one act. But they are to be so related together as to form a com-

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pany or a partnership or an association. I confess I have some difficulty, as my Lord has, in being able to see at this moment what would be an association for the purpose of carrying on a business which would neither be a company nor a partnership; but I should be sorry to say that by the ingenuity of men of business there may not some day be formed a relation among twenty persons which might not strictly be either a company or a partnership, but yet would be an association. But it must be, according to all ordinary rules of construction, if not strictly speaking a company or a partnership, an association of a similar kind. It must be, therefore, a relation established between twenty persons "for the purpose of carrying on business"—that is, "in order that such company, association or partnership shall carry on a business." Therefore the business is a business which is to be carried on by those twenty persons or by twenty persons or more. It is they who are to carry on the business, whatever may be the meaning of that word "business." That seems to me to exclude the case of its being for one particular act to be done and never to be repeated. The phrase "carrying on" implies a repetition or series of acts. But then that series of acts is to be a series of acts which constitute a business. There are many purposes which everybody would understand to be a business. There may be new businesses which at the present time are not known. But now this word "business" might in a grammatical sense have been made to include something which no ordinary person would call a business; and inasmuch as the Legislature did not desire to recapitulate in terms every kind of business, they have used a phrase which is to confine the meaning of that large word "business" to a certain kind of business. It is a business "that has for its object the acquisition of gain;" that is to say, gain is to be the result of the business—the result not of one particular act, but of a series of acts which form a business.

Now to deal with the expression "gain"; it is a gain by the company, association or partnership, or by the individual members thereof. It seems to me that

that division of phrase rather points to this, that the expression is to be taken distributively, according to the former description of the congregation of persons. Where it is a joint-stock company or a corporation or a *quasi*-corporation, and where the individuals are mere shareholders, then the gain which is acquired by the business carried on by such a company is a gain by the company and is not a gain by the individual shareholders. But where it is an ordinary partnership, or where it is an association which, not being a joint-stock company or corporation, is more like a partnership, there the gain will be not by the whole body as distinct from the individuals, but it would be by each partner—by the individual partners.

But the mode in which the gain, when obtained, is to be distributed, does not seem to me to be the real point in this case. The real point in this case is in the former part—to consider whether there is any association of persons here at all for the purpose of such association of persons carrying on a business within the meaning of this section—that is, whether they are carrying on a business which, if successful, is to result in the acquisition of gain or not; and then the second question would be, If any set of persons here can be said to be within the category described, who are those persons?

Upon such a construction of the statute I must say that I cannot agree with the statement of the question which was laid down by the Master of the Rolls in *Sykes v. Beadon*. He said that the point he had to consider was whether the thing there was an association or company formed for the purpose of gain, either by the association or by the individual members thereof—whether it was an association or company formed for the purpose of gain. But he omitted to state that the proposition was whether it was an association or company formed for the purpose of carrying on a business; because, according to his view of the question, it would be immaterial whether the gain was to be a gain which was to be the result of a business or not. He seems to me to have left out those words which I think were purposely put into this statute for a defi-

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nite object, namely, that the statute meant to deal not with people who were associated together for the purpose of obtaining gain, but with people who were associated together for the purpose of carrying on a business for the purpose of gain, and that that was the exact intention of the Legislature in putting in those words which he has omitted in the case of *Sykes v. Beadon*.

Then we must come to the particular case; and let us consider whether there were any persons at all here associated for the purpose of carrying on any business such as is described in this section. Now if there were such persons in this case, it must have been either the trustees or the certificate-holders. In my opinion, in this case neither the one nor the other were associated together for the purpose of carrying on such a business as is described here. I will take first the trustees themselves. The trustees were not, as I construe the deed, or as I take to be the real substantial business object of this congregation of persons, to enter upon a series of acts, which acts, if successful, would obtain a gain. They were joined together for the purpose of once for all investing certain money which was delivered into their hands, and not to obtain gain from a repetition of investments. In other words, they were not associated together for the purpose of speculating in shares. That was not their business. There is no reason, according to the construction of their duty, why, when they had once made an investment, it should ever be changed. Therefore it seems to me that the primary and substantial object of their associating together was not for the purpose of carrying on a business which, if successful, would result in the acquisition of gain. It is true that under a very special state of circumstances, which is described in the 20th clause, it might be said that then what they would have to do would result in a gain. That may be so. But even if that be so with regard to the transaction under the 20th clause, which I doubt, yet that is so special a part of the transactions which are described in this deed that it cannot be said to be a substantial part of that which they would have to do. Therefore if what

they will have to do, as the substantial object, is not a business, that subsidiary part does not make it any more a business. That was decided in *The Queen v. Whitmarsh* and several other cases—that a mere subsidiary transaction described in the deed does not become a part of the object so as to bring the case within this statute. I might say, even if you consider the case of the trustees themselves here, they were not formed for the purpose of carrying on a business within the meaning of this section. But if they were, they are nevertheless not within the section, because they are not the number of twenty.

Now I come to the case of the certificate-holders. It seems to me that, even if what had to be done was to be done by them by means of agents of theirs, nevertheless they were not associated for the purpose of carrying on such a business as is here described, and for the reason, that what had to be done would not be a series of acts done so that, if successful, they would obtain gain, and therefore would not be a business within this statute. The same reasoning would apply if these trustees had really been agents.

We must now go further, and see whether, even supposing this was such a business as is contemplated in the Act, the certificate-holders were the persons who were to carry on that business. It seems to me that they certainly were not. That raises the question of whether the persons who do carry on the business here were carrying it on for them or were carrying it on otherwise than for them. Now I take it that these persons here are clearly trustees as distinguished from agents and directors in the ordinary sense of the term. The distinction has been pointed out by my Lord, and I entirely agree with it. If you could see that the persons were merely called trustees, but that the duties which they had to perform by the deed were really those of directors, then, although they are called trustees, the legal effect of the deed would be that they would be directors—and if they are directors, they are agents; but here it seems to me to be obvious that, according to the true construction of this deed, they were not directors or agents—they were trus-

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tees. If that be so, the certificate-holders, even if they are associated, are not associated for carrying on the business, which is said to be a business that will produce a gain. It was not their business. They could not have been made liable for any contract made by these trustees. It was of course urged, and very naturally urged, that they would be liable as undisclosed principals. But that assumes that the persons who made the contracts which are to make them liable are their agents, authorised to bind them by their contracts, which is obviously not true. Therefore here the business is not carried on by those persons, and it can never be where those persons who are to carry on the business are *bona fide* trustees, and not agents or directors. Even though there was a business here which, if carried on by any body, would be within this section, yet here it is not carried on by the certificate-holders—by the *cestuis que trust*, who are the people who are said to be of a larger number than twenty. Even if this is a business within the section, it is not carried on by them—it is only carried on by the trustees; the trustees are not of the number of twenty or more, and therefore the case is not within the statute on either view.

That being so, I venture, with great deference, to differ from the Master of the Rolls in this case. It seems to me that my view of the statute carries with it also the allegation that I do not agree with him in the case of *Sykes v. Beadon*. But there is another case which has been mentioned, and that is the case of *The Arthur Average Association*. It is perhaps not absolutely necessary to determine whether the case of a mutual assurance association is within the statute or not; but I think I ought to say that it appears to me that the reasoning which brings me to the conclusion that the present case is not within the statute would, as at present advised, bring me to the same conclusion with regard to a case of mutual assurance. I cannot think that there is here any business, if it is properly carried on, which is a business carried on in order to obtain gain, either for the association or for the individual members of it, within the meaning of this statute. I am inclined to think

that this is a true proposition—that no transaction within the association or company, between the members of it, can be taken into consideration in order to determine whether the company or association was one formed to carry on a business within the meaning of this section.

COTTON, L.J.—What we have to determine in this case is, whether this is an association, company or partnership within the meaning of the Act of 1862. In my opinion, it turns on section 4 of that Act. Section 21 has been referred to, but I do not think that that has any material bearing on the question we have to consider, because the companies which are referred to in section 21 might register under section 6 of the Act. What we have to consider is not whether the persons under this trust deed, as I call it for the sake of brevity, could register under the Act, but whether they are bound to do so, and, in default, are an illegal association.

Now section 4 has been discussed considerably; therefore I will not read it in detail. But this is material in arriving at the construction of the particular portion upon which the question turns—that it begins with a restriction as to companies carrying on a well-known business, the business of banking. Then comes a clause upon which the question turns, which is to apply to companies other than banking companies, with certain exceptions; and that is material, because we have, without any reference to gain or anything else, a description of the business which companies in the first part of it are formed to carry on. Then, in the second part of it, we have in substance reference to companies carrying on any other business, with the qualification that the business must be one for the acquisition of gain by the company, association or partnership, or by its members; and that, in my opinion, shews that those words of this section, “for the purpose of carrying on any business which has for its object the acquisition of gain,” are material and not to be disregarded, and that you cannot properly read this section as a section saying “any other association having for its object the acquisition of gain.” In my opinion there must be a company, asso-

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ciation or partnership which, by itself or its agents, is carrying on a business; that is to say, the company or association or partnership must be formed for that purpose. If it is formed for that purpose, before it carries on any business it must register if it is within the Act, and therefore it is the forming of an association for a purpose which is struck at by the Act; and there the purpose is in the first instance that of carrying on a business. Then the nature of that business is defined thus: it must be a business having for its object the acquisition of gain by the company or its members. I do not think it is very material to consider that much-vexed and contested word "association," as to how far it differs from "company" or "partnership;" but I think we may say that "association," if it is intended to differ from "company" or "partnership," must be judged by its two companions between which it stands, and must be something where the associates are in the nature of partners. It seems to me—not that I think it material—that it might have been intended to hit the case which we have frequently seen, of a number of persons or a number of firms joining themselves together for the purpose of carrying on a particular adventure in order to make gain by it, as is very common where firms, one in London, another in Liverpool and another in the East Indies, join together, the one to carry on the one part of the business and the other to carry on the other: one partnership to get the orders or to order and see what goods shall be selected, the other to manufacture them, and the other, when they are imported to India, to sell them. That may be what was intended; but what we have to consider, in my opinion, is, whether this conglomeration, as I will call it, of the persons who subscribe their money under this trust deed is an association formed to carry on any business within the meaning of this section, having for its object the acquisition of gain.

But before I go into my view as to that, I will just state what I think really is the effect of this deed. As I understand, it is this—a provision enabling a large sum of money provided by various persons to be invested on a large aggregate of secu-

rities of a particular class—an aggregate of so large an amount as to give a fair average in that particular class of security. It is obvious, then, upon the doctrine of averages referred to by Lord Justice James, that these being securities which as a whole produce large profits, though some of them might not produce profit, yet by taking a large number of them as investments, in the result there would be a large sum to be divided, arising not from any particular investment, but from the aggregate of the investments; and then, when the parties like to sell, having this large aggregate, their money will be returned to them with a profit. That, I think, is the scheme. But then there is something more than that. The investments were made in the names of the trustees for a large number of persons. It was necessary to make provision for their conduct, as to how decisions were to be come to by that body, as to what was to be done as regards the general business of the trust; besides, it was incident to this trust that there should be sometimes a change of investments. That is incidental to every trust, and that is provided for in ordinary trusts; but here we have no doubt a provision which, at first sight, is one which looks like carrying on a business. Clause 18 provides that under certain circumstances the securities may be sold; and then, by clause 20, they may be re-invested. But, as regards the transactions carried on by this body, if it appeared that the real object was that the trustees should speculate in investments, even in this particular class, the case would have stood in a very different position. In my opinion, there is nothing of that sort. It is not a provision that they should make a profit by selling and buying again securities of this class whenever in their opinion the turn of the market makes it advisable so to do. But it is in substance a trust deed—a deed providing how they are to hold as trustees the securities of a large amount, with provisions incident to that, enabling them in certain events to sell some of the securities, and when that is done, but only under special circumstances, to re-invest—not to speculate, but to re-invest—again as an investment of this trust fund. Now,

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in my opinion, that is not carrying on a business within the meaning of this Act of Parliament. It is a trustee holding trust property, with such provisions only as are necessary as a matter of practical business in order to enable that to be done.

But what we have to consider here is not only that, but whether there is any association of persons more than twenty in number who are carrying on business by themselves or their agents.

Now it was argued by Mr. Ince that the mere fact of these persons putting money, without contract or communication with each other, into a bank to a common account, to be invested by the trustees, under the trusts of this deed, was an association carrying on business for the purpose of gain. What I have already said as to the true construction of the 4th section, I think, shews that, in my opinion, that would not do. That would not be carrying on business. They may do it for the purpose of profit, and most persons when they invest their money do it for the purpose of profit; that is to say, they expect to get a profit, either in the shape of dividends, or probably expect that the investment will go up, and will produce them a profit when hereafter they wish to realise. What, in my opinion, as I have already said, must be shewn is, that the association, by themselves or by their agents, carry on a business. Now, here how can that be said? That the certificate-holders do it by themselves I think can hardly be contended. All the power which the subscribers of this money had was to attend sometimes at meetings, and the meetings which were held most usually are those mentioned in clause 26. The only business was to receive and consider a report from the trustees on the condition and affairs of the trust, to appoint auditors to audit the accounts, and to elect new trustees to fill any vacancy in their body. It is impossible, in my opinion, to say that they are by themselves in any way carrying on any business. That is simply receiving the accounts of the trustees, which ordinary *cestuis que trust* do, without being supposed to carry on any business. That is exercising a power contained in

most trust deeds—I may say in every well-drawn trust deed—the power of appointing new trustees. How can it be said that if there was a business to be carried on by the trustees they are there in any way by themselves at those meetings carrying on a business. Then there is this: clause 20 says that a re-investment must be sanctioned at a meeting of the certificate-holders summoned for that purpose. Now I have already dealt with the point that, under clauses 18 and 20, there is not a power to carry on a speculation or business in that sense, and really all that is here given to the certificate-holders is the power to give such assent as *cestuis que trust* usually give for a change of securities when they are competent to do so. Of course the number of *cestuis que trust* makes it necessary that that should be done in such a way that those who are actually present may bind those who are absent. Otherwise the assent of the *cestuis que trust* could never be effectually obtained or given, and therefore we find a form which, no doubt, is similar to that in articles of association of trading companies with reference to the meetings of the partners or *socii*; but here that is only the form. Here they are *cestuis que trust* meeting to give their assent, not members of the partnership joining to carry on and control the business of the partnership, even if this were a business carried on by the trustees. Then can it be said that they carry on a business by their agents? In my opinion that cannot be maintained. The trustees here are the only persons who are dealing, and they are dealing not as agents for some principal behind: they are dealing as trustees in whom the property is vested, and in whom the management of the property is vested, and who have the power of changing the investments and securities. That is just like the case which often occurs where executors or trustees under a will are directed to carry on a business. The fact that they are to account to others for the profits made is a matter utterly immaterial as between them and those with whom they deal. They deal with those persons as the only persons contracting, and hold themselves out as personally liable. Those

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persons have no right as against the persons beneficially interested, the *cestuis que trust*, to make them directly liable, nor possibly, with the excepted case of a testator having directed a part of his assets to be employed in the trade, any claim whatever against the assets of the testator. Those dealing with executors so carrying on a business, deal with them as with any other persons ordinarily carrying on business. They look to no one else. But they look to them; and even although the executors have a right of indemnity if they act properly, that in no way affects or enlarges the contracts which, in the course of carrying on business, they enter into with third parties. So far as there is any contract here to be entered into by the trustees, it is only a change of investment; so far as there is any business to be carried on it is the business of the trustees, not as agents for principals behind, but their own business; that is to say, the business in which they contract as solely liable to outsiders, whatever may be their rights as against those for whom they are trustees. In my opinion, therefore, in this case the only alleged association of more than twenty, being the persons who have contributed their money, stand in this position, that they are not, by themselves or their agents, carrying on any business. Therefore, in my opinion, that cannot be said to be in any way an association forbidden by this Act. Of course, if the trustees are carrying on a business for the purpose of profit, they not being twenty in number, there could be no objection under the Act to their doing so.

In my opinion, the view which the Master of the Rolls took of this section of the Act of Parliament cannot be maintained, and the action must be dismissed.

Solicitors — Baxters & Co., for appellants;
Ashurst, Morris, Crisp & Co., for plaintiffs.

[IN THE HOUSE OF LORDS.]

1880. } PEARKS v. MOSELEY AND
July 5, 6, 9. } OTHERS.

Will—Bequest to a Class—Remoteness.

A testator bequeathed a sum of 3,000l. in trust for his son for life, with remainder to the children of the son who should attain twenty-one years, and the issue of such as should die under that age leaving issue, which issue should afterwards attain the age of twenty-one years, or die under that age leaving issue, as tenants in common, if more than one; but such issue to take only the shares which their parents would have taken if living:—Held, that the words confining the gift to issue to such as should afterwards attain the age of twenty-one years could not be read as a superadded condition divesting the gift upon a contingency, but were to be treated as part of the description of the issue who were to take. Held also, that the gift to the children could not be severed from that to the issue of children. Held, consequently, that the whole gift to children and issue was void for remoteness.

This was an appeal from a decision of the Court of Appeal (reported Law Rep. 11 Ch. D. 555), which affirmed an order of Jessel, M.R.

Joseph Moseley, who died in 1831, left his personal estate upon trust to convert and to hold the produce upon trust, as to 3,000l., part thereof, to pay the income to his daughter, Mary Jordan, for life, with a gift over in the following terms: "And from the decease of my said daughter my will is that the sum of 3,000l., the securities for the same, and the produce thereof, shall be in trust for all the children of my said daughter who shall attain the age of twenty-one years, and the lawful issue of such as shall die under that age, leaving lawful issue at his, her or their decease, or respective deceases, which issue shall afterwards attain the age of twenty-one years, or die under that age leaving issue at his, her, or their decease or deceases respectively, as tenants in common if more than one, but such issue to take only the share or shares which his, her, or their parent or

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parents respectively would have taken, if living."

Another sum of 3,000*l.* was given upon trust as to the income for the testator's son, William Moseley, for life, and as to the *corpus*, subject to such life interest, upon the like trusts for his children and issue, as had been declared in respect of the other fund for the benefit of the children of Mary Jordan; and in default of such issue of William Moseley, in trust for the testator's grandson, Samuel Moseley. The residuary estate was bequeathed to Samuel Moseley.

William Moseley had three children, two of whom died infants and without issue; the third, Harriet, attained the age of twenty-one years, and in the year 1863 married H. Pearks. On the death of William Moseley, which happened in 1877, the sum of 3,000*l.* was paid into Court under the Trustee Relief Act.

Petitions were presented by Harriet Moseley, as representative of the residuary legatee, and by Mr. and Mrs. Pearks, respectively claiming payment out of the sum so paid into Court.

Jessel, M.R., decided in favour of Harriet Moseley, and his decision was affirmed by the Court of Appeal. Mr. and Mrs. Pearks appealed.

Mr. Chitty and Mr. W. Barber, for the appellants.—The case is substantially the same as

Smith v. Smith, Law Rep. 5 Chanc. 342,

which the appellants ask the House to overrule. The question is, whether there is here a gift to a class within the principle of the decisions in

Leake v. Robinson, 2 Mer. 363, and

Seaman v. Wood, 22 Beav. 591.

Adopting the rule that a will should be construed first, and that then the rule against perpetuities should be applied, it is contended that, if there were no question of perpetuity, each child on attaining twenty-one years might claim his minimum share. In other words, within the period allowed by law for vesting, the number of shares into which the property was divisible could be ascer-

tained, namely, the number of the children who attained the age of twenty-one years, or died under that age leaving issue. There might be a further sum to come in afterwards on the death under twenty-one, and without issue, of the issue of a deceased child. In

Leake v. Robinson (ubi supra)

there was no share necessarily ascertained within the period. In

Oatlin v. Brown, 11 Hare, 372,

where there was only one description of the members of the class, the gift was, nevertheless, held good.

Hale v. Hale, Law Rep. 3 Ch. D. 643,

is, it is true, an authority against the view contended for.

The testator has, in fact, made two classes of legatees—

Salmon v. Salmon, 29 Beav. 27.

The words "which issue shall afterwards attain the age of twenty-one years, or die under that age leaving issue," are clearly parenthetical, the words "as tenants in common," &c., applying to the words preceding. Without the parenthesis the gift is good. How far can they affect the validity of the gift? They are descriptive of the grandchildren, who take a stirpital share which is ascertained within the legal period; they can therefore only invalidate the gift of the stirpital share of a deceased child. In other words, the vice does not affect the primary division into shares, but only the subsequent subdivision of a share.

It may be contended, secondly, that the gift should be treated as vesting in the grandchildren, but liable to be divested on their dying under twenty-one without issue. The words "which issue shall afterwards," &c., come after the gift, and may be treated as a condition subsequent. In

In re Moseley's Trusts, 40 Law J. Rep. Chanc. 275; Law Rep. 11 Eq. 499,

a decision on a precisely similar gift contained in the will now before the House, Malins, V.C., held the gift good, apparently on this ground.

Such a construction would be in ac-

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cordance with the leaning of the Court in favour of vesting—

Wilson v. Wilson, 28 Law J. Rep. Chanc. 95.

See also

Riley v. Garnett, 3 De Gex & S. 629; 19 Law J. Rep. Chanc. 146;

Muskett v. Eaton, 45 Law J. Rep. Chanc. 22; Law Rep. 1 Ch. D. 435,

in both which cases the Court seems to have been influenced by the consideration that the gift would otherwise be invalid—

Festing v. Allen, 12 Mee. & W. 279; 13 Law J. Rep. Exch. 74;

Bentinck v. The Duke of Portland, 47 Law J. Rep. Chanc. 235; Law Rep. 7 Ch. D. 693.

Mr. Waller and Mr. Davey (Mr. Rawlinson with them), for the respondent.—There is here but one class, and the shares cannot be ascertained until the attainment of twenty-one years by the grandchildren. The rule has always been upheld, that if there is a gift to a class, any one of whom must be ascertained beyond the legal period, the gift is void.

Hale v. Hale (ubi supra)

is an authority against taking the minimum share which must necessarily vest in a child who attains twenty-one years, and holding the gift good as to that minimum, though bad as to all in excess of it. The whole share must be ascertained within the period allowed by law.

Mr. Romer appeared for other parties.

Mr. Chitty, in reply.

THE LORD CHANCELLOR (LORD SELBORNE).—This case raises a question which, speaking for myself, I am surprised to find raised at this time, upon the law of remoteness. As I regard the case, the question so raised is one which has been long since conclusively determined by authority, and the arguments, by which it is attempted to distinguish this case from the former authorities, do not appear to me to be capable of being maintained.

The rule which has always been applied to cases of remoteness is this: You do not import the law of remoteness into

the construction of the instrument by which you investigate the expressed intention of the testator. You take his words, and endeavour to arrive at their meaning, exactly in the same manner as if there had been no such law, and as if the whole intention expressed by the words could lawfully take effect. I do not mean that, in dealing with words which are obscure and ambiguous, weight, even in a question of remoteness, may not sometimes be given to the consideration that it is better to effectuate than to destroy the intention; but I do say that, if the construction of the words is one about which a Court would have no doubt, though there was no law of remoteness, that construction cannot be altered or wrested to something different, for the purpose of escaping from the consequences of that law.

So understanding the rule, the first question in every case of this kind is that of pure and simple construction: What is the meaning of the words which the testator has used?—what would their effect be, if there was no law of remoteness? So approaching the present will, I cannot avoid coming to the conclusion that the words upon which everything turns (“which issue shall afterwards attain the age of twenty-one years or die under that age, leaving issue living at his, her or their decease or deceases respectively”) are words of description, and not words of superadded condition. If you could find in this will a gift simply to “all the children of” the testator’s “daughter who shall attain the age of twenty-one years” (I am reading that gift to which the present is referential), “and the lawful issue of such of them as shall die under that age, leaving lawful issue at his, her or their decease or respective deceases”—if you could find a gift in those terms, unqualified by anything which afterwards follows, no doubt there would be no remoteness. All the shares would necessarily be ascertained within due limits of time; and it would be immaterial if in a later part of the will you found, as to some particular share or shares, superadded conditions which might or might not be void by reason of remoteness or other.

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wise. But in this case, if there was no law of remoteness, I am satisfied that no Court would be justified in omitting the qualification which follows, or refusing to treat that qualification as entering into the description of the issue who are to take, "which issue shall afterwards attain the age of twenty-one years," and so on. It is, to my mind, the same thing in effect as if the testator had expressed himself thus: "For all the children of my said daughter who shall attain the age of twenty-one years, and the issue who shall live to attain that age of such of them as shall die in minority." If that were so, there can be no question that the gift to the issue would be void for remoteness; and then arises the ulterior question, whether it is possible to sever the gift to that issue from the gift to the children, so as to enable the one to stand while the other must fall.

I find that the Master of the Rolls, in the case of *Hale v. Hale*, expressed an opinion upon the construction of this very will, with which I agree. He says, "As I read the gift, it was to the issue which should afterwards attain the age of twenty-one years. That was a part of the description of the issue, and therefore it was a mistake to say you could divide the number of shares into as many as there are children who are alive and children who died leaving issue. There is no gift to the issue as such—only to such as attain twenty-one." And he points out that Vice-Chancellor Malins in the case of *Moseley's Trusts*, which has been so frequently mentioned during the argument, made that mistake in the reasons which he gave for his decision. It does appear to me, though there may be some expressions in Vice-Chancellor Malins's judgment in the case of *Moseley's Trusts* which may perhaps go farther, that the view which is most calculated to reconcile all parts of that judgment is, that he thought you could properly treat the whole class as necessarily ascertained within twenty-one years from the death of the testator, and the ulterior condition, that the issue should attain twenty-one, as something superadded, and not forming part of the description of the issue. If so, I cannot

agree with that view of Vice-Chancellor Malins; I am obliged to agree with the view of the Master of the Rolls.

Some other cases, one of which was before Vice-Chancellor Knight-Bruce—*Riley v. Garnett*—and another more recent case before the present Master of the Rolls—*Muskett v. Eaton*—were referred to; in which, under words of apparent contingency more or less like this, it was nevertheless held, that real estate, given in remainder, vested in the whole class of children or issue, subject to be divested if they should not fulfil that condition. I consider that whole class of cases, which is very well known, to be inapplicable to the construction of gifts of personal property, such as you have to deal with here. There are some peculiar rules of law applicable to limitations of real estate; one of which is, that a contingent remainder must take effect at the time of the determination of a previous freehold estate, or not at all, unless it is supported by a fee vested in trustees; and in order to avoid the manifest disappointment of the intention of testators, and the destruction of a whole series of limitations which might result from that rule, the Courts have in some cases leant to what I may describe as a rather violent and unnatural construction of words of contingency of this kind, and have treated them as descriptive not of a condition upon which the property was to vest, but of a condition subsequent, on non-fulfilment of which it was to become divested.

In *Riley v. Garnett*, Vice-Chancellor Knight-Bruce referred to the class of authorities on which he was proceeding; mentioning one of them, *Doe v. Nowell* (1). The report of *Doe v. Nowell* (1) refers to the earlier authorities, beginning with *Boraston's Case* (2), and including *Edwards v. Hammond* (3), *Bromfield v. Crowder* (4) and others, extremely familiar to all persons conversant with the law of real property. The rule of construction adopted in those authorities depends partly upon the law as to con-

(1) 1 M. & S. 327.

(2) 3 Rep. 19.

(3) 3 Lev. 132.

(4) 1 B. & P. (N.R.) 313.

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tingent remainders and partly upon the principle that as to real estate the Courts are always inclined to hold the fee to be in abeyance.

None of these considerations properly applies here; and I am not aware that they have ever been applied to gifts of personal estate. Therefore, in point of construction, I come to the conclusion that these words which raise the question are words of description; that they describe the issue who are to take; and that there is no gift to any issue who do not fulfil those descriptions.

That introduces the other question, which was principally argued by the counsel for the appellants, whether (as Vice-Chancellor Malins put it in a passage of his judgment in *Re Moseley's Trusts*, which really points out what is the true question to be determined) you can or cannot sever the shares, whether you can, within proper limits of time, ascertain the whole number of the class—which is the same thing as the whole number of the shares—and whether it is, as he says later in the same page, “in effect a gift of a legacy to be divided into as many shares as there are children.” If that were so it would be good, because the children must necessarily be ascertained within due limits of time; and, as I said before, it would not signify what afterwards became of any particular share, any more than in the case of *Catlin v. Brown*, to which reference was made. But, the question is, Are there here two classes, or is there one class compounded of persons answering one or other of two alternative descriptions? Can you or can you not ascertain the number of shares and of shares within the necessary limits of time?

That question has always been investigated by looking to the state of things as it was at the testator's death; and if, at that time, the whole might be too remote, then you could not rectify it by looking to the way in which the events actually turned out at any later time. The gift in this case is to all the children of William Moseley who should attain the age of twenty-one years, and the lawful issue who should attain twenty-one years (taking *per stirpes*) of such of them as should die under that age. At the death

of the testator, William Moseley was unmarried. The testator died in May, 1831, and William Moseley married in November of the same year. It was at that time absolutely uncertain whether he would ever have any child who might live to attain the age of twenty-one years. The whole class might have consisted of remoter issue, who might not attain the age of twenty-one within twenty-one years from the death of William Moseley. Not only could you not know with certainty who might be the particular members of the class, and say they must come into existence within the necessary limits of time; you could not then ascertain so much even as a minimum share to which any particular members or member of that class must, at all events, be entitled. It was uncertain whether the whole class might not eventually consist of those who would be directly affected by the vice of remoteness. How can you possibly say that there were any shares which would necessarily be ascertained, under these circumstances, within due limits of time? Still more, how could you tell how many such shares there would be?

The argument which has been offered is really this, that where a class is so defined that certain members of it, if they come into existence at all, and if they fulfil the required conditions, must come into existence and fulfil those conditions within due limits of time, then those persons, if there was no law of remoteness, would, on fulfilling those conditions within those limits of time, be entitled to a share, of which you could not, indeed, tell what the full amount would be till all the other shares were ascertained, but which at all events never could be less than a certain sum. That is true; but the conclusion sought to be founded upon it, that you can therefore sever such shares from others which may not be capable of being ascertained within the same limits of time, seems to me not to follow. A gift is said to be to a “class” of persons, when it is to all those who shall come within a certain category or description defined by a general or collective formula, and who, if they take at all, are to take one divisible subject in certain proportionate shares; and the rule is, that the vice of remoteness

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affects the class as a whole, if it may affect an unascertained number of its members.

That was really the point decided in the case of *Leake v. Robinson*, because there I think four members of the class were born before the death of the testator, as to some, if not all, of whom it is manifest upon the report that, as things stood at the time when the testator died, they must necessarily have attained the age of twenty-five years (which was the condition)—if they lived to attain it at all—within twenty-one years from the death of the testator. It was strongly argued that they ought to be severed from the rest; and, in fact, the very same argument which has been addressed to your Lordships in this case would have been equally applicable to that; because it could make no difference in principle that they stood in the same degree of relationship to the testator and were all the children of one father and mother.

What Sir William Grant said about that argument, and the way in which he disposed of it, was this: "To induce the Court to hold the bequests in this will to be partially good, the case has been argued as if they had been made to some individuals who are, and to some who are not, capable of taking. But the bequests in question are not made to individuals, but to classes, and what I have to determine is whether the class can take. I must make a new will for the testator if I split into portions his general bequest to the class, and say that, because the rule of law forbids his intention from operating in favour of the whole class, I will make his bequests what he never intended them to be, namely, a series of particular legacies to particular individuals or (what he had as little in his contemplation) distinct bequests, in each instance, to two different classes, namely, to grandchildren living at his death and to grandchildren born after his death."

Mutatis mutandis, that passage appears to me to be applicable here; because it can make no difference, in principle, that here, the class being *per stirpes*, some of the *stirpes* are represented by issue of one generation, and others of the *stirpes* are represented by issue of another generation. The rule as

to vesting must be exactly the same which would have been applicable if the gift had been in this form: "In trust for all the children of my said daughter who shall attain the age of twenty-one years, or die under that age leaving issue who shall afterwards attain the age of twenty-one." In that case the children, and the children only, would have taken; that is to say, if there had been no law of remoteness, the children who were dead would have taken transmissible interests, depending upon the attainment of twenty-one by issue whom they might leave surviving them; interests which would have been part of the personal estate of the parent, and would not have gone to the issue. As far as the principle of class is concerned, it makes no difference whether the gift might be in that form, in which beyond all controversy it would have been void, or in the form in which you find it here, where the parent is to be represented by the issue, and grandchildren substituted for children—substituted, that is to say, as original takers taking original shares, and not in the sense, which is extremely different, of persons taking by way of gift something which had previously vested in their parent, and afterwards had been divested.

I forbear from going farther into the matter, for this reason, that the whole question raised upon this will has been carefully and elaborately considered and examined by the Master of the Rolls in the case of *Hale v. Hale*. With every part of that judgment I agree; and that judgment anticipates the entire argument which has been used here. He says, "The class you could ascertain in one sense; you could say that at the death of the widow the class could not exceed a given number; that is to say, it could not exceed all the children then living and all those who died in her lifetime leaving children; and you could say, at the testator's decease, that in no case could the whole class to take exceed the whole number of the testator's children, because grandchildren would only come in the place of children. In that sense the class is ascertainable; but in the other sense it is not—you could not tell how few there

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would be to take. You might have a division according to the number of children; then a child might die leaving a son who might attain twenty-four" (that was the age in the case of *Hale v. Hale*), "after the legal period; and then that share ought to come back to the others if you could divide it; but you could not, it must remain absolutely uncertain what share each child would take until it was ascertained whether the grandchildren attained twenty-four or not. The shares were not necessarily ascertainable at the death of the tenant for life, for you could not find out what share each child would take, although you could find out that each child must at least have a certain share. That being the state of the law, could you sever the shares?—that is, could you say, I will give to each child his minimum share, and only declare so much to be void for remoteness as he may possibly take beyond the legal period? There again you would have to wait for the period of distribution to find out the share, unless you took the minimum share to be determined by the number of shares at the testator's death, in which case you would have a minimum share in the sense that a son who had then attained twenty-four must take that amount at all events, although he might be entitled to more." The testator's death of course was a much more favourable period for that argument than what we have to deal with here. Then he goes on, "As I understand it, *Leake v. Robinson*, and the whole of that class of cases, negative the possibility of doing so. You must ascertain the whole share in order to get out of the decisions. According to the other mode of dealing, the minimum share might be given to each child who answered the description at the testator's death, leaving the law as to remoteness to take effect as regards the difference between the maximum and the minimum share; but that is not the rule laid down by this Court, which has held the whole gift void unless you can ascertain the shares within the period. The rule has been acknowledged in every case on the subject." The Master of the Rolls refers to some of them.

I must own that I feel some degree of

surprise, after that very careful and well-reasoned judgment, that encouragement should have been given to the appellants to bring this question to your Lordships' bar. It may be that if *Jee v. Audley* (5), *Leake v. Robinson*, and a long series of cases which have followed them, had never been decided, the Courts might have reasonably wished, if they could, to find some means of modifying the application of the rule of remoteness, so as to preserve as much as possible of the intention of testators, and sacrifice only, if they could discover it, the real excess. But whatever one might have thought of the possibility of doing this, if the question had been entirely free from decision, it has been long since settled and determined; and I apprehend that now no authority less than that of the Legislature can alter it. I must therefore move your Lordships that this appeal be dismissed with costs (6).

LORD PENZANCE.—I confess that, upon hearing this case opened, and referring to the judgment which your Lordships are now asked to set aside, I felt considerable difficulty in coming hastily to any conclusion that the case of *Smith v. Smith*, to which reference was made, was one that ought not to be examined with regard to the propriety of the reasoning contained in it; for the Lords Justices in the judgment from which this appeal is made, although they felt themselves, as they said, bound by that case, threw out suggestions, in very unmistakable terms, that, but for that case, they would have been of a contrary opinion; and the great respect that I have for the Lords Justices induced me to look very vigilantly at that case of *Smith v. Smith*, under such circumstances, in order to see whether there was room for any reconsideration of the principles contained in that case, with a view to their alteration.

But, on referring to the judgment of the Vice-Chancellor, with which the Lords Justices said they entirely agreed, I find

(5) 1 Cox, 324.

(6) By agreement between the parties it was provided that the costs should come out of the fund.

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myself in great difficulty, because the Vice-Chancellor's judgment appears to me to have proceeded upon a supposition that the language of the will was different from what it really was. The learned Vice-Chancellor says, "Here the number of objects must be ascertained within twenty-one years after the death of the testator." "It is," he says, "to the children who attain twenty-one, and the issue of those who die under that age; so that necessarily you ascertain the whole number of the class within a life in being, and twenty-one years."

But it is not so. That is not the provision of the will. The provision of the will is to "the children of the daughter who shall attain the age of twenty-one years, and the lawful issue of such of them as shall die under that age," . . . "which issue shall afterwards attain the age of twenty-one years." It is those words that, according to those who wish to hold this gift void, bring the case within the operation of the law against perpetuities; and the judgment of the Vice-Chancellor, omitting those words altogether, fails to meet the case which is here alleged against the gift.

Now, that being the case, I thought it desirable to look a little into what is the principle upon which all previous cases have proceeded. We are asked to set aside the judgment, or, at least, to differ from the judgment, in *Smith v. Smith*; but, as far as I can see, your Lordships must not only do that, but you must differ from the principle contained in the case of *Hale v. Hale*, the principle contained in the case of *Bentinck v. The Duke of Portland*, and not only that, but also in the case of *Leake v. Robinson*. I should have quoted to your Lordships the language of the Master of the Rolls—Sir William Grant—in *Leake v. Robinson*, but my noble and learned friend, the Lord Chancellor, has already done so, and I do not repeat it. It is quite plain, as it seems to me, from the language there used, that the principle of *Leake v. Robinson* directly applies to this case. The Master of the Rolls in *Hale v. Hale*, dealing with that principle, says this: "A will takes effect at the death of the testator, and any gift made by it is void for re-

moteness if it does not necessarily take effect within twenty-one years from the termination of any life then in being;" in other words, unless the objects can necessarily be ascertained within the legal period. That, I take it, is a proposition which nobody disputes.

Upon that it is contended, that where the gift is to a class that may consist of several members, and you can ascertain the maximum number of that class, you should hold valid the bequest to such members of that class as are within the period prescribed by the law against perpetuities, and invalid with regard to those who are without that period. That is a proposition which, as the Lord Chancellor has already said, is one that might very well have been debated a hundred years ago, and might be worthy of consideration now, if the question now were one of legislation; but in the present day, after all that has passed, after the decision in *Leake v. Robinson*, and all the cases that have followed it, it appears to me that that is a contention which would be directly in the teeth of those cases; for it was not only *Leake v. Robinson*, which enunciated that doctrine, but a case in your Lordships' House of *Dungannon v. Smith* (7) distinctly adopted it. It was there said that where a testator has made a general bequest, embracing a great number of possible objects, there is no authority for holding that a Court can so mould it as to say that it is divisible into two classes—one embracing the lawful and the other the unlawful objects of his bounty. Therefore your Lordships have a decision in your own House distinctly adopting the principle of *Leake v. Robinson*.

These being the principles on which the matter rests, then comes the question of the construction of this will. Now, under the will could the objects of the testator's bounty be ascertained within the life or lives in being or within twenty-one years afterwards? The primary object of his bounty was William Moseley. Well, of course, he was ascertained. Then there are the children of William Moseley. William Moseley was the life in being,

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and when he died of course his children could be ascertained. Then there is another portion of the objects of his bounty—there are these children of the children who died under twenty-one—so many children of the children, or, in other words, so many of the grandchildren, as should live to the age of twenty-one. It is impossible to say you could ascertain the number or the existence of such persons within the life of William Moseley, or of any other life in being, and twenty-one years afterwards. Therefore, supposing that the will received its natural construction, and the words upon which so much has been said, beginning with the words “which issue shall afterwards attain the age of twenty-one years,” be considered part of the description, it is unquestionable that you could not ascertain of how many members that class would consist. If William Moseley had three children (which he had) you could ascertain that there never could be more than three shares, each child having one; but you could not ascertain, without going to a period beyond the period prescribed by law, how many of those children would leave children that would attain the age of twenty-one, themselves dying under twenty-one. Therefore I think it is unquestionable that, although you might ascertain the minimum, you could not ascertain the actual share of the persons entitled under this description to the testator's bounty.

That being so, the only question that remains (and indeed that seems to me the only question that exists in the case) is, whether you can possibly so twist (I might almost say) the language the testator has used as to consider that the first part of that bequest contained a description of the class, and that the words which follow, “which issue shall afterwards attain the age of twenty-one,” were words of condition subsequent or of defeasance. That seems to me to be the only practical question and the only way in which any question could be raised upon this will, consistently with the decisions that have gone before.

Now it was very ably argued by Mr. Chitty that cases had existed in which words of this character have received a

construction of that kind, but, as my noble and learned friend on the woolsack has pointed out, those cases were cases of a peculiar description. They were not cases applicable to personal property; they were not cases in any degree *in pari materia*, or of similar character with the present; and, above all, they were not cases in which this law of perpetuities came in question, in respect of which it has been laid down and taken as an axiom of interpretation, that you should construe the will first according to its natural meaning, without any regard to the effect which that meaning might have according to the law of perpetuities, and afterwards apply that law. Therefore, I do not think those cases are cases which your Lordships should adopt as a rule for construing this will.

But the case of *Festing v. Allen*, to which allusion has been made, is a very strong case to the opposite effect. There the words were not “which issue shall attain the age of twenty-one,” but “who shall attain that age.” Now I suggested in the course of the argument that whether the words “which issue shall attain” or “who shall attain” are used, the meaning cannot be different. It is impossible, I think, to suggest that there is any difference between the meaning which naturally flows from the use of the words “which issue,” and the meaning which flows from the use of the word “who.” They seem to me to be alternative expressions for the same idea. In *Festing v. Allen* the word was “who,” and there was a most distinct decision, after some consideration, pronounced by Baron Rolfe in the Court of Exchequer in that case, that the words “who shall afterwards attain the age of twenty-one years” formed part of the description.

It seems to me, therefore, that whether you look at the construction of this will as if no such question had arisen before, and construe the language according to its natural meaning, or whether you look at a case like *Festing v. Allen*, where the matter has been the subject of previous decision, your Lordships can arrive at no other conclusion than that the meaning of this clause in the will was, that a class should be created, to consist, in the first

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place, of the children of William Moseley, and, in the second place, as part of the same class, of their children, if those children should attain the age of twenty-one years. That is the common-sense meaning of the clause, and it is also a meaning consistent with the case to which I have just drawn attention.

I will only add that, as regards the judgment of the Vice-Chancellor in the present case, that judgment is in entire accordance with a previous judgment of his in the case of *Re Moseley's Trusts*, and that, on that case being cited before the present Master of the Rolls in *Hale v. Hale*, the Master of the Rolls dealt with the judgment of the Vice-Chancellor, as it appears to me, in a way with which I should have entirely agreed, and explained that that judgment could only have been arrived at, and was arrived at, by omitting the most material part of the will—I mean material in the sense of its creating the difficulty against which the appellants have now struggled.

Under these circumstances, I agree that the decision of the Court below should be affirmed.

LORD BLACKBURN.—I am entirely of the same opinion.

This case comes in a peculiar manner before this House. The Master of the Rolls, when he had it before him, said, and said correctly, that the case of *Smith v. Smith* was precisely in point, and being a decision in the Court of Appeal, he must follow it. In the Court of Appeal the learned Judges also said, "The case of *Smith v. Smith* is precisely in point, and we are as much bound to follow it as the Master of the Rolls was;" but each individual Judge in the Court of Appeal said that he did not agree with the reasoning of *Smith v. Smith*, but they did not enter into the details, or shew us how or why they did not agree with that reasoning. That has occasioned to me, all through, the great embarrassment I have felt in this case; for I apprehend it is never safe to say that a man's opinion is wrong until you appreciate the arguments which have led him to that opinion; and up to this moment I am unable to find out what

were the arguments which led the Judges of Appeal to say that they thought the decision in *Smith v. Smith* was wrong.

I could perfectly well understand that it might be said originally, if the thing were beginning *de novo*, that it operates at times very harshly—and in this particular case it does operate extremely harshly—that where part of a class are out of the limits of perpetuity, the whole interest of that class should be void, and that that one—in this case the only one who existed of that class, and who was not beyond the limits of perpetuity—is to take nothing, the whole being void. I perfectly understand that it could be said that that was a thing against which, although it was originally so determined, there was a great deal to be said; but there would also be a great deal to be said in its favour. But then I do not think that can be the ground upon which the Lords Justices of Appeal went, because it certainly seems clear that that has, at least since the time of the decision of Lord Kenyon, or at all events since the decision of Sir William Grant, more than sixty years ago, been considered positive and settled law, and there has been no dispute at all about its being law; and now it is no more competent to your Lordships' House to say that you will reverse that long-established law than it was for the Court below—the Court of Appeal—to do it.

But I do not think that it could have been upon that ground that the Court of Appeal went, for Lord Justice James refers to the reasoning of Vice-Chancellor Malins in *In re Moseley's Trusts*, and says that but for *Smith v. Smith* "I should, without any doubt or hesitation, have concurred in that conclusion, and I rather think that the Master of the Rolls would have done so too."

Now, the strange and peculiar thing there is, that when we look at the reasoning of the Vice-Chancellor in *In re Moseley's Trusts*, in which Lord Justice James supposes the Master of the Rolls would have concurred, we find that in *Hale v. Hale* the Master of the Rolls gave a long and elaborate judgment, the pith and object of which was to shew that he did not agree with the reasoning of Vice-Chancellor Malins in *In re Mose-*

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ley's Trusts; and I confess myself, upon looking at the matter, I have been puzzled to make out what was the ground on which the Court of Appeal went.

However, putting that aside, I at once agree with what my two noble and learned friends who have spoken before me have said. It seems to me that, in the first place, it is established by a long series of authorities, that if the gift be to a class, some of whom are beyond the limits in the way of remoteness, the whole is void. I regret that it is so in this case, but I cannot help it—it is the rule. Secondly, I think it has been established by a long series of authorities that we are to construe the will just as if there was no such rule of law as that of perpetuity or remoteness, and see whether the gift is to a class, and afterwards ascertain whether the class is one, part of which is beyond the limits of remoteness. Construing it in that way, I certainly do agree entirely with the Master of the Rolls in *Hale v. Hale*. The Vice-Chancellor Malins does construe this will contrary to what I should have thought was the obvious construction, and does so entirely by ignoring—in all he says at least (he may have had them present to his own mind—I cannot tell that)—the words which occasioned the whole difficulty and doubt.

Taking that view of the matter, I do not think it is necessary to go farther into the question than to say that I quite agree with what the Master of the Rolls said in *Hale v. Hale*; and taking that to be the construction of the will, and taking the rule, as I have previously said, to be established by authority, the only doubt I can entertain as to the propriety of affirming this decision, and as a consequence affirming the decision in *Smith v. Smith*, is, what I said at the beginning, that I am not at all sure that I appreciate the grounds on which persons of such learning as the three Lords Justices of Appeal thought that that reasoning was not satisfactory.

LORD WATSON.—At the conclusion of the argument at the bar, the main, I may say, the only, difficulty which I felt in this case arose from a suspicion that I had failed to appreciate the grounds of judg-

ment assigned by the learned Vice-Chancellor, which received the warm approval, apparently, of the learned Judges of the Court of Appeal. But I have been very much relieved by the observations which have fallen from your Lordships, and I am constrained to believe that the error, if I may so call it, upon which that judgment of the Vice-Chancellor is based, arises, I will not say from his ignoring these very important words in Joseph Moseley's bequest, "which issue shall afterwards attain the age of twenty-one years, or die under that age leaving issue at his, her or their decease or deceases respectively," but at all events from his having failed to give their due and proper effect to these words.

I am quite satisfied that, according to the just construction of this will, the words must be read as part of the description in which they are imbedded, and that they do aptly express this qualification, that no grandchild of the testator shall take who does not attain the age of twenty-one, or who dies before that period, not leaving surviving issue of his body.

Now, that being the right construction of the will, as your Lordships have also held, I think that the legal principles applicable to the case are in themselves very clear; and not only so, but that they are principles established by a long, weighty and consistent series of authorities.

It would be a waste of the time of this House were I, after the full exposition of the law which has been given by your Lordships, to make any comment upon those cases. Therefore I content myself with saying that I concur with your Lordships' view both as to the construction of this will and also as to the principles of law which must govern the case.

Judgment under appeal affirmed, and appeal dismissed; the costs to be provided for as agreed between the parties.

Solicitors—Wood & Wootton, for appellants; Crosse, Sons and Riley, agents for John Riley, Wolverhampton, for respondent.

MALINS, V.C. } SHEEHAN v. THE GREAT
1880. } EASTERN RAILWAY COM-
Nov. 15. } PANY.

Practice—Patent—Co-owners—Want of Parties—Rules of Court, Order XVI. rules 13 and 14.

One of several co-owners of a patent can sue for an injunction and an account.

Where a defendant, by his statement of defence, submitted that the several co-owners with the plaintiff of a patent ought to be made parties to the action, but took no course to bring them before the Court,—

Held, upon an objection by the defendants at the trial to the action proceeding for want of parties, that they were too late in taking the objection, and that they ought to have moved under Order XVI. rules 13 and 14, at an earlier stage, to have the co-owners joined as parties.

This action was for an account of what was due to the plaintiff by the defendants, as royalty, for their use of his patent process of steelifying iron, and for an injunction to restrain them from using the process.

It appeared that the defendants, under an agreement with the plaintiff, dated in 1873, used the patent down to Michaelmas, 1875, when they discontinued the use of it.

In November, 1875, the plaintiff agreed with Edwards and others, that the patent should belong, as to two-thirds, to the plaintiff, and as to one-third, to Edwards and others, and in 1877 the plaintiff assigned one-fourth of the patent to Turner, and agreed to assign one other fourth to Wells.

By their defence, the defendants submitted that Edwards and the other assignees of the patent ought to be parties to the action.

The action now came on for trial, and an objection was raised by the defendants of want of parties, and a letter was read, dated in June, 1880, from the defendants to the plaintiff, from which it appeared that the plaintiff's process was used by the defendants for the last time in September, 1877, and not in 1875, as stated in their answers to interrogatories.

Mr. Glasse, Mr. Arthur Charles, and Mr. Smart, in support of the objection.—We submit that all the co-owners of the patent ought to have been made parties to the action, and that in their absence the action cannot proceed.

Mr. Higgins and Mr. MacSwiney, for the plaintiff.—In the first place, we say that the defendants should not have waited to make this application till the hearing of the action. They should have applied under the 14th rule of Order XVI., that the assignees of the patent should be joined, either as plaintiffs or defendants—

Hunter v. Young, 48 Law J. Rep. Exch. 689; Law Rep. 4 Ex. D. 256.

Our second point is that, in the case of a patent belonging to several persons in common, each co-owner can by law assign his share, and sue for an infringement—

Lindley on Partnership, 4th ed. vol. i. p. 68;

Dent v. Turpin, 2 Jo. & H. 139; 30 Law J. Rep. Chanc. 495.

[MALINS, V.C., referred to

Vallance v. The Birmingham and Midland Land and Investment Corporation, Law Rep. 2 Ch. D. 369.]

And lastly, we say it would be useless to make the assignees of the patent parties, if the plaintiff is unable to carry his right to profits beyond Michaelmas, 1875, as all the assignments took place after that date.

Mr. Arthur Charles, in reply.—The 14th rule of Order XVI. provides that this application may be made at the trial.

MALINS, V.C., after stating the facts, proceeded—Now none of the assignees of this patent are parties to the action, either as plaintiffs or defendants, and the railway company take the objection that the plaintiff, being one of several co-owners of this patent, cannot sue alone, but that he ought to have made all the other co-owners either plaintiffs or defendants to the action, and that the action cannot proceed without them.

Now can the owner of a share of a patent sue alone for an injunction and for an account? For if he can sue alone then the objection raised by the company falls to the ground. I am clearly of

Sheehan v. Great Eastern Rail. Co.

opinion that a person so entitled can sue for an injunction, and even for an account, without making his co-owners parties. Suppose a trespasser enters on land belonging to several co-owners and cuts down timber, any one of those co-owners can sue for an injunction to restrain the wrongful act, as he has an interest in the subject-matter and a legal right to prevent a wrong. Mr. Justice Lindley, in his book on Partnership, is clear upon this point, that a co-owner of a patent has a right to sue; and he cites *Dent v. Turpin* as an authority.

If my opinion had been the other way, then there would have been the question, under Order XVI. of the Rules of Court, When were the defendants bound to take this objection of want of parties? No doubt the objection was taken by the statement of defence, and at that time there may have been sufficient grounds to have justified the defendants in moving, under the 13th and 14th rules of that Order, that the other co-owners of the patent might be joined as parties. But they did not see fit to take that course, and now, at the hearing, they raise the objection. The rules were framed to meet the evil which constantly happened under the old practice, that a plaintiff was often defeated at the hearing by this objection of want of parties. Ought the defendants to have taken this objection at an earlier stage of the proceedings? If the defendants are right in their contention that the plaintiff cannot sue alone, they might have demurred, but they were not advised to do so. The plaintiff might, on the statement of defence being delivered, have joined the co-owners as defendants, but he would have done so at the peril of having to pay their costs if he failed against the principal defendants. In my opinion, the defendants ought to have taken some course by which this question of parties should have been determined at an earlier period than the trial of the action; not having taken this course they are precluded from taking the objection now, and there is no justification, in my opinion, for this application.

But there is still a third objection, which is fatal to this application. The

pleadings shew, and I can only look at the pleadings, that the plaintiff's right accrued when he was sole owner. I cannot attend to the letter which has been read, stating that the defendants used the patent down to September, 1877.

On every ground, therefore, I think this objection is unsustainable.

The objection was overruled, and the trial of the action proceeded.

Solicitors—Ley & Brocklesby, for plaintiff; Capel A. Curwood, for defendants.

MALINS, V.C. }
1880.
Nov. 17, 18. }

VIRET v. VIRET.

Statute of Frauds—Letter of intending Husband—Agreement to settle Wife's Property.

A gentleman, the day before his marriage, wrote to the lady's solicitor as follows: "In the event of my marriage with Miss W. taking place before the settlements are ready, I agree to her fortune being settled on herself, subject, of course, to certain conditions, chiefly relating to myself and the children of our marriage (if any)." The marriage took place without a settlement. The husband's evidence verified a writing containing the conditions referred to:—Held, that the marriage must be presumed to have taken place on the faith of the agreement contained in the letter; and that there must, therefore, be the usual reference to chambers to approve of a proper settlement.

Trial of action.

This was an action by a husband against his wife, and (by amendment) against the infant child of the marriage, claiming a declaration that a certain letter, written by the plaintiff to the lady's solicitors the day before the marriage, did not constitute an agreement for a settlement of the lady's property.

On the 14th of January, 1878, the Rev. C. Mackenzie, the surviving trustee of a settlement, comprising part of the lady's property, wrote to the plaintiff, Edward S. Viret, the following letter:—

Viret v. Viret.

"Dear Mr. Viret,—Thanks for your note, but it has made me anxious. I cannot understand the delay, but I trust to you that all will be done as we should desire and if from any cause you are tempted to marry before the settlements are signed, you will before the wedding write a letter to our solicitors contracting to settle on Constance all her fortune coming to her eventually.—Faithfully yours,
C. Mackenzie."

In compliance with this suggestion the plaintiff, on the 16th of January, 1878, wrote to the solicitor, who had been acting upon instructions given by the lady's mother and Mr. Mackenzie, the following letter:—

"Dear Sir,—I write the following letter to you in accordance with the Rev. C. Mackenzie's wish. In the event of my marriage with Miss Wright taking place before the settlements are ready, I agree to Miss Wright's fortune being settled on herself, subject, of course, to certain conditions, chiefly relating to myself and the children of our marriage (if any), or otherwise in case Miss Wright should predecease me.—Faithfully yours,
"Edward S. Viret."

The plaintiff made an affidavit, stating that by the "conditions" he intended to refer to a memorandum made and signed by him on the same day, which was as follows: "N.B.—Regarding conditions spoken of in my letter to Lewin to-day, as I have just told my mother and Constance, I mean that I and my wife should have power to raise, by selling or borrowing on her reversion, from 2,000*l.* to 3,000*l.*, either for purchasing a residence or for any purpose we might think fit; and as regards the children, should there be any issue of our marriage, that my wife and I should be able to leave her money either all to one or equally or unequally amongst them, as we might think fit."

On the 17th of January, 1878, the plaintiff and defendant were married without any settlement having been made of the lady's property. At the time of the marriage the lady was entitled to property in reversion to the amount of about 10,000*l.*

This action was commenced in November, 1878. The statement of claim, after setting out the letters and facts above stated, and alleging that by the letter of the 16th of January, 1878, the plaintiff never intended in any way to preclude the defendant or himself subsequently to marriage from deciding what the precise terms of any settlement should be, or in particular from stipulating that a portion of the funds belonging to his then intended wife should be advanced to him for the purpose of purchasing a residence, claimed a declaration that the letter of the 16th of January, 1878, did not constitute an agreement for a settlement of the property of the defendant Constance Viret; or, in case the letter constituted in the judgment of the Court an agreement for a settlement, that the rights and interests of the plaintiff and all persons interested therein might be determined and declared.

Both the plaintiff and his wife, the defendant Constance Viret, by their affidavits, stated that the marriage was not solemnised on the faith of the letter of the 16th of January, 1878, nor on the faith of any agreement for a settlement of the wife's fortune.

The infant defendant, Francis M. Viret, was born in April, 1879.

Mr. Millar and *Mr. Warrington*, for the plaintiff.—There is nothing in the letter of the 16th of January, 1878, which binds the plaintiff to make a settlement of his wife's property.

In order to enforce against a husband a statement of intention to settle the wife's property upon her, the representation must be distinct, and the marriage must be shewn to have taken place upon the faith of the representation—

Seton, 4th ed. pp. 1223, 1224;

Alt v. Alt, 4 Giff. 84; 32 Law J. Rep. Chanc. 52.

Here the evidence clearly shews that the marriage did not take place on the faith of any such representation.

Mr. Everitt, for the defendant, the wife.

Mr. Coll, for the defendant, the infant child of the marriage.—The letter of the 14th of January, 1878, amounts to a

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clear request on the wife's part, through her agent, Mr. Mackenzie, to have all her property settled. That letter is answered by the husband's letter of the 16th of January, "agreeing to her fortune being settled on herself;" and the marriage on the following day "must be presumed to be in pursuance of the terms proposed" in that letter—

Estcourt v. Estcourt, 1 Cox, 20.

Here, as in

Alt v. Alt (*ubi supra*),

"it is clear that the marriage took place on the faith of the promise expressed" in the letter—4 Giff. 87. The evidence shews that Mr. Mackenzie was acting on the lady's behalf. There is, therefore, a contract in writing within the Statute of Frauds.

[MALINS, V.C.—The letter seems to be as definite in its terms as the letter in

Alt v. Alt (*ubi supra*).]

Mr. Millar, in reply.—In

Alt v. Alt (*ubi supra*)

the letter was complete in itself. But here the letter of the husband refers to "certain conditions," but does not state what those conditions are.

However, the plaintiff is willing to submit to any order the Court may think right.

MALINS, V.C.—A few days before the marriage a meeting took place between the parties, the lady being, as I collect, to a considerable extent represented by her relative, Mr. Mackenzie, who is a clergyman. They all seem to have been aware that the marriage was to take place with something like undue haste; but, certainly, they never gave up the notion that there was to be a settlement. Unfortunately we have not got the letter written by Mr. Viret to Mr. Mackenzie, but we have the letter written by Mr. Mackenzie to Mr. Viret on Monday, the 14th of January, 1878. The letter is this: "Dear Mr. Viret,—Thanks for your note, but it has made me anxious." What there was in Mr. Viret's note to make Mr. Mackenzie anxious—whether or not he thought they were going to be married without any settlement—we cannot tell. "I cannot understand the delay, but I trust to you that all will be done as we

should desire, and if from any cause you are tempted to marry before the settlements are signed, you will before the wedding write a letter to our solicitors contracting to settle on Constance all her fortune coming to her eventually." The property was reversionary; and therefore he says, "All her fortune coming to her eventually." The marriage was to take place on the 17th of January; and on the 16th of January Mr. Viret writes to the lady's solicitors—that is, to the member of the firm who is acting in the business—in these terms: "I write the following letter to you in accordance with the Rev. C. Mackenzie's wish. In the event of my marriage with Miss Wright taking place before the settlements are ready, I agree to Miss Wright's fortune being settled on herself, subject, of course, to certain conditions, chiefly relating to myself and the children of our marriage (if any)." Now there is no difficulty in this Court, where there is an agreement that a lady's fortune shall be "settled on herself;" that means that her fortune is to be settled in the usual way.

Is this, then, a sufficient agreement? Of course, under the Statute of Frauds, an agreement, to be binding, must be in writing; and it has been decided, again and again, that marriage is in itself no part performance of an agreement; and therefore, however plain and distinct an agreement to make a settlement may be, if it is by word of mouth only, and is not authenticated by some document signed by the party to be charged, it is void under the Statute of Frauds. A remarkable instance of that is the well-known case of *Caton v. Caton* (1) in the House of Lords. It has not been cited, though it was mentioned in the course of the argument.

Now I must infer the intention of these parties from their acts at the time. From their acts at the time—considering that they both actually engaged solicitors, and that they not only consulted their respective solicitors, but also went to a gentleman highly competent to advise them—Mr. Danney—it is perfectly plain

(1) 35 Law J. Rep. Chanc. 292; 36 Ibid. 886; Law Rep. 2 E. & I. App. 127.

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that, from the beginning to the end, a settlement was in contemplation, and that the only question was what that settlement should be. Therefore, I come to the conclusion that the marriage took place in reliance upon and in consequence of the letter of the 16th of January, notwithstanding what the parties may now say.

Now, what are the authorities on the subject? There is the remarkable case of *Hammersley v. De Biel* (2). There the brothers of the intended wife, acting by the father's authority, stated in writing that the father "intended to leave a further sum of 10,000*l.* in his will to Miss T. (the daughter) to be settled on her and her children, the disposition of which, supposing she had no children, would be prescribed by the will of her father;" and that was all. The question was, Did the marriage take effect on the faith of that representation? Every tribunal before which the case came decided that the father having (by his agents) written that letter, it must be presumed that the marriage took place upon the faith of that letter; and that, therefore, it became an obligation binding on the father. Now a case has been cited, which was decided by Sir John Stuart, and I think it is a very good decision. I refer to the case of *All v. Alt*. In that case a gentleman writes to the mother of a young lady, only seventeen years of age, as follows: "If your daughter has, or may have money, my wish and intention would be that it should be settled for her sole and separate use." That was the whole contract. The marriage did not take place for some time afterwards: it was not a case like this, where a letter is written on one day and the marriage takes place the next day. In that case it was held that there was a binding contract to make a settlement of the lady's fortune. Sir John Stuart disposes of the matter very shortly, but, as I think, very effectually. He says, "It is clear that the marriage took place on the faith of the promise expressed in this letter to settle the whole of the young lady's property, present and

future, for her separate use. The defendant is, therefore, as much bound, in the eye of this Court, as if he had executed a settlement containing such stipulations. There must be the usual reference to approve of a settlement having regard to the letter." So in this case, Mr. Viret, the day before the marriage, writes to the legal adviser of the lady, at the request of a member of her family, who had the management of the business for her; and I come to the conclusion that the marriage afterwards took place on the faith of the fulfilment of the contract contained in that letter; and fulfilled, in my opinion, it must be. There must, therefore, be the usual reference to chambers to approve of a proper settlement.

Solicitors—W. H. Tattam, for plaintiff and for defendant C. E. Viret; G. J. Eady, for the infant defendant.

HALL, V.C. }
1880.
Nov. 29. }

KANE v. KANE.

Marriage Settlement—Covenant to settle after-acquired Property—Exception of Property previously otherwise settled—Property coming to Wife to her separate Use.

A covenant in a marriage settlement by intended husband and wife for settlement of after-acquired property of the wife, except such as should previously be otherwise settled,—Held, not to embrace a fund coming to the wife under a bequest made to her during the coverture for her own sole and separate use, and free from the debts, control and engagements of her husband.

By a settlement made on the 9th of July, 1857, on the marriage of J. K. Kane with Jane Christy Inman, and to which the intended husband and wife were parties, property was vested in the trustees, H. C. Tate, J. M. Shugar and another, on trust for the wife for life for her separate use, without power of anti-

Kane v. Kane.

cipation, and then to the husband till he should marry again; with subsequent trusts for the benefit of children of the marriage. The settlement contained a covenant by the intended husband and wife severally with the trustees, that if at any time or times during the joint lives of the wife and husband any further portion, fortune or estate, &c., should come to or devolve upon the wife or upon the husband, or either of them, through her, or in her right by descent, or by or under any will, or by donation or settlement, &c., the wife and husband and their respective trustees, executors or administrators, according to their respective rights and interests, should and would from time to time at the expense of the entrusted estate, effectually settle, assign or assure, or join and concur in all reasonable acts and deeds effectually to settle, &c., all such future portion, fortune or estate, save and except such future portion, fortune or estate as should be otherwise settled previously to the same devolving as aforesaid, upon and for such and so many of the trusts, intents and purposes, &c., thereinbefore contained concerning the trust moneys, &c., thereinbefore settled, and the interest, &c., thereof as should be then subsisting or capable of taking effect.

The husband and wife and several children being alive, a lady named Gooch died, having by a codicil to her will bequeathed to Jane Christy Kane, the wife of J. K. Kane, the sum of 2,000*l.* for her sole and separate use; and the testatrix declared that any money which she had thereby given to any female should be for her own sole and separate use, free from the debts, control and engagements of any husband to whom she might be married at the time when the same should be paid, and that her receipt alone, notwithstanding her coverture, should be a sufficient discharge to the testatrix's trustees for the money in such receipt expressed to be received.

The husband and children brought this action against the wife and the surviving trustee of the settlement seeking a declaration that the legacy of 2,000*l.* was bound by the provision for settlement of after-acquired property.

VOL. 50.—CHANC.

Mr. W. F. Robinson and *Mr. Blackmore*, for the plaintiffs.—This property is within the covenant, which is the lady's covenant, and is limited to property coming to her during the marriage—

Milford v. Perle, 17 Beav. 602;

Coventry v. Coventry, 32 Beav. 612;

Whitfield v. Whitfield, 33 Beav. 532;

Campbell v. Bainbridge, 37 Law J.

Rep. Chanc. 634; Law Rep. 6 Eq. 269.

Mr. Graham Hastings and *Mr. Ingle Joyce*, for the wife.—This legacy is already settled by the disposition of the testatrix—

Grigsby v. Coz, 1 Ves. sen. at p. 519.

[They were stopped by the Court.]

Mr. Cottrell, for the trustee.

HALL, V.C.—The question simply is whether the fund given by this will is covered by the covenant. [His Lordship read the gift as above stated.] Now, the object and purpose of the testatrix is to give the fund to the lady for her separate use, so that the capital of it is to be at her sole disposal. To bring it under the settlement would be a complete destruction of the donor's intention. Do, then, the words of the covenant include a fund which a testator says the married woman to whom he bequeaths it is to take for her sole and separate use free from the debts, control and engagements of any husband? On the fair meaning of the provision in the settlement, I consider that the fund thus in question was a fund otherwise settled, and so excluded from the operation of the clause.

Solicitors—T. Fortune, agent for Binsteed & Prior, Portsmouth, for all parties.

JESSEL, M.R. }
1880. } THE UNION BANK OF LONDON
Nov. 13. } v. INGRAM.

Mortgagee in Possession—Covenant to pay Interest, with Proviso for reducing Rate on Punctual Payment—Account.

Where a mortgage deed contains a covenant for payment of interest, with a proviso for reducing the rate on punctual payment, a mortgagee in possession is entitled, in taking the account, to be credited with the higher rate, notwithstanding that he has received the rents punctually, and they have equalled or exceeded the amount payable in respect of interest at the higher rate.

Stains v. Banks (9 Jur. N.S. 1049), was reversed on appeal (Reg. Lib. 7 B. 1863, 1761).

This was a redemption and foreclosure action by second mortgagees. The mortgage deed of the first mortgagee contained a covenant by the mortgagor to pay interest at the rate of six per cent. per annum, with a proviso in the ordinary form that if he should pay the interest within twenty days of the respective times fixed for payment thereof, the mortgagee would accept interest at the rate of five per cent. per annum. Interest being in arrear, the first mortgagee entered into possession of the property, and it was admitted that the net rents received by him were more than enough to keep down the interest at the higher rate reserved by the deed, and that they had been paid to him punctually.

The action had been referred to a special referee, with power to submit to the Court questions of law arising on the trial. The referee submitted various questions, but the only one calling for a report was, whether, under the circumstances, the first mortgagee, in taking the account, was entitled to be allowed interest at the rate of six per cent. per annum from the time of his taking possession, or whether he was from that date to be allowed interest at the rate of five per cent. per annum only.

Mr. Bagshawe and *Mr. Methold*, for the plaintiffs.—Interest at the rate of five per cent. per annum only should be allowed.

The rents received by a mortgagee in possession are to be appropriated to payment of interest. The mortgagee received the rents punctually, and it is immaterial that he received them from the tenants of the mortgagor instead of directly from the mortgagor himself—

Fisher on Mortgages, 997.

Stains v. Banks (*ubi supra*)

is a distinct authority in our favour.

[THE MASTER OF THE ROLLS said that he had been counsel in that case, and had a strong impression that it had been successfully appealed. His Lordship sent for the Registrar's Book, and found that, as he had thought, the decision of the Vice-Chancellor Stuart had been reversed on appeal. The reference in the Registrar's Book is Reg. Lib. 7 B. 1863, 1761.]

Mr. Ince, Mr. G. S. Fryer, Mr. Miller, Mr. Everitt, Mr. Davey and *Mr. T. Holland* appeared for the other parties, but were not called upon.

THE MASTER OF THE ROLLS.—The question in this case is, whether, when a mortgagee in possession has been punctually receiving rents equal to the amount of interest payable half-yearly under the mortgage deed, it can be said that the mortgagor has paid the interest punctually. Now the covenant is to pay interest at the rate of six per cent. per annum, with a proviso that if the mortgagor "shall pay" the interest within twenty days of the times fixed for the half-yearly payments thereof, the mortgagee "shall accept" a reduced rate of interest. Now it is plain that the terms of this proviso have not been literally complied with, since, after the mortgagee was in possession, the mortgagor himself did not pay anything. But it is said he has a right to alter the contract into which he entered, because, the mortgagee having received the rents, when the account is taken the rents will be set off against the interest. The answer to that is very simple. When you take an account against a mortgagee without rests (as in this case) all his receipts, whether incidental payments or rents, are put into one column on one side of the account, and all his expenses and the amounts due for principal and interest are put into another column on the other side of the

Union Bank of London v. Ingram.

account, and you then strike a balance. The result is, that if the net rents have exceeded the interest, the mortgagee does not get any interest, but he does not pay any interest on the excess; and on the other hand, if the rents have been less than the interest, the mortgagor is not charged interest on the difference, so that it is an accident whether the mortgagee or the mortgagor benefits by this mode of taking the account. But it is not the fact that the rents are necessarily appropriated to the payment of interest. Any sums received by the mortgagee—for instance fines in copyholds—may be applied in that way. Another objection to the mortgagor's contention is, that what he asks for is not within the bargain into which he entered, either in word or in fact. A mortgagee is anxious to get his interest punctually and without trouble. He therefore in effect says to the mortgagor, "If you will pay me my interest punctually, I will accept a lower rate. But if you drive me to take possession of the property—which will inflict a serious responsibility upon me, since I shall be liable for the wilful default of my agent as well as of myself—you must pay me the higher rate." A mortgagee who enters into possession always has trouble, more or less. It is not a matter of course that he can employ some one to collect the rents and charge the mortgagor with the commission, so that he risks being disallowed those costs. And besides, he may have trouble in settling with the tenants as to allowances, repairs, &c. So that it is not at all the same thing; and it would, in my opinion, be most unjust to alter the bargain between the parties, in the way suggested. Then I was referred to the case of *Stains v. Banks*, but it appears that it was reversed on appeal, though it is not so reported. It follows that both principle and authority are in favour of the mortgagee.

Solicitors—Bolton & Co., for the bank; Crowder & Co.; Deane & Co. and Flower & Nussey, for the other parties.

HALL, V.C. }
1880. } THE WYE VALLEY RAILWAY
Nov. 20. } COMPANY v. HAWES.

Practice—Parties—Third Party Notice—Application whether ex parte or on Notice—Discretion of Court—Order XVI. rules 17, 18, 20, 21.

An application by the defendant in an action for leave to serve a notice on a third party under Order XVI. rule 18 ought to be made on notice to the plaintiff and not ex parte.

In an action by a company against its directors and others, seeking to make the defendants personally liable in respect of certain dividends alleged to have been improperly paid out of capital, the defendants applied, under Order XVI. rule 18, for leave to serve third party notices on all the shareholders of the company, 450 in number, on the ground that if they, the defendants, were held liable, they would have a right over against the shareholders to recover from them the sums received by them by way of dividend:—

Held, that this was a case in which the granting of the leave asked would or might materially embarrass the plaintiffs in the conduct of their action, and that, therefore, the Court, in the exercise of its discretion, ought to refuse the application.

Adjourned summons.

The above action was instituted in August, 1879, against the five directors of the company, the contractors and the financial agents (Messrs. Grant), seeking *inter alia* a declaration that the defendants were liable to repay to the company a considerable sum of money which it was alleged had, under an arrangement between the directors and the contractors, been improperly paid to the preference and other shareholders by way of dividend out of capital. These shareholders were in number 450 or thereabouts.

The directors were advised that if they were held liable they would have a right over against the shareholders to recover from them the sums which they had received as dividend, and accordingly in May, 1880, they caused this summons to be taken out, asking (amongst other

Wye Valley Rail. Co. v. Hawes.

things) for leave under Order XVI. rule 18 to issue to, and serve upon, all the past or preference shareholders to whom any part of the sum of money in question had been paid by way of interest or dividend, a notice, claiming to be indemnified by such shareholders against all liability the applicants might be under to the company in respect of the sums so paid. This summons was adjourned into Court, and on the hearing two questions were separately argued, namely, first, whether in such a case the application ought to be made *ex parte* or on notice; and, secondly, whether on the merits of the case the leave asked for ought to be granted.

Mr. Romer, for the defendants.—This is an application for leave to serve a third party notice, pure and simple, under Rules of Court, Order XVI. rule 18—a proceeding altogether distinct from a notice under rule 17, which applies where questions are to be determined as between plaintiff, defendants and third parties. The service of a notice under rule 18 is simply for the purpose of preventing the third party from afterwards denying the validity of the judgment on the ground that the action has been improperly defended or improperly compromised, and it does not in any way prejudice or affect the position of the plaintiff in the action, and therefore the application for leave to serve such notice ought to be made *ex parte*. The practice is expressly so stated in

Seton on Decrees, 4th ed. p. 10;

and

Wilson's Judicature Acts and Rules, 183.

In

Treleven v. Bray, 45 Law J. Rep. Chanc. 113; Law Rep. 1 Ch. D. 176,

the application was *ex parte*. It is only when the third party appears (which in nine cases out of ten he never does), and further proceedings are taken under rules 20 and 21, that any notice to the third party is necessary.

Mr. Whitehorne, for the plaintiffs.—This application ought to be made on notice to the plaintiffs, who are entitled to be

heard. In the authorities which state that the application is *ex parte*, all that is meant is that it is *ex parte* as regards the third party, not as regards the parties to the action. In

Treleven v. Bray (*ubi supra*)

the leave to serve the notice was only granted on proof being produced to the Registrar that the plaintiffs concurred in the application. From the reports of

The Swansea Shipping Company v.

Duncan, Fox & Co., 45 Law J.

Rep. Q.B. 423, 638; Law Rep. 1

Q.B. D. 644

(where the plaintiff did not appear); and

Bower v. Hartley, 46 Law J. Rep.

Q.B. 126; Law Rep. 1 Q.B. D.

652

(where the plaintiff appeared by counsel), it is clear that the applications in those cases were made upon notice. It would be monstrous if a defendant could introduce 450 new parties into an action without the plaintiff being heard upon the matter. The balance of convenience is in favour of the plaintiff being heard at as early a stage of the proceedings as possible. He referred also to

The Associated Home Company v.

Whichcord, 47 Law J. Rep. Chanc.

652; Law Rep. 8 Ch. D. 457;

and

Daniell's Chancery Practice, Forms, p. 169; form No. 335.

Mr. Romer, in reply.

HALL, V.C.—The present case is certainly one in which I should require notice to be given to the plaintiffs, but I may say further that I should be unwilling to give the leave in any case without notice being given to the plaintiff of the granting of that which might interfere with his action in a very material way. Convenience is all in favour of hearing what the plaintiff has to say in the first instance, instead of waiting to have the difficulties raised and discussed on the subsequent application. My opinion is that the notice ought to be given in every case.

Mr. Romer.—This is clearly a case in which the leave ought to be granted. What these defendants claim is a simple

Wye Valley Rail. Co. v. Hawes.

right over against the shareholders, to which they are manifestly entitled. See

In re National Funds Assurance Company, 48 Law J. Rep. Chanc. 163; Law Rep. 10 Ch. D. 118;

and it is of the utmost importance to them that the shareholders should be precluded from hereafter saying that the judgment fixing these defendants with liability is not binding on the shareholders, because it was improperly defended or compromised. The granting of the leave will not in any way embarrass or impede the plaintiffs. In all probability the shareholders will not appear, and even if they do the Court has ample power to consolidate the proceedings so that one of such shareholders shall represent the whole class. He referred to

The Swansea Shipping Company v. Duncan, Fox & Co. (ubi supra);

and

Wilson's Judicature Acts and Rules, Appendix B. form No. 161.

Mr. Whitehorse, for the plaintiffs, was not called upon.

HALL, V.C.—I think that this application is one which cannot be entertained. To grant it would be to sanction proceedings which would have the effect of embarrassing the plaintiffs in proceeding with their action. The Court has a discretion, which is no doubt to be exercised judicially and with due regard to all the circumstances of the case, to decide whether or not the particular case before it is a proper one, in which the collateral question or claim over should be introduced into the main action. It is said that if all these persons, some 450 in number, were made parties to the action, there is some process by means of which the Court could consolidate the proceedings or limit them in some way to some particular persons as being representative of the whole class. Whether the Court could do that or not I will not say, but I am not satisfied that the proceedings could be made to take a course which would not materially embarrass the plaintiffs. For aught I know there may be persons who, though they have become shareholders, were not affected personally by what has taken place; others of them

may be creditors of the company, and various questions may arise. I am not satisfied that that might not embarrass the plaintiffs in their action, or that it is right to make an order which would have the effect of bringing persons into the action some of whom, not improbably—indeed almost certainly—would have a case differing from that of the others. I think that this is a proper case in which the Court, exercising its discretion, should say that it will not hamper the action and embarrass the plaintiffs by having this further question decided in this action instead of being decided in an independent action in the ordinary way. The application must be dismissed and the applicant must pay the costs of this hearing.

Solicitors—Wilson, Bristows and Carpmael, for the applicants; Newman, Stretton & Hilliard, for the plaintiffs.

HALL, V.C. } SEAR v. THE HOUSE PROPERTY
1880. } AND INVESTMENT COMPANY
Nov. 29. } (LIMITED).

Landlord and Tenant—Lease—Words importing a Covenant—Covenant not to assign without Consent, such Consent not to be unreasonably withheld—Covenant by Landlord.

Among the covenants by the lessee in an indenture of lease was a covenant not to assign without the lessor's previous consent in writing, "but such consent not to be unreasonably withheld":—Held, that the words quoted did not constitute a covenant by the lessor, but a qualification upon the lessee's covenant.

Demurrer to statement of claim.

The statement of claim shewed that by indenture of lease dated the 12th of July, 1879, William Nunn demised to the plaintiff property at Peckham for the term of twenty-one years, at the yearly

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rent therein mentioned, and "subject to the lessee's covenants therein expressed;" and the plaintiff covenanted with the said William Nunn, his executors, administrators and assigns, that the plaintiff, his executors, &c., would not carry on such business as therein mentioned without the previous consent in writing of the said William Nunn, his executors, administrators or assigns for that purpose first had and obtained, and that the plaintiff, his executors, &c., should not assign or underlease the said premises or any part thereof without the like previous consent in writing, "but such consent not to be unreasonably withheld;" and on the granting of such consent the plaintiff, his executors, &c., should pay to the solicitor of the said William Nunn, his executors, administrators or assigns, a fee of 2l. 2s. for the preparing of such consent; and also to give notice as therein mentioned of any assignment or underlease.

William Nunn conveyed the premises to the defendants, who, as the statement of claim alleged, unreasonably withheld their licence to a proposed mortgage by underlease by the plaintiff.

The plaintiff claimed an injunction restraining the defendants from withholding their licence, and an order on them to give the same in accordance with the covenants in that behalf contained in the lease, and to have such covenants specifically performed, and damages.

The defendants demurred on the ground that the statement of claim shewed no covenant or contract binding them to grant the licence.

Mr. Graham Hastings and *Mr. Gover*, for the defendants.—There is no covenant by the lessee—

Treloar v. Bigge, 43 Law J. Rep. Exch. 95; Law Rep. 9 Exch. 151;

Hyde v. Warden, 47 Law J. Rep. Exch. at p. 127; Law Rep. 3 Ex. D. at p. 81.

Mr. W. Pearson and *Mr. Northmore Lawrence*, for the plaintiff.—The construction of the words here is not the same as in

Treloar v. Bigge (*ubi supra*);

"not to be" means "is not to be." This is enough to raise a covenant—

Sheppard's Touchstone, p. 162;

Brookes v. Drysdale, Law Rep. 3 C.P. D. 52;

especially as the lessee is to give a valuable consideration for the licence.

Mr. Hastings, in reply, referred to

Smith v. The Mayor of Harwich, 2 Com. B. Rep. N.S. 651; 26 Law J. Rep. C.P. 257.

HALL, V.C.—The question is one of the construction of the deed. Does the deed on a fair construction contain in the words used a contract on the part of the lessor that he will not unreasonably withhold his consent; or does it merely qualify the covenant in which these words are found, so that if the consent is unreasonably withheld the covenant by the lessor is not broken by his assigning?

If I were to decide irrespective of authority, I should say that, fairly read, the words in question merely qualify and limit the obligation created by the whole clause in which they occur. They are found in a covenant by the lessee, and they are put in a form which looks more like a qualification than a contract. The opening word, "but," suggests a qualification. It is unquestionably a very loose way of raising a covenant by the lessor to insert thus in the middle of the lessee's covenants the lessor's covenant that he will not withhold the licence, and such is not, I think, the natural meaning of the words. I quite adopt for the purposes of this case the judgment of Baron Amphlett, in *Treloar v. Bigge*, almost every word of which applies here; and that judgment very much expresses the view which I have endeavoured to state as the one which I would take myself independently of authority. On the other view, the fact that application had been made for the licence and unreasonably refused would not enable the lessor to deal with this property: it would merely give him a right of action on a cross covenant. I have referred to one of the authorities on the point; and the passage in *Sheppard's Touchstone* which was cited is quite consistent with the view I have

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taken. The first example which that author gives is "that the lessee shall repair, provided always that the lessor shall allow timber." That is an affirmative covenant, that the lessor will do a certain thing. There it is manifest from the nature of the case that some contract would be needed between landlord and tenant, who is to do the repairs; and it is natural enough to consider it as matter of contract between them, that one shall do the work and the other find timber. So in the next example, "that the lessee shall scour ditches, provided always that the lessor do carry away the earth." It would be very hard if the lessee had done his scouring, and the landlord left the earth without taking it away. To do anything like justice between the parties, one must construe it as a contract on both sides. There is no magic in the words "provided always." The next example is a clause that the lessee "and his assigns shall repair the houses when they shall be decayed," which would be clear and express, unless indeed there were some magic belonging to words like "covenant" or "promise." Then the writer says, "And so also it is where these or the like words be inserted amongst other covenants, and that the lessee shall pay 10s. a year rent, or that the lessee shall not alien; these shall be said to be covenants, unless it be in such cases where there is some other means to enforce the doing of the thing." If there were some other means to enforce the doing of the thing, then, according to this doctrine, the provision might not amount to a covenant. On the whole I think that the only fair and convenient result to come to is that this is not a covenant to be enforced or sued upon in damages, but that the non-performance of the stipulation leaves the lessee at liberty, if the licence is unreasonably withheld, to deal with his property as he would if no licence were required. Of course the lessee must be taken to know that he is not when he applies for the licence asking the landlord to do what is unreasonable or would be imprudent to be done with reference to the solvency of the assignee.

In this particular case I hold that there is not a covenant by the landlord to give his consent, and therefore that there is no foundation for the action. The demurrer is allowed.

Solicitors—S. S. Seal, for plaintiff; Henry Gover & Son, for defendants.

[IN THE COURT OF APPEAL.]

COTTON, L.J. }
1880. }
June 19. }

In re COLYER.

Trustee Act, 1850, s. 32—New Trustees—Discharge of Lunatic Trustees.

One of three trustees had become lunatic. Upon a petition being presented in Lunacy and Chancery for the discharge of the lunatic and re-appointment of the two continuing trustees in place of the three, the Court refused to do so, and required the original number to be filled up.

In re Stokes's Trusts (41 Law J. Rep. Chanc. 290; Law Rep. 13 Eq. 333); *In re Harford's Trusts* (Law Rep. 13 Ch. D. 135) *not followed.*

Petition for the appointment of new trustees.

One of three trustees had become lunatic, and a petition was presented in Lunacy and Chancery, praying that the lunatic might be discharged, and the two other trustees might be re-appointed in the place of the three.

All the beneficiaries were *sui juris*, and joined in the petition.

Mr. W. P. Beale, for the petitioners, referred to

In re Stokes's Trusts (*ubi supra*);
In re Harford's Trusts (*ubi supra*);
In re Dalgleish's Settlement, Law Rep.
4 Ch. D. 143.

COTTON, L.J., declined to follow *In re Stokes's Trusts* and *In re Harford's Trusts*,

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and to re-appoint the two existing trustees in the place of three, when the effect would be to oust one of the trustees, and required the original number to be filled up.

Solicitor—F. J. Colyer.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.

JAMES, L.J.

BRETT, L.J.

COTTON, L.J.

1880.

July 15, 22, 29.]

*In re GOURLAY ;
ex parte ABBOTT.*

Judgment Creditor—Writ of Elegit—Seizure of Goods—Liquidation—Secured Creditor—The Bankruptcy Act, 1869, ss. 16 (sub-s. 5) and 87.

Section 87 of the Bankruptcy Act, 1869, does not apply to a seizure of goods under a writ of elegit. Where, therefore, the sheriff under such a writ seized the goods of a judgment debtor before the judgment creditor had notice of an act of bankruptcy, though the inquisition of the jury as to the value of the goods was not completed until after an act of bankruptcy,—Held (affirming the decision of the Chief Judge), that the judgment creditor was a secured creditor within sub-section 5 of section 16 of the Bankruptcy Act, 1869.

This was an appeal from the decision of the Chief Judge (reported 49 Law J. Rep. Bankr. 23, where the facts are fully stated).

Mr. De Gez and Mr. Jordan, for the trustee in bankruptcy.

Mr. Winslow and Mr. E. C. Willis, for the execution creditor.—The arguments were the same as in the Court below, and the same authorities were cited, and also

Hoe's Case, 5 Coke Rep. 90 (a) ;

Palmer's Case, 4 Coke Rep. 74 (a) ;

Dalton on Sheriffs, tit. "Execution sur Elegit," p. 56 ;

Ex parte Williams, 41 Law J. Rep. Bankr. 38 ; Law Rep. 7 Chanc. 314 ;

Watson on Sheriffs, p. 307 ;

Stat. West. II. (13 Edw. 1. c. 18) ;

Churchill's Sheriff Law, p. 341 ;

Tidd's Practice, 9th ed. p. 1034 ;

Stat. 29 Car. 2. c. 2. s. 17 ;

Chitty's Forms, 10th ed. p. 361.

JAMES, L.J.—Notwithstanding the very ingenious and elaborate arguments of Mr. De Gez, we find it impossible to dissent from the decision at which the Chief Judge has arrived. The main point made by Mr. De Gez was that the seizure of the goods by the sheriff under the writ was unwarranted until after a jury had been summoned and the goods had been appraised by them. But there is a well-known form of warrant to be found in all the books, directing the sheriff's officer to begin by seizing the goods, and which form is followed in every case by the sheriff's officer when the writ is issued. We have thought it right to make enquiries, and find that, though writs of *elegit* in relation to goods are not in common use, yet they are occasionally used ; and that under them the practice has always been and is to direct the sheriff's officer to seize, and after seizure to empanel the jury, by whose appraisement the goods are delivered to the execution creditor. That being so, the 87th section of the Act does not apply, and there is nothing to warrant us in holding that the procedure under the writ is wrong. The sheriff's officer, therefore, being in possession of the goods under the writ of *elegit*, the execution creditor was as much a secured creditor as if the sheriff had seized under a writ of *fi. fa.*

BRETT, L.J., and COTTON, L.J., concurred.

Solicitors—Shaw & Tremellen, agents for C. Hall & Son, Accrington, for appellant ; Scott, Jarman & Co., agents for F. Taylor, Barrow-in-Furness, for respondent.

[IN THE COURT OF APPEAL]

JAMES, L.J.
COTTON, L.J.
LUSH, L.J. } VERNON v. THE VESTRY OF
1880. } ST. JAMES, WESTMINSTER.
Nov. 16, 27, }
29, 30. }

Erection of Urinal—Public Nuisance—Discretion of Vestry—The Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), s. 88—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 39.

A vestry is not empowered under section 88 of 18 & 19 Vict. c. 120 to do upon a public place that which if done by a private owner on his own private ground would constitute a nuisance. There is nothing in the section which authorises a vestry in erecting a urinal to commit a nuisance; and, consequently, if in the erection of a urinal they create a nuisance, they are acting ultra vires, and an injunction will be granted to restrain the act. The "damage" mentioned in the section means only any direct damage caused by the mere erection of the structure itself, and does not extend to include "compensation" for injury caused by the structure when erected.

This was an appeal from the decision of Malins, V.C. The case is fully reported 49 Law J. Rep. Chanc. 130.

The Vice-Chancellor had granted an injunction restraining the defendants from erecting a urinal in Old Burlington Mews, on the ground that, from its situation, it was a public nuisance. The vestry claimed that, under the 88th section of the Metropolis Local Management Act (18 & 19 Vict. c. 120), they were at liberty to exercise their discretion, and that such discretion, if fairly exercised, should not be subject to interference by the Court.

The vestry appealed.

Mr. Bristowe and Mr. Gregory Walker, for the appellants, repeated the arguments and cited the cases used and referred to in the Court below.

Baines v. Baker, Amb. 158, was also cited.

Mr. Glasse and Mr. S. Dickinson, for the plaintiffs, were not called upon.

For the purpose of the judgment, the

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place on which the urinal was proposed to be erected was treated as a public place.

JAMES, L.J.—It appears to me that the judgment of the Vice-Chancellor in this case ought to be affirmed. If the erection in question were made by a private landowner on his own soil and freehold, it would seem to be beyond all question a nuisance so grave and so serious that the neighbours would be entitled to apply to this Court for an injunction to restrain it. The question is, whether the thing being done, not by a private owner on his private soil, but by the parish vestry on a place that is said to be a public highway, and which is believed to be a highway, makes any difference. That depends entirely upon the true construction of the 88th section, which says, "It shall be lawful for a vestry to provide certain accommodation in situations where they deem such accommodation to be required, and to supply water," and so on. Now, there are no powers that authorised them in doing this to commit a nuisance. *Prima facie* nobody is authorised to commit a nuisance under an Act of Parliament, unless it appears by express words or necessary implication that the act is to be done or may be done notwithstanding it may tend to the creation of a nuisance. In all the Sewage Acts that I am aware of, there are express words put in forbidding the creation of a nuisance. To some extent that may be an argument here, that the omission of those words in this clause may shew it was intended to make a difference. I do not think that is sufficient. If private persons' rights are to be interfered with, they must be interfered with by clear legislation; and I am of opinion that there is no clear legislation in this case authorising the vestry, though they may be called a local parliament, or authorising any other body to interfere with those private rights. It is said that those private rights would be compensated for by the clause for compensation. I am of opinion that that clause would not apply to such a case as this. I am of opinion that the real true intent and meaning of that section is to authorise

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and empower the parish vestry out of their public moneys—the moneys levied by parish rates—to provide such accommodation, and to that extent, no doubt, the minority must submit to be overridden by the majority; that is to say, with reference to the parish rates which are to be levied, and the application of the parish rates, the parish vestry is a competent authority, appointed and authorised by the Legislature; but with respect to private rights or public nuisances, the parish is not the representative of the minority, so as to enable that minority's rights to be interfered with. I am of opinion, therefore, that this body being authorised, would be authorised to do it just in the same way as the trustees of the estate could do it, and no more; and that they could no more, under the colour of this provision, make an erection to the nuisance of the neighbours, than the owners of the estate themselves could have done it upon their own property, if they had been minded to do it, for the convenience of the public. It is my opinion that the body has exceeded their authority in doing that which, in my opinion, is a plain nuisance to the neighbourhood. I think, therefore, that we must affirm the decision of the Vice-Chancellor. With regard to the question of costs, the Vice-Chancellor had the whole case before him. We have affirmed his decision, and it is not according to the practice of the Court to interfere with a decision of the Court below as to costs when the case has been before it, and when that case resolves itself into an appeal for costs which we have no right to entertain; and I do not think there ought to be any difference in the costs of the appeal. The real question for the appeal is, whether an injunction could be obtained. That appeal has failed, and therefore it must fail with the usual consequences of the appellants having to pay the costs.

COTTON, L.J.—I am of opinion that the Vice-Chancellor in this case arrived at a correct conclusion, and that the appeal fails. For the purposes of my judgment, I assume, without deciding, that this is a public highway. Assuming that to be

so, is what has been done justifiable? Now it was said by the appellants that it was done under section 88 of the Metropolis Local Management Acts, and that as that Act, and specially that section, gives to the vestry a discretion as to the erection of these conveniences, and as to the place where they were to be erected, and the number to be erected, this Court ought not to interfere with the discretion which is committed by Act of Parliament to the vestry. Now if the vestry had in this matter exercised a discretion given to them by the Act of Parliament, in my opinion the appeal would be right, but the very ground of the decision is this: that there has been an excess of the power given to the vestry by the Act of Parliament; that is, that in this matter they are acting *ultra vires*, without parliamentary authority, and have no more power to do this, if it be a nuisance, than any other person would have who had not any pretence for saying that he was acting under parliamentary authority. Now it was said that this was a nuisance, and I quite agree with the Vice-Chancellor on that point, and agree with Lord Justice James. If this were tried without any reference to parliamentary authority, could it be otherwise than a nuisance to erect a thing of this sort in this particular place where young women going to the different shops of which we have heard are constantly passing at all hours of the day and all hours of the evening; and when this place is in the immediate proximity to the door of one large employer of labour, immediately at the entrance of a passage leading to two other doors, one going to the shop of the same employer of labour, and another going to another employer of labour who has coming to his shop from 300 to 400 young women with work for the purposes of the shop. In my opinion, to state that, is sufficient to shew that this erection is a nuisance placed in absolute proximity to those who are necessarily going for their daily work to these doors. Is it then authorised by this section of the Act of Parliament? As I understand, one of Mr. Bristowe's arguments, who pressed everything upon us that could be said, was this, that the selection of the site

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is left to the board by this section, and that when the board had once selected a site, it was not open to say that in consequence of the selection of the site that which elsewhere might not be a nuisance was a nuisance. In my opinion that cannot prevail. In the first place, "In situations where they deem such accommodation to be required," in my opinion, points not to the particular position of the urinal, but to the street or locality where they desire to provide such accommodation. Then one must look to the whole of the section and see whether there is that in the section which will justify their erecting and maintaining a nuisance. It is impossible to say that a urinal or watercloset must necessarily be a nuisance. If it could be made out that such an erection, wherever made and however guarded, must of necessity be a nuisance, then indeed it would be true that the Act of Parliament has authorised a nuisance and the Court would not have interfered; but Mr. Bristowe's argument here was that this was not a nuisance, and therefore it is impossible to say, and common sense tells us it is impossible to say, that no watercloset or urinal can possibly be erected without being a nuisance. Therefore the mere fact that a urinal is authorised to be erected does not necessarily or by necessary implication give parliamentary power to do it, if it is a nuisance. It is assumed that power is given to them; no doubt; but subject to this, that although power is given to them, they must not do it except in such a way as not to be a nuisance, because they are not exempted from the general law which prevents anyone from erecting and maintaining a nuisance. The constitution of the body is this: a vestry having large power of spending, powers are given to them in some instances to interfere with private rights, and to make orders requiring people to do that which they would not otherwise be compellable to do, and authorising them to spend the public money in order to do that which they think for the convenience of the public; but subject always to this, that where they are not exempted from the bonds and obligations of the law, they must comply with those obligations, and

not do that which the law considers to be a nuisance; and in my opinion here, it not being necessarily a nuisance to erect or maintain a urinal, and there being nothing in this clause which enables them to do it, if it is a nuisance—nothing in terms—the proper construction of this Act of Parliament is to say, although the vestry are authorised as regards the public expenditure, and as regards anything else, to erect and maintain urinals, yet they cannot do it if, as in the present case, what they have proposed to do or have done is a nuisance. Probably it is unnecessary to refer to cases, but we were pressed a good deal with the case of *The Attorney-General v. The Conservators of the Thames*, a case before Vice-Chancellor Wood. But there the erection complained of by the Attorney-General was a pier in a public navigable river, and the Act of Parliament clearly authorised the conservators to erect piers where they thought it necessary and desirable in that public navigable river—that is, authorised them to erect that which, without parliamentary authority, would of necessity have been a public nuisance (for any erection in the bed of a public navigable river, in the water-way, would of necessity be a nuisance); and therefore the only question was, whether as regards the public they had fairly exercised their discretion in fixing on this place, or rather, whether it was shewn that their discretion had been so unfairly and improperly exercised that they could not be considered as exercising their parliamentary powers. The private right there was not interfered with, that private right having been saved by the Act of Parliament.

The other case which has been referred to, before Lord Hardwicke, of the small-pox hospital, was an application to restrain, before the erection or use of the hospital, the contemplated erection, but that of course could only be if of necessity a small-pox hospital when erected must be a nuisance, and that is all that Lord Hardwicke in that case laid down. He said in effect, "You ask me to interfere, to prevent the erection by the parish of this small-pox hospital. Why? On the ground that it must of necessity be a public nuisance. I cannot accede to that;" and

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therefore no injunction was granted. If, when it had been erected, it had been so conducted as to prove a public nuisance, there would have been a very different question, namely, that which arose in the case of the Hampstead Hospital. However, all that is necessary to decide in this case is this, that this Act does not in this particular, as regards the erection of urinals, authorise them to be erected, when and if they would be a nuisance, and when, as in this case, as the Vice-Chancellor has already decided, the maintenance and use of this urinal is a nuisance.

LUSH, L.J.—I am of opinion that the judgment of the learned Vice-Chancellor was right upon both points. It has not been imputed to the vestry that they were actuated by any improper motive in fixing upon this site for the erection of a urinal. It cannot be doubted that that spot was selected by them in the honest exercise of their discretion: they thought it the most convenient and fit spot for the purpose. Therefore the only question for us is, whether or not they have exceeded their statutory authority by placing a urinal on that spot.

It is not easy at first sight to define the exact meaning of this 88th section. Its terms are wide and vague; but one thing strikes us at once upon the reading of it—that it must receive some limitation. All that it says is, that it shall be lawful for every vestry and district board to provide and maintain urinals, and so on, in places where they deem such accommodation to be required, and to supply the same with water and to defray the expense thereof, and any damage occasioned to any person by the erection thereof, and the expense of keeping the same in good order, as expenses of sewerage are to be defrayed under this Act. Now some limitation must obviously be put upon that clause, and one limitation is, they cannot have any power to erect a urinal within a private enclosure. That must be obvious.

What other limitations (if any) the section is to receive we may, I think, be better able to decide by considering what was the state of the common law upon this subject before the Act passed.

Now, it was well established at common law that an indictment lay against any person—any individual or any body, whether a vestry, or the trustees of a turnpike road, or a private individual—for obstructing any part of a public highway, and it could not be deemed a sufficient defence that the obstruction was for a purpose more beneficial to the public than the use of that part of the road would have been. That was well established. A road could not be diverted so as to get rid of an ugly angle. No person could erect anything upon the highway, whatever it was, and justify it by saying, "Why it does far more good to the public than it does harm." A telegraph company could not lay a line of posts along a public highway without the authority of Parliament. I remember a very singular case of that kind in which I myself was engaged. A telegraph company, while its Act was in the House, in anticipation of its passing began to lay down its wires, and erected, with the consent of the trustees of a turnpike road, a line of telegraph posts. Another company indicted them for the nuisance, and they were found guilty, and judgment would have been passed requiring them to take up the posts and abate the nuisance; but, fortunately for them, on the very day before the time came for moving for judgment the statute received the royal assent and their proceedings were authorised. I mention that by way of illustration of how strict the law was as to occupying by any permanent structure any part of that which had been dedicated to the public, however beneficial to the public, and whatever collateral advantages might have accrued to the public from it.

Now the situation of the vestry, but for this and other enactments of this Act, was this: They could not have erected any urinal in the middle of a public street, but this Act authorises them to do so; and there are other provisions of the same kind, some of which I have looked out. I daresay there may be others which I have overlooked, but there is one express power to erect lamp-posts anywhere they like in the public highway. There is another which empowers them to authorise the

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erection of hoardings for a longer or shorter time while buildings are in course of erection. And there is another, the 108th section, which authorises them to place what are now called "refuges" in the middle of a road, and another to erect drinking fountains. That they could not do without the authority of Parliament. I think this affords a key to the construction of this clause, and suggests to us what its true limitation is. They are authorised to deprive the public of a portion of the public right, which they had before, to traverse every part of the public highway, in return for the accommodation which they are authorised to give; and it is confined to that. The intention is, to authorise these things for the public accommodation, and in return for that the public right of passage may be infringed to the extent necessary for the affording of that accommodation.

That, in my judgment, is the true limit of the Act; and the extent of the enactment therefore is to authorise the erection of these things upon, and to that extent to obstruct, a public thoroughfare and highway; to erect them in a place where otherwise their erection would have been an obstruction to the public passage and an indictable offence. As I have said before, it is impossible to conceive that they could have put up this urinal in a private enclosure, or in a place where an individual happened to have a private right of way. They could not have put it up so as to obstruct his right of way. There is nothing whatever to suggest that they could interfere with any private right or create a private nuisance. They are authorised to take away from the public so much of the right which the public enjoyed at common law of demanding that every foot of a public highway should be kept open for them to pass over in return for the accommodation which the Act enables them to offer. That being so, it at once decides this question. This is in a *cul de sac*, where the erection necessarily occasions a private nuisance, and I am of opinion, for the reasons I have mentioned, that their authority does not extend to authorise such an erection.

Now, one word about the latter clause

of the section which speaks of damage. It says that they are authorised "to pay any damage occasioned to any person by the erection thereof." I confess my mind fluctuated during the argument upon that part, as well as upon the general intention of the Act, and it occurred to me at one time that the word "damage" there meant compensation; but I quite assent to what has been suggested by Lord Justice James, that it cannot have that extensive meaning and was not intended to have it; and I am fortified upon this point by recurring to the Public Health Act of 1875, which affects to provide the same accommodation in country towns, but says nothing at all about compensation or damages. The 39th section of that Act says, "Any urban authority may, if they think fit, provide and maintain in proper and convenient situations urinals, waterclosets, earth-closets, privies and ashpits and other similar conveniences for public accommodation." Not a word about damage there. That fortifies the view I have ultimately taken in conjunction with my learned brethren, that the word "damage" there does not at all help the interpretation so as to give it a wider sense than the clause would otherwise have. It merely means any direct damage by reason of the mere erection of the thing itself. The result, therefore, is that this 88th section authorises the board to take away so much of the public right of transit as they had before in highways and in streets in return for the accommodation which the Act authorises them to give, and which this structure presumably does give.

That is the whole extent of it, and therefore in putting it up in this spot, though it is a public place, they have infringed on a private right and so have exceeded their power.

Solicitors—Allen & Son, for appellants; Janson, Cobb & Pearson, for respondents.

[IN THE HOUSE OF LORDS.]

1880. } STURLA AND OTHERS v.
 June 15, 17, 18. } FRECCIA.

Evidence—Public Document—Admissibility to prove Birthplace and Age.

M., a Genoese, applied to the senate for the appointment of diplomatic agent in England. The senate referred the matter to a board called the "Giunta della Marina," to report as to his fitness. In the report made by the Giunta, it was stated that M. was "a native of Q., aged about forty-five." There was nothing to shew the mode of enquiry used by the Giunta:—Held, that the report was inadmissible as evidence of the age and birthplace of M.

This was an appeal from a judgment of the Court of Appeal (reported 49 Law J. Rep. Chanc. 41; Law Rep. 12 Ch. D. 411), affirming a decision of Malins, V.C.

The action was brought to determine who were the next-of-kin of a certain Mrs. Mangini Brown, and as such entitled to a sum of about 200,000*l.* The respondents made out their claim through the father of the intestate, one Anthony Mangini, consul-general, and afterwards diplomatic agent for the Ligurian Republic in London, whom they alleged to be Antonio Mangini, a native of St. Ilario, near Genoa, and there baptized in February, 1735. The chief clerk reported in favour of the respondents' claim, and the fund was ordered to be distributed among them. The appellants then made a claim, alleging that the consul-general was Antonio Mangini of Quarto, near Genoa, baptized there in 1744, and that they were his next-of-kin. The claim was by consent referred to the chief clerk to report whether they had made out a *prima facie* case. He reported against them. The order was then acted on, and the fund in part distributed, when the appellants commenced this action to stay the distribution, alleging that they had discovered further evidence in support of their claim. The chief clerk certified against them, and the case came before the Vice-Chancellor on an adjourned summons to vary the certificate.

The further evidence was contained in

a document made in March, 1790, under the following circumstances: Anthony Mangini, being then consul-general, applied to the senate of the republic to appoint him diplomatic agent. The senate, according to what was alleged to be their usual practice, referred the matter to a body called the Giunta della Marina to report as to the qualifications of the applicant. Their report, which was the document in question, amongst other things, stated that Mangini was "a native of Quarto, aged about forty-five." After that the senate gave Mangini a patent appointing him diplomatic agent. That patent was not to be found in the English Foreign Office, but there was a copy of it inside the report of the Giunta. There was evidence that the report was genuine, that it came from the proper custody, and that it was made by the Giunta in the performance of their duty.

Malins, V.C., held that, assuming the document to be authentic, it was still inadmissible as evidence of the birthplace and age of the consul-general, those being facts which it was not necessary for the Giunta to report. The Court of Appeal affirmed the decision.

The plaintiffs appealed.

Mr. J. Pearson and Mr. Wills (Mr. E. Beaumont with them), for the appellants.—The document is admissible as part of the *res gestæ*. The appellants have a right to put in proof of the appointment; and the report appended to the patent of appointment, though it is not evidence of the facts mentioned in it, yet describes the person appointed, and the person claimed to be the consul must answer the description—

Collins v. Maule, 8 Car. & P. 502.

It is not a question of pedigree, but of identification. Suppose there were no other Mangini in question but Mangini of St. Ilario, could not the Crown put this report in evidence to shew that he was not the father of Mrs. Mangini Brown. Suppose again the report said, "Mangini is only thirty years old, but notwithstanding his youth we recommend his appointment:" would not this be material to shew that a man who was then fifty-four years old could not be the consul?

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The statements as to age and birthplace are necessary for the identification of the person, and are therefore a material part of the report—

Lloyd v. Wait, 1 Ph. 61.

The admissibility of documents depends on the competency and honesty of their authors. The question in all cases is, whether there is a presumption of such competency and honesty. Hence the two classes of admissible entries are those against interest and those made in discharge of duty. It is not necessary that the person making an entry should have a personal knowledge of the fact stated if it was something as to which he ought to enquire in the course of his duty. Here the competency and honesty of the Giunta may be presumed from the fact that all the rest of the report is proved *alimide* to be accurate. Further, the report was made in the discharge of a duty—

Stead v. Heaton, 4 Term Rep. 669 ;

Higham v. Ridgway, 2 Smith's L.O. (7th ed.) 318 ; 10 East, 109 ;

Doe v. Turford, 3 B. & Ad. 890 ; 1 Law J. Rep. K.B. 262,

which is an authority against the limitation imposed in

Chambers v. Bernasconi, 1 Tyrw. 335 ; 4 *ibid.* 531 ; 1 Cr. M. & R. 347 ; 3 Law J. Rep. Exch. 373.

The Giunta was bound not to report except as to facts in respect of which they had the most accurate information. If they had the slightest doubt on any of the facts stated, their duty required them to enquire of Mangini himself. The Giunta made similar reports in other cases ; the report was therefore in the ordinary course of business—

Pritt v. Fairclough, 3 Campb. 305.

[LORD BLACKBURN.—Entries admitted on the ground that they were made in the course of business are always contemporaneous entries of facts.]

In the case of public documents there is a special presumption of the competency and honesty of the official who was responsible for them. Thus heralds' books are admissible in matters of pedigree.

Camoy's Peerage Case, Minutes of Evidence, pp. 152, 175 ;

Leigh Peerage Case, Minutes of Evidence, 1829, p. 140,

in the latter of which the entry was signed by a servant "in the behalf of my master, Sir Robert Cotton," Sir R. Cotton being a member of the family.

[LORD BLACKBURN.—The heralds held regular courts—courts of chivalry—

Russel's Case, 4 Mod. 128 ;

Oldis v. Donmille, Shower P.O. 58 Com. Dig. Courts E. 2.]

Heralds' visitations were held by commission under the Great Seal, not from the court of chivalry ; and no mode of taking evidence is prescribed—see

Lloyd's Petition as Lord Lumley, 22 H.L. Journ. 299.

In the Court of Appeal, Brett, L.J., said that although heralds' books were admitted in the House of Lords, they were not in Courts of law—but see

Matthews v. Port, Comb. 63 ;

Norris v. Le Neve, 2 Barnar. 26 ;

Vernon v. Manners, Plowden, 425 ;

Pitton v. Walter, 1 Stranger, 162.

A committee of the House of Lords dealing with a peerage claim is far more strict than Courts of law—see as to the conclusive evidence required the remarks of Lord Lyndhurst in the

Tracy Peerage Case, 10 Cl. & F. 154.

Among other documents admitted as being made in course of public duty are funeral certificates of nobility—

Vaux Peerage Claim, 5 Cl. & F. 526 ; Minutes of Evidence, H.L. Papers, 134, 195 ;

Roos Claim, 14 Peerage Claims, 184, 336.

[LORD BLACKBURN.—It appears that they were admitted as secondary evidence, proving that there had been an original certificate properly signed according to the rules of the office—that is, by the executors and mourners.]

If they were copies why were not the signatures copied also ?

Returns of inquisitions *post mortem* have been admitted as evidence of deeds, which must have been proved by witnesses—

Devon Peerage Case, Nicolas App.

Minutes of Evidence, 5 *seqq.* ;

Slane Peerage Case, Minutes of Evidence, pt. 2, p. 4 ;

Burridge v. The Earl of Sussex, 2 Ld. Raym. 1292.

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Army and navy registers are admitted as evidence, and a certificate from the War Office or India Office is good evidence of death in battle. So, too, foreign army registers and a French *acte de service* (in proof of death) were used in the

Nairne Peerage Case (not reported). In the same case an *acte de décès* was used to shew that the person to whom it related died unmarried. In the

Shrewsbury Peerage Case, 7 H.L. Cas.

1, see p. 12,

the report of the Judges on a private Act was read, an exact parallel to the report of the Giunta della Marina.

[THE LORD CHANCELLOR.—It was put in apparently without objection not to prove a pedigree, but as part of the series of proceedings—to shew good faith.]

According to Lord Lyndhurst in the

Wharton Peerage Case, 12 Cl. & F.

295,

the recitals in a private Act of Parliament were very strong evidence because founded on a report by the Judges. In the

Shrewsbury Case (*ubi supra*), see p. 13,

Lord St. Leonards says they are so no longer now that Acts are not referred to the Judges. In

The Irish Society v. The Bishop of Derry, 12 Cl. & F. 641,

the return of a bishop to the Court of Exchequer of the value of first fruits was admitted. Yet the bishop must have made enquiry by others.

[THE LORD CHANCELLOR.—Of what was it used as evidence?—of the value of the living, or of the collation of a particular person, which is the bishop's own act?]

Apparently of the latter. In

Arnold v. The Bishop of Bath and Wells, 5 Bing. 316; 2 Mo. & P.

559; 7 Law J. Rep. (o.s.) C.P. 120,

the bishop's register was read as evidence of a custom for parishioners to elect a curate. But the bishop was not an inhabitant competent to speak as to reputation.

So a vestry book was used as evidence of the right to a pew in—

Price v. Littlewood, 3 Campb. 289;

and corporation books have been received—see note to

The King v. Martin, 2 Campb. 101.

Mr. N. Higgins, Mr. Bagshawe, Mr. Everitt and Mr. B. Eyre, for the respondents, were not called upon.

THE LORD CHANCELLOR (LORD SELBORNE).—The question on this appeal is one as to the reception of evidence. The document in question, a report of certain persons called the Giunta della Marina, at Genoa, is sought to be put in evidence for the purpose of proving that a person who was formerly consul for the Genoese Republic in London, and the succession to whose daughter, Mrs. Brown, is now in question, was a native of Quarto near Genoa, and, at the time that report was made, aged about forty-five years. The document has been tendered for that purpose, and for that purpose only.

Upon that question of evidence it is that we have heard an argument at very great length, the case having been very ably presented on the part of the appellants. I believe none of your Lordships thinks it necessary to hear the respondents on that point. The evidence has been rejected by the Courts below, and I think all your Lordships are of opinion that its rejection was unavoidably necessary, by reason of the rules applicable to questions of this kind in the law of England.

There is abundant proof that the report which contains the passage it is desired to use is an authentic public document of the Genoese government, to which, so far as the good faith of those who made it is concerned, credit might be justly given on any occasion on which it might properly be used. But your Lordships, in this case, have to consider what is the nature of that report, and how far the statements contained in it can be brought within the rules of the English law of evidence as to the proof of pedigree.

The nature of the report is this: Mr. Mangini had been consul in London for about ten years, and desired to be advanced to a somewhat higher authority as agent of the republic. He had made application in writing for that appointment. He was at that time, and he remained afterwards, in London. There is no evidence before your Lordships as to any relatives of his at Genoa having had

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anything to do with the statements contained in this report, nor is there any evidence to connect any of those statements with representations proceeding directly from Mr. Mangini himself. The public authority at Genoa, with whom rested appointments of this description, was called the *collegii*, being in point of fact a joint assembly of certain members of the executive government of Genoa and the senate. With them appointments of this description appear to have rested. It seems to have been a common practice of theirs (whether universal, I will not assume one way or the other) to refer applications of this kind to a species of executive sub-committee, which was called the *Giunta della Marina*, or Navy Board. Why it was so called does not very clearly appear. That committee was composed, if I am not mistaken, of two members of the senate and one of the finance board. The nature of the reference appears upon the face of it. It was to learn what could be known about the fitness of the person who had made application for the appointment in question, and to report the result to the *collegii* with whom the appointment rested. In fact it was an executive sub-committee to assist a department of the government, by collecting and reporting information, either as to applicants for public appointments generally, or as to applicants for appointments of this particular kind.

It does not appear that any particular rules were prescribed to them as to the kind of information which they should collect; still less as to the evidence which they were to require to substantiate such information. What the law of Genoa as to legal evidence may be we do not know, and certainly there is nothing here from which we can be entitled to assume that it is the same as the law of England upon matters of this kind. Whatever it is, there is nothing to lead to the conclusion that, in the discharge of this particular duty, the persons composing the sub-committee of the executive government of Genoa were bound to confine themselves to any particular description of evidence, whether of that kind which the law of Genoa would be satisfied with in judicial pro-

ceedings or of the kind which the law of England requires in such proceedings; and to assume, in point of fact, that they were obliged to limit themselves to that sort of information which we should regard as evidence in matters of this description in the Courts of this country, would be, to say the least, a violent and unreasonable supposition.

The report which they made contains the history of what they had collected, in some way or other, as to the life of this gentleman. I have no doubt whatever that they received information which they thought was correct upon all the points comprehended in that report, but whence that information was received does not at all appear; certainly it does not appear that it, or any part of it, was received from any member of Mr. Mangini's family. We may conjecture, not unreasonably, that if this committee in Genoa was acquainted with members of the Mangini family resident in or near that city it may have had recourse to them; but there is nothing to shew that, in point of fact, this was done, or that there were no other means by which the Giunta might have obtained such information as is contained in the report. If your Lordships look through that information you find it concludes by stating that every Genoese who, during the time Mr. Mangini had been consul in London, had occasion to ask for his good offices, had been received by him with courtesy and hospitality, and was very well satisfied with the manner in which Mr. Mangini discharged his duties as consul. The Giunta, therefore, had probably been in communication with some persons who had become acquainted with Mr. Mangini in the discharge of his duties as consul in London, and there is nothing to shew that all the information received may not have been obtained from some such persons; and if from them, there is nothing to shew that those persons obtained the information from Mangini himself, or from others who were acquainted with him and talked about him. There is nothing to shew that at that time there were not people living at Genoa who, though not his relations, were more or less acquainted with Mr. Mangini, who might have heard

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these things from others, and from whom this information might have been obtained. That those persons obtained their information from the members of Mangini's family, or from Mangini himself, is of course quite possible. It may be so, but that is a mere conjecture which has no element of reasonable certainty about it. If, therefore, it is necessary that the information received by the Giunta which is contained in this report should be founded on statements proceeding from Mangini himself, or from some member of the family to which Mangini belonged, to make it admissible in evidence for the purpose for which it is tendered, there is not anything, either in the nature of the case or in the tenor of the report itself, or in any other evidence which has been brought to your Lordships' knowledge, to lead to that conclusion; and I am of opinion that it is necessary, by the law of this country, in order to make this report receivable in evidence, that it should at least appear to have been founded upon statements made by members of Mangini's family, or by Mangini himself.

Several classes of cases in which evidence, not depending upon the oath of persons who have personal knowledge, is received in matters of pedigree by the law of this country, have been referred to at your Lordships' bar. It appears to me that none of those classes of cases has really any tendency to support the appellants' propositions. Two of them may be laid aside at once—those which consist of declarations made against the interest of the person making them, and those which relate to entries made in the course of business by persons whose duty it was to make those entries. They may both be laid aside, because, besides other conditions to which I need not particularly advert, they both involve this, as a necessary element, that the subject-matter of the declaration in the one case, and of the entry in the other, must have been within the direct personal knowledge of the person making the declaration or making the entry. That can have no application here.

Then, other classes of cases were referred to, namely, the findings of com-

petent public officers, courts or persons having legal jurisdiction to enquire, under public authority, into matters within that jurisdiction, as in the cases of inquisitions and visitations of heralds under commissions from the Crown. I do not think that cases of that kind have any bearing at all on this matter. It does not appear that this Giunta della Marina had any legal jurisdiction whatever. Its members were not in the nature of a court, not in the nature of persons who, like the heralds, had authority by law, for a public purpose, to make particular enquiries, whose duty it was, in the exercise of that authority, to proceed upon just proof, and who may be presumably supposed to have discharged that duty properly, and to have taken such proof, and only such proof, as the law of the country required concerning the several matters before them.

Another species of evidence was referred to, analogous to that, but distinguishable from it, namely, funeral certificates entered in the heralds' books. They stand upon this ground. It was the official duty of the heralds to receive such certificates from persons who were by law competent witnesses, and to record the statements of those persons in their books. Therefore, from the fact of their being so recorded it is reasonably to be presumed that the duty was duly discharged; it is evidence that they did receive from persons, who were competent witnesses, such declarations. To go now into particular cases, and to consider whether or not the evidence of books or documents of that nature should have been received in any particular instances which may be more or less open to criticism, appears to me to be unnecessary. This case is quite different. This Giunta was not a body which had any such legal jurisdiction; it was not a body which is shewn to have been, or which can be presumed to have been, bound to proceed on any such kind of proof. It appears to me to have been perfectly open to its members to receive any species of information, on hearsay or otherwise, to which they themselves at the moment thought credit could be given; and, therefore, I am unable to apply to them any analogy derived from

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the cases of Courts, commissioners or other persons having a special duty or authority under the English law to make particular kinds of enquiries, to whose inquests or recorded proceedings credit is *prima facie* given.

I do not think it necessary to dwell further upon the case. Some ground must be shewn for the reception of a document of this kind as evidence. It appears to me that no ground has actually been shewn, and under the circumstances I think your Lordships must decline to receive it. Of course that does not necessarily dispose of the case; although from what we have heard at your Lordships' bar, it is not improbable that in effect it may do so.

LOED HATHERLEY.—I am entirely of the same opinion as that which has been expressed by my noble and learned friend.

I have anxiously listened to see whether or not there was any case made by the appellants which could at all be brought within the range of the now very numerous authorities which have settled and determined, with tolerable precision, the rule to be adopted with reference to evidence which may come within the class of hearsay evidence, for it really amounts to no more than that. The exceptions which have been made I need not go through or attempt to classify.

When you come to look at the character of the document which is sought to be produced, what do you find? There are no original entries to be found in that document, but there appear to have been books kept, although we have not any very precise information about how they were kept or whose duty it was to keep them, and the like; but they were kept on behalf of a body called the *Giunta della Marina*, which body was selected by the senate to make certain enquiries as to such particular things as they thought it necessary to enquire into, and on those they reported. In this instance they reported upon a reference made to them to learn something about the antecedents, the character and the then present *status* of Mr. Mangini, who was serving in a certain capacity, in fact as consul, in this country, for the republic of Genoa. He

was anxious to advance himself in his vocation by acquiring a higher authority. He was anxious, therefore, to obtain from the senate the distinction of being called agent to the republic instead of bearing the simple name of consul, a point which he thought would lead to some advantage in his position, on the one hand as regarded himself, and on the other hand as regarded his influence at the Court to which he was accredited. The senate referred this matter to the *Giunta*, and desired that body to get more information (for that is what it really amounts to) about his position and character. The consequence would be that they would have to report, which they subsequently did.

The question now is, how far the report which they so made can be put in evidence in proof of facts which are narrated in it, not as specific findings, important and essential to the duty they had to perform, but simply as part of the narrative upon which their recommendation is finally made.

The class of cases that come most near to this, are those in which persons made entries consistently with a duty imposed upon them, and made those entries (as it was held in *Doe v. Turford* they must do to make them evidence) at the time of the duty being performed. In the particular case in which the document is brought forward on the present occasion, these two things are sought to be proved by the introduction of the document by way of evidence, namely, that there is mention of Mangini having been born at Quarto, which is a place near Genoa, and of his age at that time.

It is important in the case pending between these parties at this moment, with reference to this large sum of money, 200,000*l.*, left by Mrs. Brown, to prove that he was born at Quarto. But when you compare the great importance of that statement with the place it occupies in the report, certainly it is impossible to be much impressed in favour of an enquiry, such as is usual in pedigree matters, having been had recourse to by the tribunal, or committee, as I would rather call it, which had been formed, for it is simply mentioned incidentally, as a part of the description of this gentleman, that,

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he was born at this place called Quarto—a matter which is not of the slightest importance with regard to anything they were investigating or directing their particular attention to at that time.

It is also said, and with more plausibility undoubtedly, that the question of his age, which is also sought to be proved by putting in this document, was one of more immediate reference to the duty the Giunta was then engaged upon. If you were to refer to anybody to give an account of all they knew of somebody who offered himself for your service, whether it be public or private service, the probability is that, among other things, the age of the person concerned would be one of the points which you would wish to have information upon. The place where he was born you would probably care little about, at least in a case situated as this is, and with an employment of the character he was seeking, namely, agent instead of consul in England.

But this point of the age, although it comes in incidentally among the numerous matters they may have enquired into, is not the main or the direct point in issue between the parties. It might make a great difference in collateral matters, which they say they are prepared to prove in consequence of the discrepancy of age between one claimant of this man's property and the other claimant of this man's property. The present suitors say that the point as to age is of considerable importance, but to the senate, who made the reference to the Giunta, of course a difference of five or six or seven years would be a matter of very slight importance—if any at all—or it might even have been omitted altogether. Probably, as the man had been in their service before his election to his office, it would have had exactly the same result as it did have, for there is no reason to suppose that his election turned in any way on the age of the party brought forward.

On the other hand, see what difficulty you get into with regard to the extension of the law as to hearsay evidence—in which you cannot be too particular—if you admit such a document as this to be

received as evidence. It appears to me, as I said before, that the Giunta was simply a committee. If the document were admitted you might take a committee of any public body as making statements which you would be entitled to bring in to prove collateral matters which happened to form part of the statement; and if you are to be at liberty to make this statement evidence, you would thereby extend the rule laid down in *Doe v. Turford* in a most alarming degree. You would extend it to committees of all public bodies, all municipal corporations—to the reports of the committees of the common council of the city of London, to the reports of the town councils in all the different departments of the kingdom: all these might be brought forward as containing statements which it might be assumed were to be enquired into, and so be made part of the evidence in any particular case.

Now, what proof have we in any way of any such steps having been taken by this Giunta, as would be required in order to establish the fact by way of proof, or to establish evidence of any value whatever, with reference to the particular controversy which is now going forward? Many other cases must have been enquired into besides that of this gentleman. Some questions put by my noble and learned friend on my left will shew at once into what sort of enquiry you may be launched in matters of this kind. You might take eight, nine, or ten different candidates for an office at the disposal of some municipal corporation, and a reference by the corporation might be sent to a committee of its own body to report which was the best candidate, and among other matters, in bringing forward the report of the committee to the employers, you might find a statement of the age of the person whose appointment is in question.

In this case I must say that I have looked in vain for any evidence of there being any investigation such as could be denominated, in any sense according to our views, evidence, in this country. So far from it being shewn that the Giunta took any steps by the examination of witnesses, or the like, or the examination

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of baptismal certificates, or by enquiring from any member of the family so that the declaration of that member might be treated, although not on oath, as a declaration that might be introduced, there is not only nothing of that kind established before us, but, on the contrary, from what we know of what took place in some similar matters, in the reports of commissions which were directed to some particular end, and happened casually to mention certain events, we know pretty well that no such rigorous investigation was entered into in those cases. There is not much probability that they had called together witnesses from the family, and had enquired where he was born, what was his age and the like, those being the best persons to know anything at all on the subject. Not only is there no evidence on the subject, but there is nothing to lead one to presume that any such step was taken.

Then, I do not think this comes near the case of the heralds' books, nor the commissions for making specific enquiries, these specific enquiries falling plainly under the head of a discharge of a duty, which duty is discharged in the only proper manner in which it could be discharged; and, therefore, the law taking notice that such had been the course of investigation or enquiry, and such had been the result of the due execution by the commission of that duty, gives credit to what the return states upon the matter; although even there the extent to which evidence has been admitted seems to be limited by *Doe v. Turford*, and very narrowly limited, to the question itself, and the actual certainty of its being an entry contemporaneous with the duties so discharged. That case has been still more narrowed (some think, perhaps, too much so, and others not enough) in *Chambers v. Bernasconi*.

But here there is nothing approximating to any one of those cases, and, if you accepted the argument on behalf of the appellants, you would at once have a floodgate opened to a large mass of documents which are not always remarkable for the ascertainment of truth—public commissions, and so on, without the least narrative of how those reports were

arrived at, or the evidence on which they were arrived at, or anything whatever to satisfy you that you had an authentic report made by the persons in the discharge of a duty, and the report entered at the time the duty was discharged.

I should have been glad to find any case that would have assisted in the investigation of truth, because one is very grieved at all times to be obliged to enter upon the consideration of the admission of evidence with so much caution and so much suspicion. But unfortunately the habits of mankind are not such, at present, as to lead one to desire any extension of the privilege of having evidence given and taken as part of the *res gestæ* of that which is sought to be proved, when you do not find any of the ordinary safeguards of evidence, namely, the examination of witnesses in person. There is no such safeguard as that, and no power of cross-examination, and it is only from the difficulty which has arisen in some particular cases from adhering with the utmost rigour to the rules with regard to hearsay evidence that, in the classes of evidence which I have been referring to, and which have been cited before us in argument, exceptions from the rule applying to hearsay evidence have been established. I do not think we ought, in a case of this character, to extend the exceptions to cases where we have never yet found them applied, and when it is so easy to foresee extreme hardship, and possibly utter failure of justice, which would arise from such an extension of the exceptions. I think, therefore, on the present occasion the course which the Court below took in excluding this document was right, and I, therefore, concur in thinking that the decision of the Court below ought to be affirmed.

LORD BLACKBURN.—I am also of the same opinion. In deciding the present question I assume—what I believe is a matter of controversy—that this document is a genuine document, actually being what it purports to be, and satisfactorily proved to be what it purports to be.

Having stated that, I enquire whether

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or not it is admissible evidence (its weight is another question) to prove that the consul Mangini, about whose next-of-kin the enquiry is, was born at Quarto in a particular year. That is what it amounts to in the result. It may be some evidence of more or less weight tending towards that, but I do not think it is evidence of it, and I will proceed to state the reason why.

I shall not attempt in so doing to enter upon a full enquiry into the law of evidence. I do not believe it would be possible, and I do not believe it would be proper in such a case, because one might be inadvertently ruling disputed points. But, so far as it is necessary to decide this case, one must express an opinion. It is not disputed that the general rule of English law is that hearsay evidence is not receivable, one reason probably is the want of the safeguards of cross-examination; however, undoubtedly, the law is that, as a general rule, hearsay evidence is not admissible. But to that a great many exceptions have been introduced. I do not say that if we were but beginning to make the law, we should be able to say exactly why so much should be admitted and no more, probably it would be difficult to say that in all cases; but the exceptions have been established and exist, and we have to see whether this case comes within any one of them.

Now, the first and one of the most important exceptions is briefly expressed in a *dictum* in *Higham v. Ridgway*, that documents on the face of them appearing to be against the interest of a deceased person who stated the matter are evidence. I need not enter into the qualifications of that farther than to point out that in no point of view can this Giunta della Marina who made this statement (and who, presumably, are all dead by this time) be said to have been making statements against their own pecuniary interests.

Then, there is a second class of cases, of which *Price v. Lord Torrington* (1) may be mentioned as being the earliest, establishing that where a deceased person in the course of his duty makes a con-

temporaneous entry of an act which he has done, and returns that in the course of his business, then after his death it would be received as evidence. That class of cases is also well established. There again I do not go into the qualifications, or express any opinion upon the different matters introduced, further than to point out that in no sense can it be said that the Giunta della Marina was making any statement in the course of business contemporaneous with the fact, and it is impossible to say that it falls within that principle.

Then comes another large class of cases, where, from the nature of the thing, evidence of reputation from deceased persons is admissible—where it is a public right or a *quasi* public right, evidence of reputation is admissible if you prove that the deceased person was of the class who would know it, and had stated it. Upon that again I merely say that the question we are now enquiring into, namely, the history of a private individual, is not a matter in which, in any sense, reputation generally can be received.

Then there is another class of cases which comes nearer to it. It has been established for a long while, that in questions of pedigree—I suppose upon the ground that they were matters relating to a time long past, and that it was really necessary to relax the strict rules of evidence there for the purpose of doing justice—but for whatever reason, the statement of deceased members of the family made *ante litem motam*, before there was anything to throw doubt upon them, are evidence to prove pedigree. And such statements by deceased members of the family may be proved not only by shewing that they actually made the statements, but by shewing that they acted upon them, or assented to them, or did anything that amounted to shewing that they recognised them. If any member of the family, as a person who presumably would know all about the family, had stated such and such a pedigree, that evidence would be receivable, its weight depending upon other circumstances.

Now, if in this case there had been any evidence whatever, shewing that Mangini

(1) 1 Salk. 285; 2 Id. Raym. 872.

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himself had told this Giunta della Marina that he was born at Quarto in a particular year, that would clearly have been evidence, if it was believed to be genuine; indeed, it would have been almost irresistible evidence. But there is not the slightest pretence for saying he did so. His written communication to the Genoese government does not say a word about where he was born, or his age. He did not think it material or necessary when he was seeking to be appointed agent, to tell them. If it could be shewn that the Giunta della Marina, when making this enquiry, and prepared to make this report to the government, had asked Mangini the question, the statement would have been taken as evidence to shew that Mangini had said it. Or if it could be shewn that the Giunta had asked other members of the family, and that they had said it, that might be evidence. It might be a question of how that could be shewn, but if that was shewn upon admissible evidence, then it would become a question whether it would be itself admissible evidence on the ground that it was a statement by a member of the family. But there is no pretence for saying that any one of these things is proved. What does appear is that the Giunta, for some reasons which I cannot tell, thought (I give them credit for really thinking so) that this Mangini had been born at Quarto, and was now forty-five years of age, and they wrote that down. Upon no principle that has hitherto been stated could that be admissible evidence.

But then, there comes another class of cases on which the argument principally rested; for it is only within that class of cases that the learned counsel for the appellants in their able argument have made any serious struggle to shew that this document is admissible. It is an established rule of law that public documents are admitted for certain purposes. What a public document is, within that sense, is of course the great point which we have now to consider. Public documents are admissible, and I think I can hardly state it better than by quoting what Mr. Baron Parke said in delivering the opinion of the Judges in the case of *The*

Irish Society v. The Bishop of Derry. His Lordship there says, "The fifth exception related to an entry in one of the books of the First Fruits Office of the collation and admission of John Freeman to the rectory of Camus. Writs were issued from the Court of Exchequer to the bishops to ascertain the value of the first fruits and twentieths, and returns were made by the bishops. Search for the writs and returns was made, and the book was offered as secondary evidence of returns. We think the entry was properly received." That was the point decided—that the writs having been issued to the bishop to return the first fruits in his diocese, and the return of them being presumably lost—as it could not be found—the entry in the First Fruits Office (the copy of it) was good secondary evidence of the return. Of course, that involved in it that the return itself would be evidence. Then his Lordship says, "The writs related to a public matter—the revenue of the Crown—and the bishops in making the return discharged a public duty, and faith is given that they would perform their duty correctly; the return is therefore admissible on the same principle on which other public documents are received. It was contended that the bishop could not be permitted to make evidence for himself" (that is one objection which he meets), "and, therefore, that the entry, though admissible between other parties, was not to be received for the bishop; and the case was compared to an entry in the book of a union, of a surgeon's attendance—*Merrick v. Wakley* (2), and the receipt of a certificate in a parish book—*The King v. Debenham* (3), which have been rightly held to be admissible for the surgeon in one case, or the parish keeping the book in the other. But neither of these was an entry of a public nature, in the proper sense of that word: the former was a memorandum, intended to operate as a sort of check to the surgeon, the latter a memorandum for the parish officer, concerning merely the particular parish and its rights with relation

(2) 8 Ad. & E. 170; 3 N. & P. 284; 8 Car. & P. 283; 7 Law J. Rep. Q.B. 190.

(3) 2 B. & Ald. 185.

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to another." Then he goes on to say, "In public documents made for the information of the Crown, or all the King's subjects who may require the information they contain, the entry by a public officer is presumed to be true when it is made, and is for that reason receivable in all cases, whether the officer or his successor may be concerned in such cases or not." Then he puts the case of the person who made a marriage register turning out to be interested, and says that would not prevent the register being received as evidence.

Now, taking that decision, the principle upon which it goes is, that it should be a public enquiry, a public document, and made by a public officer. I do not think that "public" there is to be taken in the sense of meaning the whole world. I think an entry in the books of a manor is public in the sense that it concerns all the people interested in the manor. And an entry probably in a corporation book concerning a corporate matter, or something in which all the corporation is concerned, would be "public" within that sense. But it must be a public document and it must be made by a public officer. I understand a public document there to mean a document that is made for the purpose of the public making use of it, and being able to refer to it. It is meant to be where there is a judicial, or *quasi* judicial, duty to enquire, as might be said to be the case with the bishop acting under the writs issued by the Crown. That may be said to be *quasi* judicial. He is acting for the public when that is done; but I think the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards.

In many cases, entries in the parish register of births, marriages and deaths, and other entries of that kind, before there were any statutes relating to them, were admissible, and they were "public" then, because the common law of England making it an express duty to keep the register, made it a public document in that sense kept by a public officer for the purpose of a register, and so made it admissible. I think, as far as my recol-

lection goes, although I will not pledge myself to its accuracy, and so far as I have ever heard anything cited, it will be found that, in every case in which a public document of that sort has been admitted, it has been made originally with the intent that it should be retained and kept as a register to be referred to ever after.

Taking that view of the matter, I think it becomes clear that this document is not evidence. Supposing this enquiry had been carried on under the authority of the English Crown, and the English Crown had required of a magistrate that some confidential report should be made, it would not be public in one sense, but it would be public in this sense, that it would concern the Crown, and, from common respect for the Crown, one would suppose that what the magistrates told the Queen would be what they firmly believed and considered they had good reasons for believing; but I do not think it would come within the sense and meaning of the rule that a public document would be admissible as evidence, on the ground that a public officer, in making the statement for the public, was likely to speak the truth and must be presumed, *prima facie*, to have known and to have spoken the truth. I am not aware of any decision which says that, in such a case as I have supposed, the document would be received. I do not believe anyone has ever tried to put in such a document, and therefore I do not think there is or can be any authority to the contrary. Nevertheless that would illustrate the principle.

Every other case that I am aware of falls within the principles of one or other of the limitations I have stated. The visitations of the heralds were proof. There the court of chivalry was a prescriptive court, and the object of the court of chivalry and the enquiry of the heralds—I do not stop to enquire whether the heralds were independent officers, or a branch of the court of chivalry, and it matters not—the very object and purpose there was, that they should enquire into arms and pedigrees for the very purpose of making a register of them; and for both these reasons it is clear that, when the visi-

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tation of the heralds appointed for these purposes had been made, those things could be, and they always have been, received as evidence. There seems to be some misapprehension that they were received in committees of privileges as to peerages, on the ground that there was some peculiar rule there. They were received, as was proved by several of the cases cited on trials at Nisi Prius, where evidence of pedigree was required. Here I may observe, that in all these cases where you have got the means, by a public document, of proving a fact, the question whether that fact is of importance or not must depend on the subject of the enquiry. If the document proves that a deceased member of the family had authenticated a pedigree, of course that becomes as strong evidence as you can have, if pedigree was the subject of the enquiry there.

I rather think that in one or two of the cases mentioned in peerage enquiries about the funeral certificates, that was the ground of the decision. I rather think, but I should not like to be too sure about it, that the book of the heralds which was produced had a copy of all the certificates of the funerals which had been returned by those who attended the funerals; and the case in *Shower's Parliamentary Cases* (*Oldis v. Donmille*) shews what the practice was of heralds attending the funerals of great men. I think the effect of what was decided was that that was good secondary evidence of the certificate, just as in the case of *The Irish Society v. The Bishop of Derry* it was decided that the First Fruits Book was good secondary evidence of the returns. Then, it being established in the peerage cases that there was a certificate signed, as required by the earl marshal, by the executors, in both the cases which were cited, that certificate when produced did state on the face of it that the executor who signed it was a near relation, I think in the *Vais Peerage* he appeared to be a son, and in the other he appeared to be a near relation; I say, taking them to be signed in that way, of course the document that was produced became extremely cogent evidence of pedigree. It

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would not probably have been evidence of anything else—not of reputation. It might have been evidence of reputation where reputation was admissible, but it was only because pedigree was the subject of the enquiry.

Frequently in the cases cited, or many of them, half-a-dozen different reasons have been given, which might be all good or bad, for admitting the evidence. Take, for instance, the case in the third volume of Campbell of *Price v. Littlewood*, where the question being about a private right to a pew, the Judge admitted the entry and gave two reasons, saying, first of all, that it was evidence of reputation. I confess I think that was a mistake. I do not see how the ownership of a pew can be a matter of reputation; perhaps I am wrong. Then, secondly, he said that it was a public document. Now, I have considerable doubts whether the entry in the vestry there was public enough to make it a public document, but it might be that the entry in the vestry was intended for the information of all the parishioners who liked to come and see it. Supposing in the case of *Arnold v. The Bishop of Bath and Wells* the entry had been made by the bishop on his visitation that such and such a man was the clergyman of the parish, and had been admitted some twenty years before, *secundum consuetudinem*, and suppose it was wrong to admit him, that falls completely within the principle which I think the case of *The Irish Society v. The Bishop of Derry* establishes. It seems to me that it is clearly within that principle. The bishop made his visitation, and recorded it with the wish and intent that it should be kept publicly as a register, to be seen by everybody in his diocese. If the bishop had not the right to make such an enquiry, so as to make it evidence in future, that is another affair; but if he had, then he was a public officer performing what he thought a public duty, with the view and intent that it should be public.

Now, taking all that into consideration, can the document in this case be said to come within that class of cases? I think it is impossible to look at it in that way. There is not the slightest evidence, or the

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least circumstance, to lead me to the conclusion that it was even intended that this private and confidential report should be seen by Mangini or anybody interested in it. It was meant for private information, to guide the discretion of the government. It was not like the bishop's return of the first fruits, for the public information, to be kept in the office and to be seen by all in the diocese who might be concerned when there came to be any litigation. But this was meant as a private and confidential report, and it certainly seems to me according to common sense that it ought not to be received. But I base my judgment upon this, that no case has gone so far as to say that such a document could be received; and clearly, unless it is to be brought within some one of the exceptions, it would fall within the general rule that hearsay evidence is not admissible.

LORD WATSON.—I also am of opinion that this document is not admissible as evidence. I listened with very great pleasure to the argument at the bar, which, so far as I was concerned, was a very instructive one; but I noted in the course of the argument, whilst the law on various points was very fully elucidated, the difficulty that the appellants' counsel had to contend with throughout, was to bring the facts of their case within the rule of any of the authorities which were cited by them.

I concur in the views which the noble and learned Lord on the woolsack and the noble and learned Lord opposite have expressed as to the difference between this case and the cases dealt with in those authorities. I do not think it necessary to make any further reference to them, because, being of opinion that the present case is not ruled by them, I must deal with this case upon its own merits.

Now, I have not been able to find in the authorities cited any warrant for holding that secondary evidence is admissible according to the law of England, where there exists no reasonable presumption that the statement offered in evidence was derived either from the personal knowledge of the party who made it, or

from some legitimate source—I mean legal evidence. I think in all those cases where it is admissible, secondary evidence is admitted as a substitute for primary evidence, and can only be received when it plainly appears to be either directly drawn from that which would have been primary evidence, or drawn, not directly, but by some one competent to infer the result, from legal evidence under his consideration.

One of these presumptions, I think, is excluded by the circumstances of this case: I mean personal knowledge on the part of those members of the committee who drew up the report in 1790. On the other hand, it does not appear to me that either the terms or the character of the report warrant the suggestion that there was legal evidence before the committee, upon which the members of that body arrived at the results which they reported for the benefit of those who were appointed to exercise an act of patronage.

It does not appear to me that the duty cast upon the committee necessarily, or even by fair implication, involved the necessity of making any *quasi* judicial or strict enquiry into the circumstances which they were about to report. I do not think that the duty cast upon them differs in the slightest degree from the duty which is incumbent upon every department of state, or individual officer of state, to whom is entrusted the patronage of government office. It is their duty to satisfy themselves that the person whom they are about to appoint is fitted and qualified for the office which they are about to confer upon him; and, where there are several candidates, it is their duty to make up their minds, upon a fair estimate of their various qualifications, which shall be preferred to the office. It is quite competent, as is the case here, for any person entrusted with the right of patronage to delegate that duty, as has been done here, but that does not appear to me by any means to alter the character of the duty, or the character of the enquiry which that duty involves, in order to its being satisfactorily performed.

Now, I venture to say there is nothing here to suggest, and there is nothing in

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any analogous case in my power to suggest, which involves the duty of proceeding according to strict legal rules. The sort of commission that was given here was one of a very roving description, to find out every little circumstance, whatever it might be, wherever they could pick it up, and in whatever manner they could ascertain it. Accordingly we were referred to various documents of similar character, and those by their tenor very strongly support the view that the enquiry made was of the character that I now state. They were not appointed to enquire into any specific fact; they were not appointed to enquire into age or place of birth; and accordingly in many cases they obviously did not so enquire, as they do not report these particulars.

I cannot conceive, when you take these circumstances into consideration along with the undoubted fact that this was not made for the purpose of being recorded in a public register, that it can have the authority of a public register. No doubt the document survives, but the mere fact that a document intended for a temporary purpose of this kind is found, after a long lapse of years, in the archives of a government office, does not constitute it of the authority of a register. The purpose of this document was ephemeral, and was at an end the moment the appointment was made; and it would be a very singular fact if the law of England were to give such an authority to this one report, when the investigation in the cases of all the unsuccessful candidates, and the reports in their cases, must have been of precisely the same weight and authority as this; there is no difference between them. The results of the investigations, and the steps taken to investigate, appear to me to have been, in the case of Mangini at all events, entirely without the knowledge of the parties concerned.

I have no hesitation, under these circumstances, upon the facts of the case itself, and seeing that no direct authority can be adduced in support of the appellants' contention (and no authority which in my mind warrants the principle), in saying that this is a document which cannot be reasonably presumed to be

founded upon legal testimony, and one which cannot be received in evidence. I fully concur in the result which your Lordships have arrived at.

It was admitted by the appellants' counsel that the appeal must fail if the document were rejected.

Order appealed against affirmed, and appeal dismissed with costs.

Solicitors—Lowless & Co. for appellants; G. L. P. Eyre & Co. and Foster & Spicer, for respondents.

[IN THE COURT OF APPEAL.]

JAMES, L.J.	} THE TOTTENHAM LOCAL BOARD OF HEALTH v. ROWELL.
BRETT, L.J.	
COTTON, L.J.	
1880.	
July 16, 23, 24.	

Public Health Act, 1848 (11 & 12 Vict. c. 63), ss. 2, 69, 90, 129—Local Government Act, 1858 (21 & 22 Vict. c. 98), ss. 58, 62, 63—Local Government Amendment Act, 1861 (24 & 25 Vict. c. 61), ss. 23 and 24—Sir John Jervis's Act (11 & 12 Vict. c. 43), s. 11—Paving and Sewering Expenses—Private Improvement Expenses—Limitation of Time—Charge on the Premises.

In 1864 the plaintiff board under the powers of the Public Health Act, 1848, incurred certain expenses in execution of certain works in the street adjoining R.'s premises, for which expenses he, as owner (among others), became liable under section 69 of that Act, and which the board by a resolution declared to be private improvement expenses, and for which, under the powers of section 90 of the Act, they levied on the owners and occupiers a private improvement rate, payable by annual instalments. These expenses constituted under section 62 of the Local Government Act, 1858, a charge on the premises, bearing interest at five per cent. per annum till payment.

In 1872 they revoked the resolution, and made a fresh rate for the whole amount,

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remaining unpaid to be paid by the owners and occupiers. R. not having paid this rate, the board, in 1875, brought an action against his representatives (he having died in 1874) to enforce the charge on his property:—

Held (reversing MALINS, V.C.), that the charge under the 62nd section constituted an additional and not an alternative remedy, and that the bar of six months which applied to the summary remedy against the person before the Justices, and also in the County Court, did not apply to the additional remedy of enforcing a charge on the property, and that the board were not precluded by their election to treat the expenses as private improvement expenses from enforcing the charge, but that it was enforceable only in respect of the instalments for the time being in arrear.

Appeal from a decision of Malins, V.C., reported 49 Law J. Rep. Chanc. 147.

This was an action originally brought in the County Court, but afterwards transferred to the Chancery Division, against the executors of a Mr. Rowell, who died in 1874, to recover the sum of 25*l.* and interest from February, 1873, which the plaintiffs alleged constituted, under the 62nd section of 21 & 22 Vict. c. 98, a charge on the deceased's property, and by their plaint prayed for the enforcement of such charge.

The sum of 25*l.* represented the amount of a rate levied by the board on the inhabitants of the district under the powers of the Local Government Acts.

The facts of the case are stated and the material sections of the different Acts are set forth in the report in the Court below, but the following additional facts should be here stated.

On the 8th of July, 1864, the plaintiffs passed a resolution that the expenses of the board in the execution of the works were "private improvement expenses," and should be payable by the owners and occupiers by annual instalments, with interest at five per cent. for twenty years, under section 90 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), and section 23 of the Local Government Amendment Act, 1861 (24 & 25 Vict. c. 61); and, in pursuance of this resolution, on the

13th of July, 1864, they made a private improvement rate for raising the money. Some of the instalments of the rate were paid, but the validity of the rate was, in 1867, disputed.

On the 8th of August, 1868, the board made an order that the expenses which had been declared to be private improvement expenses remaining unpaid should be paid by the occupiers in annual instalments for fourteen years.

The original resolution of the 8th of July, 1864, and the orders consequent thereupon were, however, revoked by the plaintiffs on the 17th of December, 1872, and a fresh apportionment of the expenses incurred was ordered to be made and to be paid by the owners and occupiers.

Such apportionment was made, as stated in the report below, and notice of it served on Mr. Rowell, and by reason of his not having disputed its correctness became conclusive upon him.

The Vice-Chancellor held that the board not having taken the remedies given them by section 129 of 11 & 12 Vict. c. 63 for recovering payment of the rate within the six months limited for taking summary proceedings, were debarred from enforcing a charge on the property under section 62 of 21 & 22 Vict. c. 98.

The board appealed.

Mr. Higgins and *Mr. Ilbert*, for the appellants.—The 62nd section of the Act of 1858 gives us an additional, not an alternative remedy. If we fail in getting payment from the owner by the means of summary proceedings we may go against the land; we have six months in which we can go by summary proceedings against the owner personally, but there is no such limitation of time in the case of this additional remedy. Such an implication is distinctly rebutted by the language of the section itself, which by expressly mentioning the limit of time as applied to summary proceedings, excludes the notion that it also applies to proceedings by way of charge against the property.

It would be practically impossible to proceed by way of summary proceedings

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first, and then, after failing, to enforce the charge within a period of six months.

Then the object clearly is, that as the local board have spent public money in the improvement of private property, they should have a right to recover payment out of property which shall be accessible, while the owner, who is under the interpretation clause, section 2 of the Public Health Act, 1848, an artificial person, may not be found or may have absconded.

The remedies are quite distinct—the Courts are different, the persons are different, and the effect is different: if in the County Court the plaintiffs cannot get interest, under this section they get interest at five per cent.

They referred to

The Vestry of Bermondsey v. Ramsay,
40 Law J. Rep. C.P. 206; Law
Rep. 6 C.P. 247;

West v. Downman, Law Rep. 14
Ch. D. 111;

*The West Ham Local Board v. Mad-
dams*, Law Rep. 1 Ex. D. 516;
11 & 12 Vict. c. 63. ss. 69, 90, 129;
21 & 22 Vict. c. 98. s. 62;
24 & 25 Vict. c. 61. ss. 23 and 24.

Mr. J. Pearson and Mr. Manby.—The board have treated these expenses as “private improvement expenses,” and, having done so, there is no charge under the Act for such expenses. They have, under their resolution, received instalments from us, and they cannot go back now and charge the property.

The rate made under the 90th section of the Act of 1848 is made payable by the occupier, as between the local board and ground landlord; the board cannot go upon the ground landlord, their duty is to go on the occupier. The converse of this case occurred in

Wilson v. The Corporation of Bolton,
41 Law J. Rep. M.C. 4; Law Rep.
7 Q.B. 105;

and the principle of that case governs this.

The remedy to be obtained in the County Court must be enforced within the period limited by Jervis’s Act for summary proceedings before the Justices—

The Tottenham Local Board v. Rowell,

46 Law J. Rep. C.P. 432; Law
Rep. 1 Ex. D. 514.

The Board having elected to treat these as private improvement expenses, not as a charge on the premises, they are recoverable only by summary proceedings against the occupier. Each instalment ought to have been proceeded for within nine months, and they cannot now turn round and recover, by a charge on the premises, the whole sum at once from the owner.

The fact that the apportionment was made on a wrong principle does not affect the question, for the surveyor was not *functus officio*, and could make a fresh apportionment under the original resolution—

Cook v. The Ipswich Local Board, 40
Law J. Rep. M.C. 169; Law Rep.
6 Q.B. 451.

They also referred to the case of

*Hesketh v. The Local Board of
Atherton*, 43 Law J. Rep. M.C. 37;
Law Rep. 9 Q.B. 4.

Mr. Higgins, in reply.—The main question is whether the plaintiffs have a charge under section 62. The fact that they were declared private improvement expenses makes no difference. The owner is made liable by the Public Health Act of 1848, s. 69, and not only the occupier. The premises in the Act mean those which have been improved by the board at the public expense; and the scheme is that whoever pays has a charge on the premises—see section 62 of Act of 1848. Section 58 of that Act enables the board to give a rent-charge on land issuing out of the premises. The Legislature meant that, while it is uncertain who are the persons to pay, at all events the land shall be liable.

JAMES, L.J.—I think we may dispose of this case now, and on the one short point with which Mr. Higgins commenced, and with which he nearly concluded his argument; that is to say, that the expenses are made a charge on the premises in respect of which they were incurred, and are to bear interest at the rate of five per cent. per annum until payment thereof. There is a distinct statutory charge in respect of those expenses, and it is not an unreasonable thing, because the property

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is improved. What has been done has been done for the benefit of the property, which has thereby been fitted for building and so on, and therefore it is not at all unreasonable to find it declared in an Act of Parliament, in default of other remedies, that the property which is improved and which has had the benefit must bear the *onus*. These are the words—"that such expenses shall be a charge on the premises in respect of which they were incurred;" and the premises no doubt mean the property—not any particular interest in the property, but the property which has been improved. If there is any doubt as to that, it has been remedied to some extent by what appears in the statute of 1858, in which the freehold is expressly in terms charged with the annual instalments, where the expenses are made payable in that way. If there be a charge the *onus* lies upon the persons who say that that charge has been discharged or satisfied.

Now in the first place, it was held by the Vice-Chancellor—a view which I am unable to concur in—that the bar of six months to the summary remedy applies also to any remedy for enforcing a charge, and a decision of this Court was referred to as shewing that the optional remedy given to proceed either in the County Court or by summary proceeding, must be held to be limited by the same limit of time. Of course it is not for us now to reconsider that case. That is the law of the land, and I quite agree in it; but that law to my mind has no application, not only in these particular circumstances, but no application in principle to anything which is made a charge on the land. It is not to be expected that a charge, which is made a charge on the land, could be enforced within the limit of time given for summary proceedings. It never could have been enforced by anything that can by any stress of language be called summary proceedings, and therefore that view of the Vice-Chancellor cannot be maintained.

But in truth another view has been principally pressed upon us by the counsel for the respondents in this case. That view, as I think, may be summed up in this way. The board had an election to

retain the charge which would be a charge on the property, or to do some other thing by which they were getting different remedies against different persons; that is to say, that they had an election to allow it to remain a charge or to declare the costs to be private improvement expenses. Now, in my opinion, there was really nothing that could be construed to be any election to give up the charge, nor is there anything in the Act of Parliament which seems to me to say that the charge is alternative for something else. There is nothing that I can find in the Act of Parliament which either expressly or by implication amounts to anything of that kind. If the Act of Parliament does not say, either in words or in effect, that if the board do this they then give up their charge, then they never intended to elect and never did elect to give up the charge. They elected to give themselves the additional remedy. I think Mr. Higgins was right in saying that it was an additional remedy or another remedy. They gave themselves the easier and more expeditious remedy under the summary procedure which was given to them if they made it a private improvement rate. I cannot find anything in the resolution which amounts to a declaration on their part that they were giving up the charge, and I think for this purpose I should admit that the charge was reduced by a valid resolution to one payable in instalments with interest within fifteen years, under that section which enabled them to do that. They dealt with it as a charge which enabled them not to convert the charge into an annual sum, but to make the whole charge, with interest, payable by annual sums instead of being payable at once. But that provision which they were enabled to make, made in favour (if it was in favour) of the immediate occupier or owner of the premises for the time being under the power enabling them to give that benefit to the owner, did not imply that they were giving up the benefit of the charge they had for the entirety at the time; and the whole effect, according to my view of that, would be, that the charge could not be enforceable as long as the annual instalments were

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paid, but would only be enforceable after the instalments had fallen into arrear. I am of opinion that the plaintiffs were entitled to have the charge, and as they only claim it from the time that they gave the notice, they are entitled to have the charge with the interest which they are claiming, and they ought to have the costs of the proceedings.

BRETT, L.J.—Mr. Higgins has finally persuaded me and convinced me that we ought to read section 62 of the Act of 1858 according to its plain and grammatical construction; that so read it of itself imposes a charge upon the premises directly and immediately the expenses have been incurred, and that there is no limitation of the time during which that charge is to remain effective. The condition upon which the charge is made to arise is nothing but this: "where the local board have incurred expenses for the repayment whereof the owner is made liable." Directly then the local board have incurred expenses, the section must be read as if, immediately following that, there came these words: "such expenses shall be a charge on the premises;" therefore directly and from the moment the expenses which are named in that section have been incurred, such expenses shall be a charge on the premises—that is, the charge is imposed then and there by the statute. Moreover, the phrase is grammatically a phrase of addition, because the earlier part of the section names the other remedies to which the board may resort; and then it has these words of addition: "and such expenses shall be a charge on the premises." Therefore, it seems to me that upon the reading of that section this is a charge the moment the expenses are incurred, and it is a charge which exists, although other remedies exist at the same moment that that commences, or other remedies may by different processes be made to arise, either as against the owner, who is in the first place the person liable, or against other persons. Now the owner is liable at the beginning to another remedy, the moment the expenses have been incurred which he ought to have expended himself. There is a remedy against him

personally for the whole sum, which remedy is to be enforced within six months; but if the board claim the whole payment from him at once and fail to recover it from him personally, and there are means of recovering it from him by distress, if they may distrain upon him, then if they have done nothing to prevent them from putting the charge into effect, I see no reason why the charge might not then and there be put into effect for the whole sum as against the owner. But the board have the power of causing other remedies as against other persons to arise. They may declare the improvement to be "private improvement expenses." That is the first resolution which they may pass. Having done that, they may deal with that in one of two ways. Having declared the expenses to be "private improvement expenses," they may make a private improvement rate; and if they do, they at once have a remedy against the occupier, and they may distrain upon the occupier, and the occupier is given a remedy over against the owner to a certain extent. If they do make a private improvement rate, they can only put their remedies upon that rate into effect under what are called Jervis's Acts; and if they do attempt to put their remedy into effect against the occupier, they are at once, as against him, limited in time. But they may not only attempt to use the summary remedy, but, as it was said, may sue in the County Court, and then the decision of the Court in the case referred to, which, if I may venture to say so, I think was perfectly right, is, that the same limit of time applies to that action in the County Court. But that affects the remedies which they have caused to arise, and exist as against the occupier, or against the owner personally. They may have a summary remedy against the owner, but then that summary remedy must be subject to the same limitation of time.

Well, having declared those expenses to be private improvement expenses, there is another mode in which they may deal with them. They may come to a resolution that the whole sum shall be divided into instalments and spread over a certain number of years not exceeding

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thirty. If they do that, that at once gives them remedies against the occupier and against the owner. Having once made the sum payable by instalments, I incline to agree, though it is not necessary to determine it in this case, with Mr. Higgins, that it makes the Act more reasonable and more fair, no doubt, to say that they could not retract that, and insist, either by putting the charge into effect or otherwise, upon an immediate payment of the whole. Having once made the sum payable by instalments it must so remain, but then, it being payable by instalments, they have a summary remedy against the occupier or against the owner, or a suit against each as each instalment falls due. Although they have that remedy, it may be ineffectual because the occupier may be unable to pay; the owner may be unable to pay; there may not be sufficient to enable them to recover by distress—those remedies may fail; but if they do fail, it seems to me that there is nothing which, upon the failure of those remedies, has done away with that charge which existed from the beginning, and which is not limited in time upon the arising of any condition subsequent, by any words in the Act; but where the payment has come to be a payment by instalments, then I think that if the charge is to be made effective, it could only be made effective for instalments in arrear, so that if the sum had been made payable by instalments in fifteen years, and the payments were in arrear for seven years, then if the charge was attempted to be put into force, it could only at the end of those seven years be put into effect for the seven years' instalments in arrear, and then, if afterwards further instalments became in arrear, it must be put into effect again. All those remedies, which are either existing at the time when this charge takes effect, or which are, by following the forms of the statute, made to arise after that charge has taken effect, have nothing to do with the charge; they make it neither greater nor less. If those remedies fail, or are not put into effect, nevertheless the charge, existing absolutely independently of them, may always be made effective by the process of the

Court, and therefore there being no limitation of time as to that except the ordinary Statutes of Limitation, I suppose there is no objection to that remedy which has been a remedy belonging to the board from the moment after these expenses were incurred—there is no legal objection to that remedy being now put in force; and that remedy is put in force by means of the suit which has been brought. I therefore, after having been puzzled for a sufficiently long time, think I can see my way to a clear reading of that section, having been so taught to read it by Mr. Higgins's argument. I therefore venture to differ from the Vice-Chancellor, and to think that this remedy was one which ought to have been allowed.

I should like to say that I think nothing we hold here is inconsistent at all with the case in the Queen's Bench, which only dealt with the other remedies which are given by the statute, and did not deal at all with this remedy of putting the charge into effect.

COTTON, L.J.—This is an action by the Local Board of Tottenham to enforce a charge which they claim to have against the property of the late Mr. Rowell for certain expenses incurred by them. What took place was this, as I understand it: They determined, under section 69 of the Act of 1848, to do certain works authorised by that section in certain public streets where Mr. Rowell had property; and before they executed the work they passed a resolution saying that the expenses should be treated as "private improvement expenses," and be an amount chargeable on the particular property, or that the amount should be made payable by instalments over a certain period of years.

That they afterwards modified by, I think, reducing the term of years; but that is not very material. In respect of the proportion of Mr. Rowell as applying to his property they claim a charge upon his estate.

Now the first question one has to consider is this, whether the Act of Parliament gives them the charge which they claim; and, if it does, whether the Act of Parliament or the act of the parties, the

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plaintiffs, has prevented them, under the circumstances, from enforcing that charge.

Now, in my opinion, section 62 of the Act of 1858, which is incorporated with the Act of 1848, does give them that charge; and in construing that section of the later statute it is not immaterial to consider the period at which that enactment was made, because the first Act, having given certain remedies, this Act, probably having regard to the difficulty of recovering the money in all cases by means of the remedies so given as against what is there described as the owner—a very artificial person, whom it might be very difficult to ascertain—and also the remedies given as against the occupier, does give a remedy which in certain cases no doubt is a charge, probably in order to remedy a difficulty and to cure a defect which there might be in the remedies given by the previous Act. Now what it says there is, “Where the local board have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable”—I need not read the rest, for it goes through the different ways in which he may be made liable, and amongst others it mentions the Act of 1848. Then when we come to the 69th section of the Act of 1848, we find this: “And the expenses incurred by them in so doing” (that is to say, by doing the work in dispute in the street) “shall be paid by the owners in default according to the frontage of their respective premises.” Now surely that makes the owner liable. No doubt there are superadded remedies—summary remedies, partly as against the owner and partly as against the occupier, with a right to go for a proportion on the owner; but there by the Act the owner is made liable by the declaration that the amount shall be paid by the owner. That makes him liable, and makes him liable under the Act, subject, nevertheless, to powers given in the subsequent part of that section to enforce by summary remedy either against the owner or against the owner or occupier; so that, in my opinion, where it is found that under the Act of 1848 there are expenses in respect whereof the owner is made liable, then there is a charge given. Now, that being

so, what one has to consider is this, whether or no the local board are in any way prevented from enforcing that charge; and the only point on which the Vice-Chancellor decided it against them was the length of time, independently of any limit fixed by the Act. In the Act of Parliament there is no limit of time expressly fixed, as that before which they must enforce the charge given by section 62. The only limit of time is that which is given with reference to summary proceedings, either against the owner or occupier; and that being so, there is no reason at all why you should apply to the period of enforcing the charge the same limit as that which the Act gives as the period for enforcing, by summary remedy against the owner or the occupier, personal payment of the expenses. I think that as against the owner the limit of time is fixed by the Act itself. It says that the summary proceedings shall be taken within a certain time—six months—and as regards the enforcement of the right against the occupier, it is only by reference to another Act—Jervis's Act—that the limit of time is fixed. It is true that where one of these Acts gave an option to enforce the personal remedy against the owner by proceedings in the County Court, the Court of Appeal held that the same limit of time applied to proceedings in the County Court as applied to summary proceedings before the magistrates; but that was on the special words of the section giving power so to proceed in the County Court at their option; that is to say, that the option must be exercised while there was a summary remedy still existing, and that therefore it was reasonable to hold that the same limit of time must apply to that personal remedy given in the County Court as applied to proceedings before the magistrates.

But one might shew numerous cases where it would be almost impossible to enforce a charge or to begin to enforce a charge against the land within the period of six months which was given for enforcing the personal remedy against the owner or occupier. But I do not think it is convenient or right to deal with it on shewing what inconveniences would arise. There is no limit at all fixed by the Act

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with reference to anything except proceedings against the person who is liable personally. As against the land there is to be a charge on the land for the sum payable, with interest at so much per cent. per annum, with no limit fixed as to the time within which that charge was to be enforced; and, in my opinion, the only proper limit of time is that which the Statute of Limitations fixes. Of course the parties may have a personal objection to the claim for payment by the local board; that is to say, they may say, "You, the board, have been so negligent in enforcing your remedies that the person who ought to pay instead of me has now escaped, and you are coming upon me;" but nothing of the sort arises in the present case. Whether it could be ever effectually urged by any succeeding owner or purchaser I say not. It is sufficient to say it does not arise in the present case, where the defendant, who was a debtor when the work was done, when the money ought to have been paid, would be so now if alive, and, not being alive, his property or his representatives stand in the same position as he did. Therefore the lapse of time, in my opinion, cannot be alleged.

Then the more serious argument was that there had been an election to treat these as "improvement expenses," and therefore to treat them as recoverable by rate only against the occupier. There, I think, the error in the argument depends on the word "only." If there is anything in the Act which shews that where there is an election to treat them as private improvement expenses all other remedies are gone, that would be something; but there is nothing at all to shew that treating them as private improvement expenses, to be recoverable by way of rate, would get rid of the charge on the land. The charge on the land is not given by section 62 as regards "expenses which shall not have been declared to be private improvement expenses," but generally in respect of all expenses for which the owner is made liable—that is, liable when they are incurred; and unless there is something definite in the Act which shews that the local board shall give up their charge when they determine to deal with the expenses under the latter part

of the section, or to deal with them under section 23 of the later Act as payable in instalments, we ought not, in my opinion, to deprive the local board of that tangible security given by the 62nd section to which I have referred.

The case has been referred to which Lord Justice Brett has just mentioned; but that was an entirely different case. There they had called upon the owner in the first place, I think, to pay the sum at once, and then they would have had a summary remedy for a limited time as against him. After they had lost that remedy they declared the expenses to be "private improvement expenses," and sought to recover by means of another summary proceeding; and there it was quite right to say, "You cannot get this new summary proceeding, when by what you have done and by your delay you have lost the original summary proceeding which you had before you exercised any option." That makes that case an entirely different one from the present, where we are dealing not with the question whether the board can get for themselves a new and extended summary proceeding and a remedy against a different person, but whether they have, by what they have done, lost the charge given to them by the Act, when there are no words in the Act releasing that charge, and when there is nothing in the Act that shews they must elect whether they will continue to have a right to the charge or take this proceeding of enforcing it as an improvement expense.

Now section 23, I think, does help Mr. Higgins's argument, for what it did in fact was, not to declare that it should be recoverable by rate, but that the payment should be extended over a period of years; and section 23 does assume that that section shall apply to cases where there is a charge on the property in respect of the expenses which are to be distributed over a period of years, and in no way says that by so distributing the payment of the expenses the board shall lose the charge which has been previously given them, and which this section assumes they have at the time when they determine so to collect the expenses instead of calling for payment of all at one time.

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In my opinion, therefore, there was originally a charge, and the right to enforce that has not been lost by the local board, nor has it in any way been taken away by way of release by any of the other sections.

Solicitors—Heath & Parker, for plaintiffs; Peckham, Maitland & Peckham, for defendants.

[IN THE COURT OF APPEAL.]

JAMES, L.J.	}	ASHWORTH v. MUNN.
BRETT, L.J.		
COTTON, L.J.		
1880.		
March 23.		
July 9.		

Will—Partnership Property—Real Estate directed to be sold—The Mortmain Act (9 Geo. 2. c. 26), s. 3.

The proceeds of sale of real estate, forming part of the partnership property of a testator, and directed by him to be sold, are an interest in land within the meaning of the Mortmain Act.

Attres v. Haws (47 Law J. Rep. Chanc. 863; Law Rep. 9 Ch. D. 337) explained. *Marsh v. The Attorney-General* (2 Jo. & H. 61; 30 Law J. Rep. Chanc. 233) questioned.

Decision of MALINS, V.C., affirmed.

This was an appeal by a charitable corporation from the decision of Malins, V.C., reported 47 Law J. Rep. Chanc. 747.

Mr. Higgins and Mr. Bunting, for the appellants.

Mr. Romer, for parties in the same interest.

Mr. Glasse and Mr. Byrne, for the plaintiffs in the action.

Mr. J. Pearson and Mr. Northmore Lawrence, for some of the next-of-kin of the testator.

Mr. Kekewich, Mr. Ingle Joyce and Mr. Methold, for other parties.

Mr. Rigby, for the Attorney-General.

The arguments were the same as in the

Court below, and, in addition to the authorities then cited, the following were referred to:—

Lindley on Partnership, 4th ed. vol. i. p. 672, and cases there cited;

Marsh v. The Attorney-General (*ubi supra*);

Morris v. Glynn, 27 Beav. 218;

Edwards v. Hall, 6 De Gex, M. & G. 74; 25 Law J. Rep. Chanc. 82;

Entwistle v. Davis, 36 Law J. Rep. Chanc. 825; Law Rep. 4 Eq. 272; *In re Mitchell's Estate*, Law Rep. 6 Ch. D. 655;

Attres v. Haws (*ubi supra*);

Wild v. Milne, 26 Beav. 504;

Raymond v. Lakeman, 16 W.R. 67;

Hayter v. Tucker, 4 Kay & J. 243;

Sparling v. Parker, 9 Beav. 450; 16 Law J. Rep. Chanc. 57;

Day v. Croft, cited 9 Beav. 455;

Watson v. Spratley, 10 Exch. Rep. 222; 24 Law J. Rep. Exch. 23;

Baxter v. Brown, 7 Man. & G. 198;

Bligh v. Brent, 2 You. & C. Exch. 268; 6 Law J. Rep. Exch. Eq. 58;

The Attorney-General v. Harley, 5 Madd. 321;

Jeffries v. Alexander, 8 H.L. Cas. 594; 31 Law J. Rep. Chanc. 9.

JAMES, L.J.—I am of opinion that the decision of Vice-Chancellor Malins in this case ought to be affirmed. The case has been very fully, very elaborately, and I need not say very ably, argued, and I think we have had everything suggested to us that could possibly be suggested in the case, and, with some fluctuation of opinion during the time of the argument, it appears to me at last that we must arrive at the conclusion that the case is hit by the words of the statute commonly called the Statute of Mortmain. There are some expressions in the judgment which I prepared in the case which had been referred to—*Attres v. Haws*—which seem to indicate that we thought the cases had gone to the extent of saying that no share in a partnership which had land for the purposes of the partnership, or real property, or impure personality, as part of the assets or capital, was hit by the statute of Geo. 2; that expression

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was not applicable to anything we then had before us to decide—it was expressed rather too generally, and I may say, speaking for myself, inadvertently. The attention of the Court was then called to the whole of the cases then decided, of which *Myers v. Perigall* (1) was the exemplar. It certainly had been decided in *Myers v. Perigall* and other cases of exactly the same character, that shares in a joint-stock company, whether incorporated or unincorporated, which has land either as the substratum of its business or other real assets as part of the assets of the business, are to be dealt with for the purposes of the statute as pure personal estate, but that is because they are to be treated just as if they were shares in a corporation; and they have always been held to be unaffected by the statute.

The great distinction between that class of cases and the case of a private partnership is this, that in all those cases the intent and meaning of the partners is that the partnership, whether it be large or small, is to be in the nature of a corporation; they are all of them intended to have perpetual existence, and they are all intended to exist with fluctuating bodies of members from time to time, just like a corporation. Then no partner is ever supposed to have anything to do with the land except as one of the society through the machinery provided by the Act or deed of settlement, and is never intended to have anything to do with the land in any shape or form, except to get the profits from the land or the profits from the business of which the land is a part; and it is always intended that every share should pass in the market as a distinct thing, and in point of beneficial ownership wholly unconnected with the land or with the real assets of the partnership property of the company. That was the class of cases with respect to which the decision I have referred to was made. The principle which was established in *Myers v. Perigall* was applied by this Court in the case of *Attres v. Howe* to what is called debenture stock in railroads. Now the case of a private partnership stands upon a very different

footing, not only practically, but theoretically, in point of law, and upon the ground which was pointed out by Lord Cairns in *Brook v. Badley* (2), to which we have been referred, but which does not seem to have been adverted to in some of the other cases, that whether it is going beyond the preamble or not, one of the things which the statute in express terms hits at, is anything which is a charge or incumbrance upon real estate. Those very words are in the statute, and were put in for the purpose of preventing those possible evasions, some instances of which I attempted to give in the judgment in *Attres v. Howe*. There are the words “any charge or incumbrance.” Now it appears to me that in a private partnership which has got land it is difficult to say that the partner has not an interest in the land—not *qua* partner, because I agree with what Mr. Higgins has said, that it does not signify in whom the legal estate is, in whom the ownership of the freehold is—that may be either in all the partners or one or more of the partners, or it may be in a trustee wholly outside the partnership—and I agree that the beneficial interest is a beneficial interest in the partners not as tenants in common or as joint tenants, or anything of that kind, but their interest is exactly in proportion to what the ultimate amount coming due to them upon the final taking and adjustment of the accounts may be. Suppose the capital of the firm consisted of land, as it does in this case, and that this was made to appear in the books, as it ought to appear, if the books were properly kept; and that the capital of the firm consisted of, say 60,000*l.*, or any large sum of that kind, there might be due to one partner so many thousand pounds, shillings and pence, and there might be due to another partner so many thousand pounds, shillings and pence, and from another there might be a sum due, and he would be obliged to contribute that sum to make up the proper amount of capital. Therefore the share of each of the other partners, no doubt, is not a share in any specific asset

(1) 16 Sim. 533; 2 De Gex, M. & G. 599; 18 Law J. Rep. Chanc. 185; 22 *ibid.* 431.

(2) 36 Law J. Rep. Chanc. 741; on appeal, 37 *ibid.* 884; Law Rep. 4 Eq. 106; *Ibid.* 3 Chanc. 672.

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or any specific part of the assets, real or personal, but it is his share of what will ultimately come to him when the accounts are ascertained, and when the partners who are to contribute have contributed, and when the assets are got in, the debts paid and the amounts realised. But then, although there be the right of each partner in so much capital stock, which is personalty—and I should say, in one sense is pure personalty, because it is personalty as between the real and personal estate—still it is exactly that which comes within the very words of the statute. Whatever is the amount coming due to that partner, that partner has an immediate and direct charge or incumbrance on the land for that very sum, and his right is to have the land sold for the purpose of realising that charge or incumbrance which he has upon it. I may give an illustration. Suppose, instead of its being a thing to be taken on settling the accounts, the partnership deed provided this and nothing more, that upon the death of a partner the surviving partners should take the whole of the assets, real and personal, and that the deceased partner should only be entitled to the share standing to his credit at the last taking of the accounts, with some proportion of the interest in the meantime, which is a very common clause, that would give a clear charge or incumbrance, unless it was expressly excluded by the terms of the deed, upon all the assets for the purpose of paying the sum due to him. Then a devise or bequest of the money coming to him as his share of the partnership would be a devise of a sum of money directly charged on all the assets, real and personal, of the partnership. It appears to me that that circumstance does make a broad distinction between this case and the case of shares in joint-stock companies, which alone have been the subject of decision in the Courts, as far as they are found in the reports. There is a case of a private partnership which is not reported anywhere, but which is referred to more than once by more than one learned Judge as having been distinctly and clearly decided in accordance with the view now expressed by the Vice-Chancellor, and which we propose to affirm.

It is not necessary to go into any further detail as regards this point. Upon the simple ground that if not an interest in land, it is, at all events, a direct charge on land, I think the order of the Vice-Chancellor ought to be affirmed. The costs must come out of the estate.

BRETT, L.J.—I am of the same opinion. I cannot but marvel at the great extent to which the construction of this Mortmain Act has been carried. It seems to me to have been carried much further than the reason of its enactment suggested or authorised, but the construction has been carried to this great length by authorities which we have no right to dispute. Now, the authorities seem to me to have gone to this length, that although the devise to a charity is in terms of money only, and although the only thing which by the devise will come to that charity is money, yet if in order to effectuate the devise in favour of that charity it may be necessary to deal with an interest in land of the testator, the devise is within the Statute of Mortmain. It appears to me that the construction of that statute has been carried as far as that, and that the case of *Brook v. Badley* before Lord Cairns, cannot be supported, and cannot be faithfully followed unless it is a decision to the full effect of that proposition. The decision in *Brook v. Badley* seems to me virtually, and indeed intentionally, to overrule the case of *Marsh v. The Attorney-General*, and the case of *Brook v. Badley* is one we are bound to follow. That being the large interpretation which has been placed upon the statute, there have been certain cases decided in which it has been said that that principle does not apply. The first set of cases are those of corporations in which the corporation has an interest in land, but where it has been held that, although the corporation has an interest in land, yet the shareholders in that corporation have not such an interest, and that a devise of their shares is not within the Mortmain Act. It seems to me obvious that in that case the whole value of the share can be realised without interfering with the land at all; the land will remain untouched in the hands of the

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corporation, the whole interest of the shareholder, the devisor, will be realised without interfering with the land at all, or with any interest in land, and the money which will go to the charity will be mere money. Then there comes the case of companies which are constituted by statutes, but they are the same as corporations in some respects, and we need not deal with them. We then come to the case of what has been called joint-stock companies, which it has been argued are precisely the same as ordinary partnerships. With great deference, there is a distinction. There are joint-stock companies where, by the agreement of the partners—that is to say, by the constitution of the company to which they have agreed—there are to be shares in the company, and there are to be shareholders, and by the agreed constitution of the company those shares may be transferred, and the company still continued. Now, in such a case, if the company is the owner of land, in one sense it may be said that that land does not belong to a corporation, but does belong to the shareholder; but, by the agreement of the parties that matter is to be dealt with precisely as if there was a corporation; that is to say, the shares are to be allowed to be transferred, so that the new shareholders may come into the partnership without the partnership ceasing at all; and so far as the constitution of the company and the intention of the parties are concerned, the whole value of the shares—that is, the whole interest of the shareholders—may be transferred for money, the partnership continuing, and the partnership property continuing untouched by the intention of the parties. The matter is thus exactly the same as in the case of a corporation. Now, whether anybody may cavil at the decision of *Myers v. Perigall* or not is not to the purpose. *Myers v. Perigall* is an authority which cannot be overruled; and *Myers v. Perigall*, dealing with such a company so constituted, said that with regard to the Mortmain Act it was just the same as if there were a corporation and shareholders. Therefore, in such a case, although the company is not a corporation, although it is not a company

within any statutes, yet, inasmuch as by agreement of the parties to the constitution of the company the shares were intended to pass without interfering with the land that may belong to the company, it has been held that a devise of shares in a company so constituted is not a devise to a charity obnoxious to the Mortmain Act. But when you come to the case of an ordinary partnership not so constituted, which holds land, one partner cannot dispose of his interest without the consent of the others; and, supposing he dies, the partnership is at an end, and it may not be possible to ascertain his interest in the partnership without dealing with the land which is the property of the partnership, in which, therefore, he has an interest. It comes within the proposition laid down by the cases, that where it may be necessary to deal with the land in order to effectuate the devise in favour of the charity, the gift is void. Therefore it seems to me the case of an ordinary partnership is not within the exceptional rules, but within the original rules, and therefore this decision was correct.

COTTON, L.J.—I am of opinion that the decision of the Vice-Chancellor must be affirmed. The question we have to consider is this: whether the interest of the testator in certain land used by him and his partner, during his lifetime, for the purposes of the partnership could be legally given to a charity, notwithstanding the Act of the 9 Geo. 2. It is probably unnecessary to mention, but I do so from what was urged in the course of the argument, that it is not in any way a question as to whether it is personal estate or real estate. There are a number of things admittedly personal estate which, notwithstanding that fact, cannot legally be given to charity in consequence of the Act of the 9 Geo. 2. As that is so, one may put aside all the argument on those cases which have decided that the interest of a partner in a partnership, though there is land, and his interest in the partnership property consisting of land, are personal estate, and go to his next-of-kin and not to his heir-at-law. The question is not what the charity can

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take under this will, but what was the interest of the testator in the property which he attempted to devise to that charity. I mention that because there was a good deal of argument to this effect: How can this be within the mischief of the statute when it was perfectly impossible that under this devise the charity could ever take any land? That is not the question, because what the Act points at is the devise of land—that is, it prevents testators giving by their wills that which in them is land or an interest in land; and what we have to consider really is, whether or no the interest of the testator was land, or “any estate or interest in land, or any charge or incumbrance thereon.” Now, to deal with it first of all without reference to any of the cases on the point we must consider whether this is not an interest or charge on land. If a charge, then it was an interest. No doubt it was mere partnership at will, and at the time when the testator died this will became operative, and there was an end of the partnership. The only way in which, except by arrangement, his estate, or those who claimed through him, could get his share in the partnership, was by paying all the debts, winding-up the partnership and selling the real estate and the other property belonging to the partnership, giving to him the balance of the proceeds after all claims were settled, or rather his share of the balance after all claims were satisfied; because undoubtedly in the disposition any one partner can, although all the debts are paid, if he thinks his interest so requires, say that the real estate shall be sold, and not be divided amongst the parties; and obviously in many cases it must be so, that there cannot be a division, and there must be a sale. At all events, it is the right of the surviving partner, if he desires it, to say there shall be a sale, and therefore I say that the testator could not get his interest in this partnership, or in this land, except either by special arrangement or by sale. Then where there was a sale he would have a right to the proceeds of the sale of the land, and to have that paid to him; and until there was a sale he would have a claim against the land, and as against also the other

assets of the partnership, whether you call it lien, or charge or anything else, to secure to him what was ultimately coming to him. It is, in my opinion, independently of any decision, an interest in land, and we cannot but say that a gift of his interest in the partnership property, being land, is a gift of an interest in land within the 3rd section of the Mortmain Act. If authority be required to assist us in arriving at that conclusion, in my opinion the principle of *Brook v. Badley*, before Lord Cairns when Lord Chancellor, by which of course we are bound, does decide that, under such circumstances, although what the testator could get is money only, and although he leaves an interest which he can only get in the shape of money, still it is an interest in land, if at the time of his death what he devises is in the shape not of money realised, but of money which is to be produced by the sale of land, he having an interest or charge upon the land till that money is realised and in a state to be paid to him as money. I think the decision on principle and on that authority is right. But in such a case as this, where perhaps all the cases are not very clearly reconcilable with one another, one must consider what cases there are in support of the contention of the appellants. It is unnecessary to go through them all because they can be easily summarised. *Myers v. Perigall* is the principal decision upon which the appellants rely, and I will presently deal with the question as to how far that applies to the present question; but, independently of that decision, there was little on which they could rely, with the exception of *Raymond v. Lakeman*, which never came into the regular reports, and *Marsh v. The Attorney-General*. No doubt *Marsh v. The Attorney-General* does seem to support the argument that, as the testator could get nothing but money, although that money was to be produced by a sale of real estate, yet he could leave his interest, such as it was, to charity. But if that was the principle on which *Marsh v. The Attorney-General* was decided, it was clearly inconsistent not only with the principle of the decision, but with the decision itself, of the Lord Chancellor in

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Brook v. Badley, and of course we are bound by that decision of the Lord Chancellor, even although we did not think it right, which in my opinion it is. I next come to the question, whether *Myers v. Perigall* does or does not apply. That was a decision with reference to an unincorporated joint-stock company. The distinction between corporation and unincorporation is, in my opinion, entirely immaterial; but that applies to a company the principle of which was this, that it should have a continuing existence, notwithstanding the changes in the persons who constituted the partnership; that is to say, in that, as in other joint-stock companies not incorporated, there is an attempt to give a *quasi* corporate character to the body called in ordinary language "the company," to distinguish it from partnership. Whether the partners die, or whether they transfer their shares to others, which they are ordinarily at liberty to do without any prohibition or restraint, the body or the company is to continue; the business is to be carried on under a partnership for the benefit of those who for the time being may be in union, either by originally taking shares or by transferring or by taking a transfer of shares. As a consequence, the shares can be realised not only by winding up the whole concern, but by selling them in the market; and there is also another distinction not so material, but material, perhaps, with reference to some observations of Judges in different cases, that in these joint-stock company cases, whether corporate or not, the shareholders, as such, have no right of interference whatever with the property; they cannot go, as was said by Lord St. Leonards, upon the partnership land. The management and the right of going on the partnership property is solely and exclusively in the managers or the directors. Then, how does the decision that the gift of a share in such a company as that in *Myers v. Perigall* is not within the Act of Geo. 2 apply to such a case as this? There is the great distinction that the shares in that case, from the constitution of the company, were capable of being realised without

winding up the concern, and therefore what the charity took was a share which it would sell in the market, or might hold without any objection as to its being an interest in land; whereas, in the present case, the interest of the testator in this partnership property could only be realised by requiring the assets to be realised—that is, that this particular asset should be sold, and a portion of the proceeds of sale paid to him. That involves, for the purpose of realising that which he gives to the charity, the necessity of dealing with the land, and gives him, for the purposes of so dealing as to realise his interest, an interest or charge upon the land. In my opinion, therefore, there is a substantial distinction between this case and the case of *Myers v. Perigall*, which enables us to say that it is not a decision applying to or governing this case, and that the case ought to be dealt with and decided independently of that, on the other authorities and on principle. I must say, with regard to *Brook v. Badley*, that it is impossible to hold, as argued by Mr. Higgins, that partnership property is put in an entirely different category, and that therefore the principle of Lord Cairns's decision in *Brook v. Badley*, though apparently applying to cases where the interest of the testator in money is to be realised by sale of real estate, does not apply to the case of a partnership. In my opinion, there is no such distinction on principle or authority between partnership property and other property as to justify us in saying that the principle of *Brook v. Badley* does not apply to a share in a partnership.

Solicitors—Walker & Battiscombe, for appellants; Clarke, Woodcock & Ryland, agents for Creeke, Sandy & Ghest, Bacup; Gregory & Co., agents for Wright & Son, Bacup; and Robinson & Preston, agents for T. A. & J. Grundy & Co., Bury, for respondents.

[IN THE COURT OF APPEAL]

JAMES, L.J.
BRETT, L.J.
COTTON, L.J. } PALMER v. LOCKE.
1880.
July 26, 27. }

Appointment—Fraud on Power—Bond to appoint a certain Sum under Power.

M., having a limited power of appointing a trust fund by will only among his children (to whom in default of appointment the fund was given equally), by his will appointed a sum of 5,000l. to his son J. Shortly after the date of his will he executed a bond to his son J., whereby after reciting the power, and the appointment by will already made, he bound himself that J. should receive either out of the trust fund or out of his, M.'s, own property, the sum of 5,000l. at the least. M. died, without having revoked his will:—Held (affirming the decision of THE MASTER OF THE ROLLS), that the appointment was a good exercise of the power, and that the fact that it might have the effect of discharging M.'s own estate from a liability did not invalidate it.

Coffin v. Cooper (2 Dr. & S. 365; 34 Law J. Rep. Chanc. 692) followed.

A covenant by the donee of a limited power that he will exercise it in a particular way is void and does not render the donee's estate liable to an action for breach of the covenant. (By BRETT, L.J., dubitante COTTON, L.J.)

This was an appeal from a decision of Jessel, M.R., upon an adjourned summons in an action for specific performance of a contract for the purchase of an absolute reversionary interest of one Joseph Guedalla in the sum of 5,000l.

Under the will of Judah Guedalla, dated the 21st of December, 1839, his trustees were directed to hold one-third part of the proceeds of sale of his residuary personal estate upon trust, subject to the life interest of the testator's son Moses and his wife Phoebe, for such of the children of Moses, by his then present or any future wife, or the issue born in his lifetime of such children, with such provisions for their maintenance, and at such ages and upon such conditions, as Moses, by his last will, or any codicil thereto, should

appoint, and in default of any such appointment, and so far as the same, if incomplete, should not extend, in trust for all the children of Moses who should attain twenty-one, or marry under that age. The testator died in 1858.

Moses Guedalla died in 1875, leaving his widow and six children him surviving, one of whom was Joseph Guedalla.

By his will dated the 4th of January, 1873, Moses Guedalla recited the said power of appointment limited to him, and in exercise of that power directed the trustees of his father's will out of the one-third part of the residuary personal estate to pay to his son Joseph the sum of 5,000l. The residue of the said one-third part he appointed among his five other children in the shares therein mentioned.

Moses Guedalla, shortly after the date of his will, namely, on the 19th of February, 1873, executed a bond for 5,000l. to his son Joseph. The bond recited the power of appointment limited by the will of Judah Guedalla, and that he intended to appoint or give, or had appointed or given, by will or codicil, pursuant to the recited will or otherwise, the sum of 5,000l. at the least to his son Joseph, either out of the property subject to the recited will, or the property of the said Moses Guedalla; and by way of making Joseph Guedalla entitled in any event to that sum on the death of Moses Guedalla, either in possession or in reversion on the death of his present wife, the said Moses Guedalla, by way of advancement for his son, and to forward his prospects in life, had determined and agreed to execute the above-written bond.

The bond was conditioned to be void if Moses Guedalla should by his last will, or any codicil thereto, appoint or give the sum of 5,000l. at the least to Joseph Guedalla absolutely, either under the recited will of Judah Guedalla or out of the property of Moses Guedalla, subject only to the interest of his present wife, and if such sum or any part thereof should be given out of the property of Moses Guedalla, then if such property should be sufficient to make good the same; or if the said Joseph Guedalla should on the decease of Moses Guedalla become entitled in default of appointment or otherwise to

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such sum under the recited will of Judah Guedalla.

By a deed dated the 23rd of April, 1873, Joseph Guedalla mortgaged his interest under the will of Judah Guedalla to George Gilliam, to secure repayment of the sum of 600*l*. The deed contained a power of sale in case of default of payment. This mortgage was transferred on several occasions and subsequently became vested in the plaintiffs, who in exercise of their powers of sale put up the mortgaged property for sale by auction on the 1st of May, 1879. The defendants became the purchasers at the price of 2,000*l*.

Upon the reference as to title directed by the Court in the action, the conveyancing counsel reported that a good title could not be made, on the ground that the appointment made by the will of Moses Guedalla was in discharge of his own personal liability under the bond, and was void on the authority of

Sugden on Powers, 8th ed. p. 527;

Reid v. Reid, 25 Beav. 469;

and

The Duke of Portland v. Topham, 11 H.L. Cas. 32; 34 Law J. Rep. Chanc. 113.

The chief clerk made his certificate, whereby he certified in accordance with the opinion of the conveyancing counsel. The plaintiffs thereupon took out a summons in chambers to vary the certificate, and the summons was adjourned into Court.

The summons was heard before the Master of the Rolls on the 19th of April, 1880, when he decided on the authority of

Coffin v. Cooper (ubi supra) that the appointment was good.

The purchasers appealed.

Mr. Davey and Mr. Armistead, for the appellants, contended that the appointment was bad; that the power was a fiduciary power and exercisable only by will; and that it was a fraud on the power to attempt to fetter the discretion, which ought to remain till the donee's death, even by a moral as opposed to a legal obligation; and they also relied on the ground on which the conveyancing counsel based

his opinion that the appointment had the effect of releasing the donee of the power from the present liability which he had incurred under the bond, and to a certain extent exonerating his estate. They also alleged that the nature of the transaction raised a strong suspicion of a corrupt bargain between father and son.

The cases referred to were

Reid v. Reid (ubi supra);

Hurst v. Hurst, 16 Beav. 372; 22

Law J. Rep. Chanc. 538;

Thacker v. Key, Law Rep. 8 Eq. 408;

Buiteel v. Plummer, 39 Law J. Rep.

Chanc. 805; Law Rep. 8 Eq. 585;

Ibid. 6 Chanc. 160;

Stuart v. Castlestuart, 8 Ir. Chanc. Rep. 408;

Wilson v. Piggott, 2 Ves. 351;

The Duke of Portland v. Topham (ubi supra);

Smith v. Death, 5 Madd. 371;

Davies v. Huguenin, 1 Hem. & M. 730; 32 Law J. Rep. Chanc. 417;

Sugden on Powers (ubi supra);

Smith v. Houlton, 26 Beav. 482.

Mr. Ohitty and Mr. B. B. Rogers were stopped by the Court.

JAMES, L.J.—I am of opinion that the decision of the Master of the Rolls must be affirmed. I think he found himself bound by the decision of Vice-Chancellor Kindersley in the case of *Coffin v. Cooper*, and I think that Vice-Chancellor Kindersley was rightly bound by what he considered to be, and what I consider to be, the common course of decision which really prevented this point from being successfully raised. It has been decided in various cases that such a power as this could be released; because it is fiduciary to this, and only to this extent, that the donee of the power cannot use it for any corrupt purpose, or for any purpose of benefiting himself or oppressing anybody else. This was so decided in the case of *The Duke of Portland v. Topham*. I think it is sufficient to say that I agree with what Lord Chancellor Hatherley said—that to hold that such an appointment as this is avoided because there has been a deed of covenant executed previously, would be to strain the doctrine of im-

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proper appointment beyond anything which the cases require. In my opinion it would be to strain it most improperly and in effect to shake a great number of appointments which I have not the slightest doubt have been considered sound both before and since the decision of Vice-Chancellor Kindersley.

With regard to the other point. It seems to me that you cannot act upon suspicion. It is said that the will which was made in January was avoided by reason of a bond made six weeks afterwards, and it is supposed that there was some corrupt bargain between father and son, of which there is not the slightest trace, and which might be as well supposed in every case where there is a testamentary appointment made. It may be said, "How do you know he was not bribed?" "How do we know there was not some corrupt object?" In the absence of some ground for supposing it, we must assume everything was done rightly. Otherwise the result would be that every disposition made under a power of testamentary appointment given to a father for his children, and not only testamentary but every other power would be laid under suspicion when a man is dead and it is no longer possible to prove that there was not some bargain between them. I am of opinion the decision ought to be affirmed.

BRETT, L.J.—I should have thought it very dangerous, unless there were some principle very clearly outraged, to overrule the decision of *Coffin v. Cooper*, which was decided so long ago, and which has probably been acted upon; but I confess it seems to me that according to principle the case of *Coffin v. Cooper* was right. To my mind, I confess it does not make any difference whether the covenant in this case was entered into before or after the will was executed. If I thought that the covenant was binding upon the person who has entered into it, I should have felt some difficulty, because then it might be said, and truly said, as it seems to me, that the exercise of the appointment would be an exercise made to the advantage of the persons making it; that is to say, that the effect

of it would be to relieve his estate from an obligation into which he had entered. But I must confess that I agree entirely with the view which was taken by Lord Justice James in *Thacker v. Key*, that such a covenant as is here in question, and as was in question in *Coffin v. Cooper*, is a wholly void covenant, and that no remedy could be had upon that covenant against the covenantor if a consideration was given for the covenant. Then it is admitted by everybody that it would be absolutely fraudulent, and if fraudulent it would be of course void, because both parties are parties to the fraud. It seems to me that, although there is no consideration given for the covenant, it is not a binding covenant, because it would be contrary to public policy to allow a person in the position of trustee to enter into such a covenant so as to bind himself. And if the covenant is a void covenant, then what is the fetter which is put upon the exercise of the power of appointment, which has been delegated to the donee of the power? Under those circumstances there is no fetter at all, unless it be said that a bare promise which cannot be enforced, a moral obligation, as it is called, to keep a bare promise is such a fetter. Now the law, at all events, does not recognise that there is any fetter in a bare promise, and I can see none really; and if it be taken to be a bare promise and not an effective covenant, then I should absolutely agree with what Lord Justice James has before said, and which was adopted by Lord Hatherley, namely, that it would be far too great a strain to say that a bare promise is to be considered a fetter upon the power of appointment, because there would be a kind of moral obligation to keep the promise. I confess myself that I should think the morality of the thing was in favour of the breach of such a promise rather than in favour of keeping it. But assuming it to be so, I should think it would be stretching the doctrine a great deal too far; and the instances we were obliged to put to Mr. Davey in order to test that doctrine seem to me to shew that conclusively. Therefore, for those reasons, both upon principle and authority, it would seem to me that there is no objection to the exercise

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of the appointment because of the existence of the void covenant. It was suggested that by so holding we should destroy the effect of these powers of appointment. It seems to me to be just the contrary. We give them the greatest possible effect, because we say that no such covenant as this can prevent the exercise of the power of appointment; that is to say, that the person who has entered into such a covenant may, without any risk, exercise his discretion to the last day of his life. If such a covenant as this were held to be a release, then the former decisions with regard to releases might be a considerable difficulty in the way, but it seems to me that it cannot possibly be said that such a covenant as this is a release. As to the case of *Davies v. Huguenin* which is referred to in the judgment of Vice-Chancellor Kindersley, I confess that, as so stated by him, I have some difficulty in saying that I could entirely agree with the decision in that case; but it seems to me that even if *Davies v. Huguenin* were held to be wrong, that would have no effect upon the decision in this case.

With regard to the second point in this case, taken at a late moment, I think there can be no doubt that the suggestion, if true, would shew that the covenant was a fraudulent agreement between both parties to it, and fraud is never presumed by the Court: those who suggest it have to prove it.

COTTON, L.J.—I am of opinion that the decision of the Master of the Rolls is correct, and from what was read to us by Mr. Chitty, I think that our decision is also in accordance with the views of the Master of the Rolls; but whether that be so or not, I think that both on authority and principle the judgment that was given was right.

Now it was said that this was a fiduciary power, and that therefore the donee of the power was in the position of a trustee, and must be down to the time of his death absolutely unfettered.

Now I put it to Mr. Davey during the course of his argument how he could develop and define a fiduciary power, and I leave out entirely that kind of fiduciary

power (if it is so called, and it is sometimes) where from the form of the power given there is an implied gift in default of an express gift. But a fiduciary power in this case must be considered as a power which is sometimes said to be given to the person as a trustee. Now I think a great deal of inaccurate argument arises from expressions undeveloped and not explained, which may bear two senses. How can you say that a man is properly a trustee of a power? As I understand it, it means this in the words of Lord St. Leonards, that it must be fairly and honestly executed without having any ulterior object to be accomplished. A donee cannot carry into execution any indirect object, or acquire any benefit for himself directly or indirectly—that is, it is something given to him from which he is to derive no beneficial interest; in that sense he is a trustee, and he is liable to all the obligations of a trustee in this sense; he must not attempt to gain any indirect object by the execution of the power in a way which in form is good, but which is a mere mask for something that is bad. Now, here it is not suggested—well perhaps it is suggested—that it was in form an attempt to do something which could not be done. That can hardly be said to be so. It was an absolute gift by the donee of the power to his son, in effect, with a covenant or bond that he would not revoke the appointment in his favour; but there was no possible suggestion, with one exception, that the intention was in any way to benefit himself. It was done for his son; taking the whole transaction it was what he thought would be best for the interests of the son; and it is clearly the duty of a father, who has such a power, to do what on the whole he considers to be the best for the family amongst whom the property is, under the power, to be distributed.

Now there are two matters, no doubt, which I must deal with. It was said that the execution of the power by the will was to relieve the donee from the obligation which he contracted under the bond. I do not go so far as to give an opinion that the bond is absolutely bad. The question may hereafter arise, but I

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give no opinion upon that point at present. In one sense it is clearly bad, namely, that it cannot be construed as an exercise of a power of appointment, nor is it one that a Court of equity would specifically perform; but I do not give any opinion that it is one under which no relief could be sought by way of damages from the father's estate. But in reality the will was not executed in order to relieve him from the obligation. The obligation began after the will and the whole was one transaction, and if anything, it was a contract not to revoke his will which he had made; but, dealing with it only in that which may be said to be a narrow and subtle way, it is not every possible benefit to the donee of a power, arising from the exercise of it, which will make the execution of it bad. Mr. Davey went so far as to say, and I think his argument necessitated it, that a moral obligation on the part of a donee of a power would be sufficient to vitiate the exercise of a power, and I put to him such a point as this, than which I can conceive no stronger moral obligation: A man has no property of his own, but has a daughter who is going to marry. He says, "I cannot make you any present allowance or give you any present fortune, but I will see that you are provided for by my will." He has nothing but a power of appointment by will. Can it be fairly said, without straining the doctrine of this Court to an excess which makes it almost useless, that a will executed under those circumstances in favour of that daughter or her husband would not be a good execution of a power? To say so would be to defeat the very object of the power. No doubt it is in the power of the father at the time of his death to make or not to make the will, and to distribute the property in such proportions as he thinks fit; but no doubt there is a moral obligation of the strongest kind to make a provision for the daughter and the son-in-law in consequence of the circumstances under which the marriage took place. But then, to put a further case, suppose a father is surety for his son: if the son has got no money the father will be called upon to pay, but can it be said that an

appointment to the son under those circumstances is bad? The result indirectly will be that, instead of the father's own estate paying that debt, the son will pay out of money which he gets from the appointment; and one really must, as has been said already by Lord Justice James, and was laid down by Lord Hatherley, not strain too far the doctrine of this Court in order to vitiate exercises of a power which are done honestly and for the benefit, according to the best judgment of the donee, of the objects of the power, without any indirect motive so as to secure a benefit to the donee of the power. Of course if there is anything of that sort, anything corrupt, no appointment can possibly stand. So if there is any attempt to do what cannot be done, by means of the power, that is bad.

Here, no doubt, by the mere exercise of the power, no indefeasible interest could have been given to the son at the time, and it may be said that this therefore is an attempt to do indirectly what cannot be done directly; but there is the absolute appointment to the son as far as it can be made absolute, leaving him to deal with it as he thinks fit for his benefit; and it is not that the father deals with it by way of raising money, or deals with it under any contract or engagement that he makes, but as far as he can, leaving it by will to the son he puts him in the position of doing what the son thinks most for his interest, and what the father does not think for his disadvantage; but it is to the appointee and to him only that the father looks; and to enable him as far as he can, having regard to the nature of the power, to do what is most for his benefit and what is desirable. Now I have dealt with the question simply, without reference to the authorities, but when the authorities are looked at, this point comes before us as now settled, that such a covenant as this does not vitiate an appointment exercised in accordance with it. We have the decision of *Coffin v. Cooper*, before Vice-Chancellor Kindersley, carefully considered, where he, throwing aside what would be pushing the doctrine to an extreme, gave effect to the appointment, and held it not to be

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bad; and the point came again for decision, and was decided in the case before the Court of Appeal of *Bulleel v. Plummer*.

One word more as to why I hesitate to say that such a bond as this is void. It has been held that under certain circumstances such a bond, or one very like it, can be held to be a release of the power. If it is bad it must be bad *in toto*; and I am not satisfied that it can be good as a release of a power, and yet bad altogether as a covenant. At any rate, at the present time I give no opinion whether this covenant is in law bad, or whether under those circumstances it could be enforced against the assets, if there were any, of the donee.

Appeal dismissed with costs.

Solicitors—Burne & Hunt, for appellants; Last & Sons, for respondents.

[IN THE COURT OF APPEAL.]

JAMES, L.J.	}	GREAVES v. TOFIELD.
BAGGALLAY, L.J.		
BRAMWELL, L.J.		
1880.		
May 1, 2.		

Annuities charged on Land—Registration—Subsequent Incumbrancer with Notice—Priorities—18 & 19 Vict. c. 15. ss. 12, 15—Trustee in Bankruptcy.

Notwithstanding the 12th section of the Act, 18 & 19 Vict. c. 15, rent-charges and annuities charged on land for valuable consideration subsequent to the passing of that Act, though unregistered, are valid as against the trustee in bankruptcy of the grantor, and also as against subsequent incumbrancers and purchasers of the land who take with notice of such charges.

This was an appeal from the decision of the Master of the Rolls.

By deed dated the 8th of February, 1872, J. B. Greaves, jun., for valuable consideration, charged all the estate and interest to which he should become entitled by purchase as the person answer-

ing the description of heir-at-law of J. B. Greaves, sen., in the estates devised by the will of R. Brook, with the payment to the plaintiff, Sarah B. Greaves, during widowhood, of an annuity of 200*l.*, and with the payment to Charlotte B. Greaves, during widowhood, of an annuity of 500*l.*

The estates were mostly situate in the West Riding of Yorkshire, but some parts of them were in the East Riding. J. B. Greaves, jun., caused a memorial of the deed to be registered in the West Riding, but not in the East Riding, and did not cause a memorial of it to be registered at the Common Pleas pursuant to 18 & 19 Vict. c. 15. s. 12.

On the 17th of April, 1876, J. B. Greaves, jun., became heir-apparent to his father, J. B. Greaves, sen., and in 1877 mortgaged part of the estates by a deed which recited the annuity deed.

In June, 1878, J. B. Greaves, sen., died, and thereupon J. B. Greaves, jun., as the person answering the description of his heir-at-law, became entitled to the estate in fee-simple in possession.

J. B. Greaves, jun., executed several other mortgages of the property to different mortgagees, some of whom admitted whilst others denied notice of the annuity deed.

On the 23rd of December, 1878, he was adjudicated a bankrupt.

The annuitants then brought this action against the trustee of the will of J. Brook, the incumbrancers and the trustee in bankruptcy, claiming a declaration that the annuities were payable in priority to the incumbrances, and payment of the arrears and future instalments.

The Master of the Rolls held that the annuity deed, not having been registered pursuant to the Act 18 & 19 Vict. c. 15. s. 12, was invalid against all the incumbrancers, the question of notice or no notice being immaterial.

The plaintiffs appealed.

Mr. Ince and *Mr. G. O. Price*, for the appellants.—If these annuities are held void for non-registration it will be impossible in this case to return to the grantees the consideration that they gave for them as used to be done. In cases

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under the old Annuity Acts, the grantees could sue for a return of the consideration paid; here the deed was a deed of family arrangement under which a right of appeal was waived, and that could not now be restored. Then it is said that the policy of the Act 17 & 18 Vict. c. 15 is to negative notice, but we submit that under section 15, a purchaser with notice of our equity is bound, although it is not registered, and must take subject to it—

Whitworth v. Gaugain, 1 Ph. 728;
15 Law J. Rep. Chanc. 433.

The prior sections of the Act contain words expressly negating notice, but when you come to section 12 they are omitted. We submit that section does not omit those words *per incuriam*, but purposely, and that it must not be read as though they were implied. They also referred to

Tunstall v. Trappes, 3 Sim. 301;

Davis v. The Earl of Strathmore, 16 Ves. 419;

Ferguson v. Lomax, 2 Dru. & War. 120;

Ex parte Wright, 19 Ves. 255.

Mr. Chitty and Mr. V. E. Smith, for the respondents.—We admit that under the old Registry Acts it would be a fraud for a purchaser with notice of an equity to set up those statutes—

Le Neve v. Le Neve, 1 Ves. sen. 64.

But the question here is the construction of the Act 17 & 18 Vict. c. 15. s. 12. When the usury laws were abolished a purchaser of land had no opportunity of knowing whether any annuities or charges bound the land, and the Act 17 & 18 Vict. c. 12 was passed for that purpose and to enable him "to ascertain by search" whether any such charges existed, and relieved him from all notice, constructive or otherwise, of any equities affecting the land, unless such equities are registered. That we submit is the construction of the Act. The object of the Act was to put an end to the old doctrine of notice. It is not a question of notice or no notice, nor of fraud at all, but simply a question whether the annuities were registered. If the decision of the Master of the Rolls is reversed, not only the case of express notice, but the dangerous doctrine of con-

structive notice will be let in again—the evil which the Act intended to remedy.

Mr. Ingle Joyce, Mr. J. J. H. Humphreys and Mr. E. Martin, for other parties.

No reply was called for.

JAMES, L.J.—I am of opinion that this order of the Master of the Rolls ought not to be sustained. Now, the 12th section of the Act 18 & 19 Vict. c. 15 is expressed in the very words of one of the old Registry Acts, which are in substance the same as the other Registry Acts, providing for the security of purchasers and mortgagees. If an Act of Parliament uses the same language which was used in a former Act of Parliament referring to exactly the same subject, with the same purpose and for the same object, the safe rule of construction is to assume that the Legislature, using well-known words, upon which there have been well-known decisions, used those words in the sense which decisions had attached to them. In the case of *Le Neve v. Le Neve*, which turned upon the Middlesex Registry Act, Lord Hardwicke came to the conclusion that the protection which was meant to be afforded was a protection against secret incumbrances, and that it never could have been the intention of the Legislature to have put a man who had knowledge of a conveyance in the position of a man who was liable to be defrauded or injured by the existence of some secret dealings with the land. From that time, whatever expressions of doubt may have been used as to some of the language in the decisions, that has been the universal course of decision. In the case of *Davis v. Lord Strathmore* Lord Eldon states the principle in very clear language. It is this in substance, that those statutes did not affect or take away the jurisdiction of Courts of equity to enforce equitable rights depending upon contract; and in the case of contracts relating to land, as in all other contracts, equity enforced them, not only as against the man who entered into them, but as against his heirs and against volunteers under him, and exactly in the same way as against persons who took his estate with notice of the contract or trust or obliga-

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tion with which he had bound his estate. Lord Eldon pointed out in that case there was no altering the language of the Acts of Parliament; there was no dealing with or in any way repealing the Acts, directly or indirectly, but giving the Acts their full force—that is to say, leaving the estate to go in priority to the man who was registered, still, if that man had notice of anything which his vendor or his grantor had bound himself by, he was bound by it. I asked Mr. Chitty, in the course of the argument, whether he could contend that in any register county an agreement for a purchase, or an agreement for a lease, or a contract for an annuity, would be void as against the purchaser with notice of the contract. He was obliged to admit that it is every day's practice to enforce unregistered agreements relating to land even in register counties, and against persons who may have obtained conveyances which they registered, if they had notice of such prior contracts. Now, that having been the principle on which those decisions were pronounced, why is it that any different construction should be put on this 12th section of the Act in question, which is, in fact, almost as much a distinct and separate enactment as if it had been a separate Act, instead of being a section in chapter 15 of that year? Now, it is said that the policy of this Act of Parliament, following a similar policy in other Acts of Parliament, was to relieve purchasers, mortgagees and creditors from the difficulties arising out of the equitable doctrine as to notice. If the Legislature meant or thought that the equitable doctrine as to notice had been carried too far, or had been used in a manner likely to create more mischief than it was doing good (as to which I may perhaps have a strong opinion myself), it is for the Legislature to express and to give effect to that view by altering the law as to notice, and relieving persons still further than some of our recent decisions intended to relieve them from the mischief and inconvenience attending the doctrine of constructive notice. But I find no expression going to shew that notice is to be abolished in favour of annuities any more than

any other incumbrances. A purchaser, mortgagee or creditor is still liable to be affected by notice of any other incumbrances than an annuity; is still liable to be affected by notice of any agreement for a lease; by notice of any contract of any kind whatever, affecting the enjoyment of the land, such as the covenant in *Tulk v. Moxhay* (1); and I see no reason to suppose that the Legislature, leaving all the doctrine of notice still in existence as to all those classes of transactions and contracts, was making a distinct law and a distinct policy with regard to life annuities and rent-charges. Now it is said that you can gather such a policy from the Act itself, that several prior sections all say that certain things shall not affect the land “any notice notwithstanding.” Now, when you consider what the subjects are as to which those words are introduced, and contrast them with the particular subject of the 12th section, you see the plainest reason why the distinction should be made, and why these words should be left out. The subjects dealt with up to the 12th section are judgments, decrees or orders of some Court or other by which a creditor or other person has obtained *in invitum* a right to execution against the debtor's property. With regard to those the Act of Parliament says nobody shall be affected at law or in equity by any notice. It is for the judgment creditor to take care to complete his judgment or order, by taking the final steps and registering it; and, if he does not, the debtor is to be at liberty to deal with his land, just as he would the moment the writ was issued; that is to say, the debtor's conscience was not affected by any obligation to retain the property that it might be laid hold of by the creditors. But when you come to the 12th section, where you are dealing with matters not of legal process, but of contract—that is, life annuities and rent-charges—there you have exactly the same words which were used in the old Registry Acts, and upon which the construction to which I have referred was put, and you have the significant, and what appears to me to

(1) 11 Beav. 571; 2 Ph. 774; 1 Hall & Tw. 105; 18 Law J. Rep. Chanc. 83.

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be conclusive, expression of the opinion of the Legislature by the omission of the words "in equity," and of the words "any notice to the contrary notwithstanding." It seems to me impossible to explain the omission of those words in the 12th section, which had so frequently been repeated in former sections, except it was felt that they really had no proper application to the subject-matter of that section. I am of opinion that full effect can be given to every word in this section by saying that the annuity or rent-charge does not affect the lands, tenements or hereditaments—that is to say, does not create any legal incumbrance upon the "lands, tenements or hereditaments as to purchasers, mortgagees or creditors"—but that the equitable right of any person who can affect the conscience of the purchaser or the owner of the lands remains the same as if this Act had not been passed. I am of opinion that a purchaser or mortgagee is not exempted by this section from his liability to equitable proceedings to enforce a prior equitable right arising out of a contract for valuable consideration of which he had notice; and I hold, therefore, that as against the mortgagees who had notice, the annuitant is entitled in equity to have his annuity paid in preference to them. With regard to creditors, there seems to be some difficulty in knowing what creditors are meant in this section, because the recital refers only to purchasers, which would include mortgagees. I take it the word "creditors" must of course mean creditors who would, in some way or other, be affected; that is to say, creditors who would have some estate or interest or right in or to the land. Those might be judgment creditors who could of course take under the former decisions nothing but what was legally and equitably the property of the judgment debtor; and the only other class of creditors who, as it seems to me, could come in would be the creditors represented by the trustee in bankruptcy, and the trustee in bankruptcy is a person who (except under peculiar cases provided for by the bankruptcy law) can only take that which the debtor himself had. It is utterly impos-

sible, as it seems to me, to put the trustee in bankruptcy, who is the only person before us, in any better position, or on any higher footing, than the debtor himself. I am of opinion, therefore, that the proper way to answer the question before us is, that the annuitant is entitled to equitable priority over any purchaser or mortgagee having notice of his annuity and over the trustee in bankruptcy.

BAGGALLAY, L.J.—I am of the same opinion. Now I think it will be convenient to consider what the practice of the Court of equity was under the Registry Acts prior to the passing of the statute 18 & 19 Vict. c. 15. The earliest case to which we have been referred is *Le Neve v. Le Neve*, decided by Lord Hardwicke, and he put the case very shortly in this way: "The intent of the preamble of the Act was to secure subsequent purchasers and mortgagees against prior secret conveyances and fraudulent incumbrances, for the last of which there was no occasion to provide. The first means that a subsequent purchaser having registered should prevail against a prior secret conveyance of which he had no notice; but if he had notice of a prior conveyance for a valuable consideration which was vested properly, that is not a secret conveyance. The Act does not say that a subsequent purchaser shall be affected with no equity whatever; therefore, though its manifest operation is to vest the legal estate according to the prior registry, yet it is left open to all equity." Then he refers to cases arising under the Act for the enrolment of bargains and sales, shewing that the rule had always been "that an enrolment by a subsequent bargainee having notice of a prior bargain for valuable consideration (whether by actual agreement to pass immediately, or by articles) is not material; for he is equally affected with that notice as if his conveyance was by feoffment, or lease or release. So that the operation of equity in both those Acts is the same, and is reasonable, for it were strange that a conveyance in such form should exclude any equity, which would give an opportunity to take advantage of having the

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legal estate to commit fraud." He then proceeds to consider what prior cases under the Registry Acts there had been, and having referred to three or four of those decisions which turned on the Registry Act of Ireland, which was substantially the same as that of England, he says, "The ground on which all the cases went was, that taking the legal estate after notice of a prior right for valuable consideration was a fraud, and took away the *bona fides* of the second purchaser, making it *mala fides*." That was a recognised principle followed by Lord Eldon in the case of *Davis v. Lord Strathmore*, and by other cases. In *Davis v. Lord Strathmore* the question turned on an undocketed document. At that time the Annuity Act in force was the 17 Geo. 3. c. 26, and Lord Eldon says there, "This Court, particularly in cases upon the Annuity Act, has acknowledged the distinction between Acts of Parliament denying legal effect to certain instruments and declaring them void to all intents and purposes, collecting from the more extensive words the inference that the equitable as well as the legal jurisdiction was intended to be prohibited." The Act of 17 Geo. 3 was repealed by that of 53 Geo. 3. c. 141, and then the repeal of the later Act in 1853 gave rise to the introduction into the Act of 18 & 19 Vict. c. 15 of its 12th section. This 12th section has its own preamble. It says, "By reason of the repeal of the Act 53 Geo. 3. c. 141, purchasers are no longer able to ascertain by search what life annuities may have been granted by their vendors or others." Then it says, "Be it further enacted"—that is, for the remedy of that particular evil; and it provides that a memorial should be left with the senior master of the Court of Common Pleas, and, if not so left with him, that then the annuity should not affect any lands, tenements or hereditaments as to purchasers or creditors. I can see no reason why the same principle which has been recognised for so many years should not be continued to be applied to this section. I should have been of that opinion if we had had merely to consider the effect of the 12th section alone; but we find in other sections pro-

viding for the registering of certain memorials, judgments and orders, there is an express provision that those judgments or orders shall not affect the lands and hereditaments even if the subsequent purchaser, mortgagee or creditor, shall have notice of any such judgment decree or order, which excludes, as regards those three particular classes of cases, the exercise of that equitable jurisdiction which had been previously exercised. When we come to the 12th section we find no such exclusion of the doctrine; nor does it appear necessary, because, the sole object being to enable persons to ascertain whether there has been any previous annuity deed, that object is gained without search if the party can obtain the information in any other way. For these reasons I am of opinion that the appeal should be allowed.

BRAMWELL, L.J.—I also think that this appeal must be allowed. I think so with great doubt and the greatest reluctance; but it seems to me that the authorities are conclusive. I understand them to have established this, that if a man having an estate sells it or undertakes to grant an interest in it or a charge upon it for a valuable consideration and afterwards, disregarding the bargain he had made, conveys to a third person, or so deals with it by bargain with a third person that he is incompetent to convey the estate or grant the interest to the first which he had agreed to do, and the third person has all along notice of the first contract, the conscience of the second purchaser—that is, the second person who has entered into the bargain with the owner of the estate—cannot retain the estate without giving the first person who had entered into the first contract that right in it which he had stipulated for; and if necessary he must join in the conveyance of the estate, if the first person was a purchaser; or he must join in executing a charge, if it was a charge that was to be executed; or a lease, if it was a lease to be granted. Then I understand the authorities further shew this, that that principle is not affected by these Acts of Parliament which require registration in order to give or to prevent a

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priority, but that the conscience of the second person, as I have called him, is equally affected, and that the intention of the Legislature in such Acts as those I have referred to was to afford a protection to persons whose consciences were not affected, and not to give the second person whose conscience was affected an opportunity of joining in the commission of that which was a breach of contract and a wrong to the first person who made the bargain. That I understand is the principle that governs cases of this kind, and, if it does, I cannot see how it is not applicable to the present case; the more especially when we bear in mind that there are two sections which expressly say, "notwithstanding any notice," and that this is legislation *in pari materia* with the other statutes so construed, and is legislation after those decisions have taken place to which I have referred. It seems to me, therefore, that this appeal must be allowed; but I confess I do it, as I have said, with the greatest reluctance. I cannot but, with all submission, doubt very much whether, if A and B entered into an agreement with each other, and afterwards C entered into an agreement with one of them which was inconsistent with the first agreement, it would not have been a great deal better to let A and B fight it out, and take their remedies against each other, rather than bring in the third person; because, as I understand it, that third person may have been perfectly honest, he may have done his best to ascertain whether the prior contract existed and ought to be enforced, and may have come to the conclusion that it did not exist and could not be enforced; but notwithstanding that his conscience is said to be affected, and instead of buying what he thought, an estate without any difficulty at all, he finds himself let in for a lawsuit because somebody told him a heap of untruths which he was unfortunate enough to believe. That is the first thing that makes me feel reluctance in this matter, and I cannot help thinking that the Legislature in these Acts of Parliament, and especially in this one, intended to prevent the occurrence of what is to my mind the gross injustice of that which I have pointed out; and I

think that what the Legislature intended was this: Unless the man registers his annuity, you (a subsequent purchaser) shall not be troubled with any enquiry as to whether your conscience was affected or not. A place is pointed out where the annuitant may register his interest if he likes, and if he does not he must take the consequences of your getting a better title against him. I doubt very much whether the principle of Courts of equity ought to be extended to cases where registration is provided for by the statute. I do not know whether I have grasped the doctrines of equity correctly in this matter, but if I have they seem to me to be, as a good many others of them are, the result of a disregard of general principles and general rules in the endeavour to do justice more or less fanciful in certain particular cases.

Solicitors—Pilgrim & Phillips, agents for Smith, Hinde & Co., Sheffield, for plaintiffs; Peacock & Goddard; Cattarns, Jehu & Hughes; Ridsdale, Craddock & Co.; H. A. Maude; Johnson & Weatheralls, and Ashurst & Co., for the various defendants.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.

JAMES, L.J.

COTTON, L.J.

1880.

Nov. 4.

ATHILL v. ATHILL.

Mortgage of Freehold—Contemporaneous Mortgage of Leasehold to secure same Mortgage Debt—"Collateral" Security—Exoneration—Incidence of Mortgage Debt.

A mortgage of freeholds contained a recital that the mortgagees had "agreed to advance out of moneys belonging to them on a joint account the sum of 4,900*l.* on having the repayment of the same with interest secured as thereafter mentioned, and by a collateral security or indenture intended to bear even date with these presents, whereby it is intended that the mortgagor shall demise certain leasehold hereditaments to the mortgagees, and covenant with them for payment and other purposes as therein mentioned," but was in other respects in common form. The mortgage

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of the leaseholds, after reciting the mortgage of even date of the freeholds, and that "upon the treaty for the said advance it was agreed that the principal and interest should be further secured by these presents," was expressed to be "in consideration of the said sum of 4,900*l.* to the mortgagor advanced by the mortgagees out of moneys belonging to them on a joint account, and which sum is so secured by indenture of even date herewith as aforesaid," but was in other respects in common form.

The mortgagor died intestate:—

Held, that, as between his heir-at-law and next-of-kin, the mortgage debt of 4,900*l.* must be borne rateably by the freehold and leasehold properties according to their values.

This was an appeal from the decision of Hall, V.C., reported 49 Law J. Rep. Chanc. 821.

Mr. Graham Hastings and Mr. Beaumont, for the appellant, urged the same arguments as in the Court below, and cited the same authorities.

Mr. W. Pearson and Mr. Ward, for the respondent, were not called upon.

JESSEL, M.R.—This is an appeal from a decision of Vice-Chancellor Hall deciding that a mortgage debt is to be paid rateably out of two properties, one freehold and the other leasehold, belonging to an intestate. Now, of course, unless there is something to shew that the mortgage debt is to be paid primarily out of one of two properties, the conclusion follows that they are to contribute rateably; and the real question we have to decide is, whether there is anything in the deeds themselves, or in the nature of the transaction coupled with the contents of the deeds, to shew that the mortgage debt was intended to be thrown on one of the two properties to the exoneration of the other. Now in saying "intended to be thrown," I mean not actual intention, but the intendment or result as a legal consequence of what the parties did. There is no equity between real and personal representatives, and therefore if there really was a completed contract sufficiently evidenced between mortgagor and mortgagee that one of the two pro-

perties was to be a primary security, and the other a secondary or ancillary security, not to be resorted to until the primary security was exhausted, the legal consequence would follow that the first property—that is, the property the subject of the primary security—would have to bear the whole burden of the mortgage, if it was sufficient, before the other was resorted to, and that as between the real and personal representatives.

Now the whole argument really turns upon a very few words contained in the deeds creating the mortgage. The history of the transaction is very simple. The mortgagor, having freehold and leasehold property, wanted to borrow a sum of money by way of mortgage on the security of both properties. The proposed mortgagees happened to be trustees with powers of lending on mortgage of real securities, which powers they and their advisers considered were not sufficient to entitle them to lend on leasehold securities. It was suggested—though how such a suggestion came to be adopted by lawyers is not very easy to understand—that if the money was purported to be lent on the freehold security, and the leaseholds were taken as an additional or further security, there could be no objection even if the freehold security turned out to be insufficient; and it was in consequence of this suggestion being adopted by the legal advisers of the mortgagees, that the eventual arrangement carried out by the deeds was that the freeholds and leaseholds were separately mortgaged for the same sum. So much for the history of the transaction.

When we come to the terms of the deeds themselves we find this: There are two deeds of even date. The first is a deed between the mortgagor of the one part, and the mortgagees of the other part, which recites that "the mortgagees have agreed to advance out of moneys belonging to them upon a joint account to the mortgagor the sum of 4,900*l.*, on the mortgagees having the repayment of the same with interest secured as hereinafter mentioned, and by a collateral security or indenture intended to bear even date with, and made between the same parties as these presents, whereby

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it is intended that the said mortgagor shall demise certain leasehold hereditaments in Middleton Street East, Bethnal Green, and elsewhere in the said county of Middlesex, to the said mortgagees, and covenant with them for payment and other purposes as thereafter mentioned." Then there is a common mortgage of the freeholds for 4,900*l.*, and the ordinary covenants for payment with power of sale and covenants for title. Then we have the mortgage of even date between the same parties, which recites the leases under which the leasehold property was held, and then recites the mortgage of the freeholds in these terms: "Whereas by an indenture of even date herewith, and made between the same parties as these presents, the said mortgagor in consideration of the sum of 4,900*l.* by the said mortgagees out of moneys belonging to them upon a joint account advanced to the said mortgagor, conveyed and assured the freehold pieces or parcels of land, messuages and hereditaments in William Street, Martin Street and elsewhere, in the parish of Stratford, Essex, to the said mortgagees, their heirs and assigns, by way of mortgage to secure the repayment of the said sum of 4,900*l.*, and payment also of interest as in the reciting indenture mentioned, and the said reciting indenture contained all usual powers and covenants, including a power of sale; and whereas upon the treaty for the said advance it was agreed that the said principal and interest should be further secured by these presents." Then there is a common mortgage of the leaseholds for 4,900*l.*, followed by the usual clauses—a power of sale, covenants for title and so on. I think there is nothing more to be mentioned.

Now it is alleged on the part of the appellants that the use of the word "collateral" in the first deed, coupled with its use by indorsement (it appears to have been indorsed on the second deed), without anything further to shew an intention to make one property the primary security as contrasted with the other, is sufficient to make the freeholds the primary security for the 4,900*l.* to the exoneration of the leaseholds. Of course

the mortgagees might have contracted with the mortgagor that it should be a primary security, and that they could only resort to that in the first instance, but they have not done so. They had a clear right under the second deed if they thought fit to sell the leaseholds before selling the freeholds, and applying the money to the payment of the mortgage debt. There was nothing in the two securities themselves which was in the nature of primary and secondary at all. When you look at their terms, there was no obligation whatever upon the mortgagees to resort to the one security in priority to the other. There was no contract to that effect. Then why should we attribute to this word "collateral," which does not by itself necessarily mean "secondary," that meaning, when it is not so in the contract itself? Where a word, as it is admitted by the counsel for the appellant, is at all events susceptible of the strict meaning of "parallel" or "additional," why should it have one meaning rather than the other if the nature of the transaction does not require us to depart from its literal meaning? It appears to me there is nothing whatever in these securities to compel us to say that the word "collateral" means in this case "secondary," or that it was intended as a matter of bargain between the mortgagor and mortgagees that the mortgagees should first resort to the freeholds for repayment of the mortgage money before they could touch the leaseholds. That being so, it appears to me the conclusion at which the learned Vice-Chancellor arrived was undoubtedly correct, there being nothing to make the one security available in priority to the other, and that they should both contribute rateably. It only remains to say a word or two on the authorities. In the first place, there is no doubt upon the authorities that it is a question of construction, of course having regard to the nature of the transaction and the position of the parties and their dealings with the properties; but it is in fact asking us to infer, in the absence of express provision, that the mortgagor intended, as a consequence of his acts, that one estate should be resorted to before the other. I agree with

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the Vice-Chancellor that the practice of conveyancers, although it does not decide the point, is not wholly irrelevant. The practice of conveyancers undoubtedly is, as he has stated it, that where it is intended to throw the mortgage on one of two properties, or to regulate the incidence of the mortgage debt, as between real and personal representatives, to insert a provision to that effect, and the absence of such a proviso in clearly drawn deeds is, I think, a not wholly immaterial circumstance, though not in itself sufficient to decide the question, because undoubtedly where it is not expressed you can infer the intention from the circumstances to which I have already referred.

Now I do not intend to go through the cases which have been cited. I have done so to a very considerable extent in a reported decision of my own in *Leonino v. Leonino* (1), but I will say this, that they are no further a guide to another tribunal in deciding a case upon this subject than any cases of construction are a guide to a Court of construction on another instrument; that is to say, they help the Court in considering what the true meaning of words and phrases may be, but they lay down no absolute rule which prevents the Court of construction arriving at its own conclusion from the words used, irrespective of the actual authority of the decided cases not being decisions upon the same instruments or on the same words. Therefore, it is only necessary to say that there is no case which has been cited to us which really contains expressions like those used in the case before us, or which turned upon circumstances either identical or even nearly identical with the circumstances of this case. I think the appeal should be dismissed.

JAMES, L.J., and COTTON, L.J., expressed opinions to the same effect.

Solicitors—A. Crossfield, for appellant; Angell, Imbert-Terry & Page, for respondent.

[IN THE COURT OF APPEAL.]

JAMES, L.J.
BRETT, L.J.
COTTON, L.J. } VON HEYDEN v. NEUSTADT.
1880.
March 1, 2, 15.

Patent—Chemical Product—Want of Novelty—Prior Publication—Importation and Sale in England of Patented Article made Abroad by same Process—Infringement—Injunction.

Prior publication to be anticipation must give really the same full and sufficiently precise information which is required in a specification. Although an article has been produced by laboratory experiments and the fact has been recorded in chemical publications, that is no anticipation of a process by which a person for the first time produces the article in quantity, so that it becomes of practical and public utility, and is manufactured as an article of commerce.

The importation into and sale in England of a patented article that has been made abroad by the patented process is an infringement of the English patent, and will be restrained.

Elmslie v. Boursier (39 Law J. Rep. Chanc. 328; Law Rep. 9 Eq. 217); and *Wright v. Hitchcock* (39 Law J. Rep. Exch. 97; Law Rep. 5 Exch. 9), approved and followed on this point.

This was an appeal from the decision of Bacon, V.C., granting an injunction to restrain the defendants from selling in the United Kingdom any salicylic acid made according to the process for which the letters patent then vested in the plaintiff had been granted, or according to any process which was a colourable imitation thereof.

The letters patent under which the plaintiff claimed were granted in 1874, and the letters patent under which Neustadt, one of the defendants, claimed to make, import and sell in England salicylic acid were granted to him in England in 1877.

The defendants disputed the plaintiff's patent on the ground of prior publication and want of novelty, and also disputed the fact of the infringement.

(1) 48 Law J. Rep. Chanc. 217; Law Rep. 10 Ch. D. 460.

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The other material facts and the arguments are fully stated in the considered judgment of the Court.

The following cases were cited in the course of the argument:—

Hills v. Evans, 4 De Gex, F. & J. 288; 31 Law J. Rep. Chanc. 457;

Betts v. Neilson, 40 Law J. Rep. Chanc. 317; Law Rep. 5 E. & I.

App. 1;

Elmslie v. Boursier (*ubi supra*);

Wright v. Hitchcock (*ubi supra*).

The Attorney-General (Sir J. Holker) and Mr. Everitt, for the appellants.

Mr. Aston, Sir Henry Jackson and Mr. Macrory, for the respondent.

Our. adv. vult.

The judgment of the Court was now (March 15) delivered by

JAMES, L.J.—In this appeal, the defendants, the appellants, disputed the validity of the plaintiff's patent on the ground of want of novelty, and also contended that there was no sufficient evidence of infringement. Assuming the novelty to be established, it was not contended that the invention was not a useful one, nor that the specification was insufficient. Upon the specification some doubt was thrown out by the Court as to the meaning of part of the description of the process arising from the clumsiness of the grammatical construction of the sentence in the awkward use of the participles absolute, arising probably from its being either English written by a German, or an English translation of a German original. This, however, was not insisted on by the appellants' counsel, and it results from all the evidence of all the scientific witnesses on both sides that they had no difficulty in reading it, and did read it, in the sense alleged by the plaintiff's counsel, and we may therefore take it that it does contain sufficiently accurate instructions for all practical purposes. The specification begins with a statement, the accuracy of which is admitted by the scientific witnesses of the defendants, that when the patent was taken out salicylic acid was produced in two ways, either by introducing carbonic

acid into boiling carbolic acid, sodium being simultaneously dissolved in the latter, or by the employment of the expensive and not easily procurable oil of winter-green—the *gaultheria procumbens*. The specification then states in substance, reducing the language to its briefest terms, that the invention consists in effecting the production of salicylic acid by the action of carbonic acid gas on carbolic acid in the presence of an alkali, or alkaline earth, and doing this in large quantities, and at a great reduction in price. The words "in presence of an alkali," &c., refer to one of the most strange things in the chemical action of bodies on one another. It has been found that sometimes two bodies which have little or no action on each other are made active by the introduction of a third body, which is itself apparently perfectly inert and passive, neither effecting nor undergoing any change. And the principle which underlies the process patented by the plaintiff is this: carbonic acid has no effect on carbolic acid, but if a certain compound be made of carbolic acid and soda, and carbonic acid be introduced into this compound heated, then the carbonic acid immediately attacks not the soda, but the carbolic acid, the greater part of which it transmutes into salicylic acid, which remains in combination with the soda, so much of the carbolic acid as is not transmuted being disengaged and driven off. The patentee as to his *modus operandi* says in substance, "I take caustic soda, dissolve it in carbolic acid (183 degrees centigrade) until all the water and the greater part of the excess of carbolic acid are driven off (the same being preserved for future use); then I conduct a stream of dry carbonic acid gas into the retort and raise the heat to somewhat above 200 degrees centigrade; the entire mass will gradually become solid, and the operation is terminated when but little residual carbolic acid distils over. Or, instead of taking an excessive quantity of carbolic acid and dissolving the caustic soda in it, I take the two in exact chemical equivalents and combine them, and, by heating and agitation, get rid of all the water. The substance, dephlegmated as much as

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possible (by which we understand deprived of everything that can be called moisture—metaphorically, however, a phlegm), is to be transferred into a retort and treated with carbonic acid gas as above. The result, which is a salicylate of soda, I wash with water, and from it I precipitate the salicylic acid by hydrochloric or other suitable acid." This is the process, and there is no doubt that by means of it the whole of the carbolate of soda is converted into salicylate of soda, and that practically the whole of the salicylic acid is obtained from that compound. It is not disputed that this actual process had never been used, either in works or laboratory, for the production of salicylic acid, either for sale or for any other practical purpose or use whatsoever. Nor is it disputed that a product of great value, and previously very dear, is obtained by it most economically. By whomsoever the process was really discovered, it is one of singular beauty as a chemical operation, and of singular efficacy and utility as a manufacture. The article was quoted in 1868 at 13s. an ounce—it is now sold at 7s. 6d. a pound; and it has come into general use not only as a useful medicine, but as a powerful antiseptic. But it is contended that it is not novel, because it is anticipated by information given to the world in prior publications, being part of the common stock of knowledge possessed by the chemical portion of the public. The burden of proving this anticipation is on the defendants, and it must be made out very clearly in order to destroy the patent of a man who, at all events, was the first person who *de facto* produced the thing to the public practically in a working state. Now on that subject Lord Westbury held in the Court of Chancery in *Hille v. Evans*, and repeated and adhered to it in the House of Lords in *Betts v. Neilson*, that the anticipation contained in a prior publication must give really the same full and sufficiently precise information which is required in a specification. If it were necessary in this case we should be prepared to adhere to and act upon that view of the law. But what we have got in this case is not one clear statement by

one writer, but a mass of paragraphs exhumed by the industry of the defendants' advisers from a number of publications as follows:—

A letter of Professor Kolbe (who was himself the real author of the patented process) of the 17th of December, 1859, in the 113th vol. of the "*Annalen der Chemie*." A paper by himself and Lautemann in the 115th vol. His work on "*Organic Chemistry*," vol. i., published in 1855. The same work, vol. ii., published in 1861. "*A Manual of Organic Chemistry*," by a gentleman of the name of Kekule, published in 1867. "*A Treatise on Organic Chemistry*," by Gerhardt, in 1854. Laurent's "*Annales de Chimie*," date not given;—all but the first two being works not referred to in the defendants' particulars of objections, and therefore only discovered since the institution of this action.

We are of opinion, that if it requires this mosaic of extracts from annals and treatises, spread over a series of years, to prove the defendants' contention, that contention stands thereby self-condemned. As for annals, in particular the annual registers of science, one knows that in every country every year thousands of facts, or supposed facts, find their way into them—coming like shadows, so departing, without leaving any permanent trace behind them. And if it could even be shewn that a patentee had made his discovery of a consecutive process by studying, collating and applying a number of facts discriminated in the pages of such works, his diligent study of such works would as much entitle him to the character of an inventor as the diligent study of the works of nature would do. The same thing would, in our judgment, hold true if it were suggested, as it was suggested in this case, that the anticipating information was to be found in Kolbe's volume of 1855, Kolbe's of 1861, and Kekule's of 1867. We do not ourselves think that if you were to take all the extracts together as if they had been written in one consecutive paper, they would amount to anything like an anticipating either of the principle of the patented invention or of any process for applying it. Possibly a

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chemist, if he had thought of it, might have deduced from the statement that carbolic acid is partially converted into salicylic acid by dissolving sodium in it in the presence of a stream of carbonic acid, the chemical explanation of the fact that it was so produced because of the action of dry carbonic acid contained in anhydrous carbonate of soda, and guessed that anhydrous carbonate of soda might be wholly converted into salicylate of soda by passing a stream of dry carbonic acid gas over it. But then no chemist did think of making that deduction and guess and apply them. And the same observation may be made on the statement—"that ready-formed carbonate of soda is partially converted into salicylate of soda when heated in a stream of dry carbonic acid has been proved by experiment;" with this further note, that the writer evidently at that time had not ascertained or realised the important fact that the whole of the carbolate could be so converted. That statement is really the nearest approximation to the discovery actually patented, and seems to us conclusively to negative the theory of anticipation. It is imperfect and inaccurate, and the fact that that particular chemist, who was the only one who, in fact, knew anything about it, had, even in a laboratory experiment, obtained a success which he could only describe in that very qualified way, was not likely to lead a manufacturer or practical chemist to think of doing what is described in the specification. It would, on the contrary, effectually discourage any attempt in that direction. We have, in addition, this broad fact, that with all the knowledge supposed to be communicated by the chemical publications, no one did before the patent make an ounce of salicylic acid through the use of caustic soda, or by this or any other process make salicylic acid at any practical price for general use. It is suggested that the demand was so small as to account for this indifference of makers to the discovery. But there was a demand for the article. It was made for medical purposes. No apparatus was required (except a closed vessel such as is at hand in every chemical works and laboratory in

the world) for using the information which is supposed to have been communicated to the world that a cheap material could be more cheaply and effectually used than a dear one; and yet the instructed chemical world, engaged in this matter, continued to use the dear material instead of the cheap one. And there is another view of this. There was the whole class of chemical professors and lecturers and writers throughout the civilised world interested in and watching the progress of chemical science and art. It is certain that if any such information had reached the minds of any of them as is communicated by this specification, it would have been set forth with the fulness and detail due to so interesting a chemical phenomenon as this peculiar action of carbonic acid gas on carbolic acid in combination with a third body, and illustrated by an experiment so attractive as the patented process would have been if merely used as a lecture-room exhibition. One of the defendants' own witnesses, Mr. Dale, and his French friend, had been for years trying in vain to utilise carbolate of soda, which was the refuse produced in their dye works. We are satisfied, therefore, that the objection that there was a prior anticipation of the discovery has wholly failed. We believe entirely what the scientific witness, Dr. Armstrong, stated—that the discovery, the subject of the patent, took him entirely by surprise, although he had been a pupil of Kolbe's, and was conversant with what had been previously done by him in the matter. And it must be borne in mind that there is a great mass of scientific evidence to the like effect, preponderating, in our judgment, vastly over the counter evidence of the defendants. And on this it is to be noted that, when the issue is whether certain useful and sufficient information had been given to the public by certain scientific publications, the evidence of instructed and skilled men, conversant with the special literature, that no such information was, in fact, conveyed to their minds, is far more to the point than evidence of other like instructed and skilled men, who, speaking *post litem motam*, and with all the new light thrown on the subject,

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conclude now that the information was then sufficient. The whole may be summed up thus: No one, before the patentee, had ever practically or theoretically taught the world how to make, out of such abundant and cheap materials as soda, carbolic acid, carbonic acid gas and hydrochloric acid, the rare and expensive thing, salicylic acid. No one had ever before taught the world the simple and fruitful chemical truth, that all that was required to effect this wonderful transmutation was to make the carbonate of soda perfectly anhydrous and perfectly desiccated. We now come to the second part of the case. Is there evidence that the defendants have infringed the patent for the plaintiff's invention? The defendants admit that they have obtained the article which they sell by Neustadt's process as patented by him. Now, the only distinction between the one process as patented and the other is, that Neustadt begins with anhydrous carbolate of soda. Whether this would make any difference, even if his anhydrous carbolate of soda were made in some different manner from the plaintiff's, it is not material to enquire. But it may be worth noting in passing that at the time of the patent carbolate of soda was not an article of commerce. It existed in some works as worthless and intractable refuse, and with that exception it probably only existed in Kolbe's laboratory, or some like laboratory, in the minute quantities made for chemical investigation and experiment, and existed only to be destroyed in the course of such investigation and experiment. The witnesses for the plaintiff say that there is now no other practical mode of obtaining it than the plaintiff's, and that they have no doubt that it is so obtained. The defendants, who must have known how he obtains the materials, have given no evidence to the contrary. We are satisfied, therefore, that the evidence of the plaintiff's witnesses in this respect is accurate, and that the defendants have imitated and, in fact, adopted the plaintiff's invention. But in the course of the argument a doubt was suggested from the Bench whether, if a process is patented in England, and the patent is for the process only, and that process is

imitated abroad, the importation of the product from abroad and the sale of it here is an infringement of the patent. But it appears that very point was raised and decided by me, as Vice-Chancellor, in the case of *Elmslie v. Boursier* as far back as the year 1869, and that case was approved of, adopted and followed by the Court of Exchequer in the same year in the case of *Wright v. Hitchcock*. The latter case was, it is true, against the vendor of a product made in this realm. But that makes no difference in principle, which is that the mere vendor of such a product is an infringer. These cases have never been questioned. It is, of course, open to us as a Court of Appeal to reconsider, and, if satisfied that they were erroneous, to overrule the decisions of the two Courts of first instance. But we see no ground for dissenting from them. It is true that the statute of James (1) only mentions "the sale, working or making of any manner of new manufacture within this realm." But it is to be observed that that statute gives no right to the inventor. The statute is a statute for abolishing and forbidding monopolies, and the 6th section, under which the Crown acts in these matters, is a mere proviso excepting from the operation of that Act certain patents or grants of privileges which are to be "of such force as they should be if that Act had never been made, and of none other." And it is from the ancient power and prerogative of the Crown, so saved and preserved, that every patentee derives his monopoly. What the Crown could lawfully do, and has lawfully done, after that statute is shewn by the uniform tenor of the letters patent which have been since issued—issued by the advice and authority of every law officer and every holder of the Great Seal for upwards of two centuries and a-half. The power of the Crown to grant such letters patent of such tenor and their validity has never been brought in question, and such form of the letters patent has now been expressly authorised by the 15th and 16th Vict. c. 83. s. 54. Nor has there been any straining of the old statute in what

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has been so done and authorised. All that was required was to assume that, when the Crown's right to grant the sole privilege of working or making was saved, there was saved with it the power to make such privilege effectually profitable to the true inventor. The question, therefore, is to be determined by the true construction of the letters patent themselves. It was on that construction of the letters patent that the case of *Elmslie v. Boursier* was decided; and we see no reason to doubt the conclusion there arrived at that the sole right granted by the Crown "to make, use, exercise and vend the invention within the United Kingdom," and the right to have and enjoy "the whole profit, benefit, commodity and advantage accruing and arising by reason of the said invention," includes a monopoly of the sale in this country of products made according to the patented process, whether made in the realm or elsewhere. It may be added, the patent in another part expressly forbids any person directly or indirectly to make, use or put in practice the invention. A person who makes, or procures to be made, abroad, for sale in this country, and sells the product here is surely indirectly making, using and putting in practice the patented invention. Any other construction would, in fact, in the case of any really valuable invention of a process, render the whole privilege granted by the Crown futile. When the patent was an English patent only, an imitator would only have had to establish his factory or use the chemical process at Boulogne or Ostend, and he would effectually deprive the inventor of the "whole profit, benefit, commodity and advantage" of his invention; and, the more valuable the invention, the more certain it would be that the prohibition in the letters patent would be so indirectly avoided; that is to say, evaded. We are of opinion, therefore, and conclude that the plaintiff has established the validity of his patent, and the infringement of it, and that the appeal must be dismissed with costs.

Solicitors—Van Sandau & Cumming, for appellants; Lumley & Lumley, for respondent.

HALL, V.C. }
1880.
Dec. 17. }

In re SAVAGE'S TRUSTS.

Will—Construction—Direction to apply Share of Residue "as part of my residuary estate."

A testator, by his will, directed that his trustees should stand possessed of the residue of his estate upon trust, as to one-seventh part thereof, to invest the same, and pay the income to his daughter for life, and after her death to hold the same in trust for her child or children who should attain the age of twenty-one years; but if there should be no such child, then he directed his trustees "to apply the said share as part of his residuary estate." He afterwards declared trusts of the remaining six shares of his residuary estate.

F. survived the testator, but left no child who attained the age of twenty-one years:—

Held, that the share of F. was undisposed of by the will.

Humble v. Shore (7 Hare, 247; 1 Hem. & M. 550 n) and *Lightfoot v. Burstall* (1 Hem. & M. 546; 33 Law J. Rep. Chanc. 188) followed. *Crawshaw v. Crawshaw* (49 Law J. Rep. Chanc. 662; Law Rep. 14 Ch. D. 817) distinguished.

Petition.

Thomas Edward Savage, by his will dated the 29th of October, 1869, gave and devised his residuary real and personal estate to trustees upon trust, as to the real estate, to sell the same, and as to the personal estate to call in and convert into money such parts thereof as should not consist of money or Government securities, stocks or funds, and after declaring the trusts of two legacies for the benefit respectively of his wife and his daughter Elizabeth, he directed that his trustees should stand possessed of the residue of the said trust moneys, stocks, funds and securities upon trust, as to one-seventh part thereof, to invest the same and pay the income thereof to his daughter, Frances Boulding, the wife of John Frederick Cook, during her life, for her separate use, and after her death upon trust both as to capital and income for the child or children of his said daughter Frances who should live to attain the age of twenty-one years; but in case no child of

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his said daughter should live to attain the said age, he directed his trustees to apply the said share "as part of his residuary estate," and as to one other seventh part or share, upon trust, to invest the same, and apply the income thereof for the benefit of his granddaughter, Emma Boulding Savage, until she should attain the age of twenty-one years or die under that age, and upon her attaining such age to pay the capital of the said share to his said granddaughter; but in case his said granddaughter should die under the age of twenty-one years, he directed his trustees "to apply her said share as part of his residuary estate;" and as to the remaining five seventh shares of his residuary estate in trust for all and every his other five children, naming them.

The testator made three codicils to his will.

By the second codicil, dated the 21st of January, 1871, he directed his trustees to stand possessed of the share of his residuary estate bequeathed by his will to his son, Seth Holliday Savage, upon trust, during the life of his said son, to apply the income thereof in manner therein mentioned for the benefit of the said S. H. Savage and his wife, children and issue, and subject thereto in trust for the child or children of the said S. H. Savage who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry, and if no child of the said S. H. Savage, being a son, should attain that age, or being a daughter should attain that age or marry, then "in trust for the testator's other children in equal shares."

By the third codicil, dated the 31st of January, 1872, the testator revoked the bequest in favour of the said E. B. Savage, and in lieu thereof directed his trustees to invest a sum of 500*l.* and apply the income thereof for the benefit of the said E. B. Savage, till she attained the age of twenty-one years or died under that age, and upon her attaining that age to pay the said sum of 500*l.* to her; but in the event of her death under that age he directed the said sum of 500*l.* "to be applied as part of his residuary estate."

And he declared that his said will and three codicils should be read and construed as if the part or share of his residuary estate which his trustees were therein directed to stand possessed of for or for the benefit of each of his children had been one-sixth instead of one-seventh.

The testator died on the 6th of January, 1873, leaving a widow and seven children and his said granddaughter, E. B. Savage, surviving.

Frances Boulding Cook died in 1879, having had one child only, a daughter, who died in 1880, a spinster, and under the age of twenty-one years, and upon her death the question arose whether or not the share of the testator's residuary estate, bequeathed upon trust for the benefit of F. B. Cook, was disposed of by the will, and accordingly the trustees of the will, under the provisions of the Trustee Relief Act (10 & 11 Vict. c. 96), paid into Court the sum of 2,771*l.* 5*s.* 5*d.*, as representing the said share.

This was a petition by some of the residuary legatees named in the will, asking that the 2,771*l.* 5*s.* 5*d.* so paid in should be paid out to them.

Mr. W. Pearson and *Mr. Cadman Jones*, for the petitioners, submitted that this share of residue passed under the gift contained in the will, and was divisible among the testator's other children as residuary legatees. They relied upon

Crawshaw v. Crawshaw (*ubi supra*).

Mr. Robinson and *Mr. Dundas Gardiner*, for some of the next-of-kin, contended that the share was undisposed of by the will and codicils, and went, as to so much of it as was composed of real estate, to the testator's heir-at-law, and as to so much as was personalty to the testator's next-of-kin. They referred to

Humble v. Shore (*ubi supra*);

Lightfoot v. Burstall (*ubi supra*);

Sykes v. Sykes, 36 Law J. Rep. Chanc. 938; 37 *ibid.* 367; Law Rep. 4 Eq. 200; *Ibid.* 3 Chanc. 301;

and

In re Barker's Estate. *Hetherington v. Longrigg*, Law Rep. 15 Ch. D. 635.

Mr. Graham Hastings and *Mr. Borth-*

In re Savage's Trusts.

wick, for other respondents in the same interest, cited

In re Bevise's Trusts, 20 W.R. 359.

Mr. Hadley, for the trustees.

Mr. W. Pearson, in reply.

HALL, V.C.—I am unable to come to the conclusion that there are words in this will sufficient to constitute a gift over of the share of residue now in question. The *ratio decidendi* of *Humble v. Shore* and the other similar cases is that you must have some clear expression of meaning shewing that the testator intended to give the share of residue, the trusts of which have failed, to some person or persons other than the original donee; that there must be language to give that share to the persons who are entitled to the other shares. In language there is nothing of that kind here. Of course, a strict construction of the words used in this will would be absurd. The testator cannot have meant that this share was to go in exactly the same way as the residue, for that would include the particular share itself. Something, therefore, must be imported into the will, so as to exclude the trusts of that share, and to make it go as the other shares, in exclusion of that the trusts of which have failed. The trust here is to "apply the said share as part of my residuary estate." In *Humble v. Shore* and the other cases cited the words "sink into" or "fall into" the residue, or similar words, were used; and it was considered that where you have such language as that there is no disposition of the share, even though there may be words directing payment or application of the share. It is held that the words "sink into and form part of the residue" are in effect inoperative, and that the other words associated with them are not of themselves sufficient to carry the share undisposed of. The argument that those words are not sufficient, by reason of their association with the words "sink into and form part of the residue," but are sufficient if not so associated, is one which I cannot follow. It seems to me, on those decisions, that unless we can, upon a fair construction, discover a direction to pay and apply the particular share upon the

trusts declared of the other shares, there must be an intestacy. That was the conclusion I came to in *Hetherington v. Longrigg*, upon an examination of the cases which have been cited, and after referring to the decision of the Court of Appeal in the unreported case of *Homfray v. Darby*, where there was a direction that the share in question should "sink into and form part of the testator's residuary estate." All the cases were then considered by me. In *Humble v. Shore* there was a more express direction than is to be found here, because the words "and be applied accordingly" were superadded.

The Master of the Rolls in *Crawshaw v. Crawshaw* considered that the case then before him was distinguishable from *Humble v. Shore* and the other cases; but he fully admitted the authority of those cases, and that he was bound by them. In *Crawshaw v. Crawshaw* the codicil was the governing instrument, and the words were "paid and applied according to the trusts of my will." There was that distinction—we have not any similar words in the present case. The Master of the Rolls in the first part of his judgment said, "Here the words are not precisely similar to those in the cases which have been referred to." He made that observation, and he then commented unfavourably on the reasoning in *Humble v. Shore* and *Lightfoot v. Burstall*, and said that those decisions were founded simply on the ground that a direction that a share of residue should fall into the residue is mere surplusage, and means nothing more than that which the law would of itself imply. I cannot quite accede to that, because the observations and reasoning in which Vice-Chancellor Wigram deals with the words "be disposed of accordingly," which followed the words "sink into the residue," rather seem to shew that he did not base his judgment wholly on that ground; but, however that may be, the Master of the Rolls, in giving his judgment, said that the words in the case before him were different from those in *Humble v. Shore*, and considered that the words of gift before him were not mere surplusage. The

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reasoning in favour of the conclusion arrived at by the Master of the Rolls is more cogent if there are words pointing to a substantive disposition of the particular share, and here there are no such words. The Master of the Rolls compared the language of the wills in the previous cases with that of the will and codicil before him, and particularly with the words in the ultimate gift in the codicil, which, so far as I collect, operated so forcibly on his mind as to enable him to say that the true meaning was that the share was intended to go to persons other than those to whom it had originally been given; that is to say, that it was to go upon trusts other than and exclusive of the trust which had come to an end. I consider that the authorities which have been referred to are not materially distinguishable from the present case, and that, were I to decide otherwise, I should be making a distinction not generally approved and contrary to the views entertained by Vice-Chancellor Wigram in the case before him.

Certain expressions contained in this will and codicil have been commented upon in the argument as being favourable or unfavourable to the two views presented. With regard to the distinction attempted to be drawn between a gift of "residue" *simpliciter* and a gift of the "residue of the said trust moneys, stocks, funds and securities," I confess I am not able to appreciate it. It is too refined for me. It is also said that the codicils shew that the testator knew how to declare trusts for persons other than those in whose favour the original trusts of the share had been declared; and that if he had meant it, he could have said something to that effect in this case. That argument, so far as I see, is rather favourable to the view that there is an intestacy. I think that the omission here of the language which the testator has elsewhere used, rather shews that there was nothing reasonably clear and definite in his mind, and that, in fact, he did not understand the operation of the particular clause. I rather think that he had not in his mind any trust for a set of children exclusive of this particular child. The codicil in which he varies the gift to one child,

and directs that the residue is to be divided into sixths instead of sevenths, does not, I confess, seem to me to carry the argument any further on the one side or the other. There is nothing in the context or provisions of this will from which I can spell out anything to enable me to say that there is no intestacy. So far as I may rightly express my opinion, I should think it is a misfortune that this will was not so framed as to carry the share of residue; but I hold, according to the authorities, that it is not so framed. There must be a declaration that this share of residue is undisposed of, and enquiries to ascertain how much arises from real and how much from personal estate.

Solicitors—Swann & Co., for S. H. Savage; A. R. Oldman, agent for Caparn, Willders & Caparn, Holbeach, for the other parties.

MALINS, V.C. }
1880.
Dec. 3.

In re HILL'S TRUSTS.

Mortmain—Charity—Legacy consisting partly of the Proceeds of Sale of Land—Apportionment.

Josiah H. by his will gave all his real and personal estate to trustees, upon trust (after the death of A.) to convert the trust premises into money, and thereout to pay a legacy of 5,000l. to his brother, Jacob H.

Jacob H. by his will (in effect) bequeathed this legacy to charitable purposes. At the death of Jacob H., the legacy was still reversionary, and the real estate of the first testator had not been sold:—

Held, that the legacy did not fail entirely; but that there must be an apportionment, and that so much of the legacy as was payable out of pure personality was well given.

Petition.

Josiah Hill, by his will dated the 2nd of November, 1835, devised and bequeathed all his real and personal estate to trustees, upon trust at such times as they in their discretion should think

In re Hill's Trusts.

proper to sell and convert into money, to invest the proceeds, and to pay the income thereof to his daughter, Louisa Hill, during her life; and, after her decease, in case she should die leaving no children (which event happened), upon trust to convert the trust premises into money, and to dispose of the same (amongst other things) in payment of legacies of 3,000*l.* and 2,000*l.* to his brother, Jacob Hill.

Josiah Hill died in January, 1836. A suit was shortly afterwards instituted to administer his estate, in the course of which it was found that the value of the pure personal estate, at the time of his death, was about 15,000*l.*, and that the value of the real estate and the personal estate savouring of realty was about 3,000*l.*

Jacob Hill by his will dated the 12th day of March, 1858, after directing payment of his debts and legacies, gave (after the death of his niece, Louisa Hill) all his residuary personal estate to which he was, under the will of his late brother Josiah Hill or otherwise, entitled to his trustees. Upon trust to pay and transfer eight equal twelfth parts thereof unto certain persons therein mentioned, "and upon trust to pay and transfer unto the treasurer for the time being of each of the after-named charitable or religious institutions or societies—that is to say, 'The Incorporated Society for the Propagation of the Gospel in Foreign Parts,' 'The Church Missionary Society,' 'The Church Pastoral Aid Society,' and 'The Bristol Infirmary'—one equal twelfth part of such of his residuary personal estate as he was by law enabled so to give."

The testator, Jacob Hill, died in the year 1862, and his niece, Louisa Hill, in September, 1872. The whole of his personal estate, other than the amount derived under the will of his brother Josiah Hill, was exhausted in payment of his debts and legacies.

In the year 1874, pursuant to an order made in the administration suit, the real estate of Josiah Hill was sold. Under another order of the Court, the trustees of Jacob Hill's will had recently been paid a sum amounting (after deducting expenses) to 4,994*l.* 16*s.* 7*d.* in respect of

the two legacies of 3,000*l.* and 2,000*l.* The trustees divided this sum into twelve equal parts, paid eight of such parts to the several persons entitled thereto, and then paid the remaining four parts, amounting together to 1,664*l.* 18*s.* 8*d.*, into Court under the Trustee Relief Act.

This petition was now presented by the legal personal representative of Louisa Hill (the sole next-of-kin of Jacob Hill), claiming a declaration that the bequest in Jacob Hill's will to the four above-mentioned charities had failed, and that the fund in Court belonged to her, as legal personal representative of the sole next-of-kin.

Mr. Charles Browne, for the petition.—The fund in Court represents a legacy to four charities, payable partly out of the personalty and partly out of the proceeds of sale of the real estate of Josiah Hill.

[MALINS, V.C.—So far as it arises from the sale of land, it cannot be given to a charity.]

And there can be no apportionment so as to make that part of the legacy payable out of pure personalty available for the charitable bequest—

Brook v. Badley, 37 Law J. Rep. Chanc. 884; Law Rep. 3 Chanc. 672.

The legacy, therefore, wholly fails.

Mr. Horsburgh, for parties in the same interest.

Mr. John Pearson and *Mr. Dibdin*, for two of the charities.—In

Brook v. Badley (*ubi supra*) the legacy was treated as exclusively charged on land—see the judgment in the Court below, 36 Law J. Rep. Chanc. 741; Law Rep. 4 Eq. 106.

Here there is an express finding by the chief clerk that the amount of the pure personalty, at the death of Josiah Hill, was five times as much as the amount of the realty and impure personalty. So much of the legacy as is payable out of pure personalty is well given.

Mr. Maidlow and *Mr. Stock*, for the two other charities.

Mr. Charles Browne, in reply.—At the death of Jacob Hill the legacy was still reversionary. It still consisted of money to be produced by the sale of land, and

In re Hill's Trusts.

was, therefore, an interest in land within the Statute of Mortmain.

[MALINS, V.C., referred to his own decision in

Ashworth v. Munn, 47 Law J. Rep. Chanc. 747; affirmed on appeal, ante, p. 107; Law Rep. 15 Ch. D. 363.]

Brook v. Badley (*ubi supra*)

is an express decision that, whenever the legacy is charged on real estate—although the real estate may only represent a small portion of the testator's estate—the legacy fails entirely, and there cannot be an apportionment. He also referred to

Shadbolt v. Thornton, 17 Sim. 49; 18 Law J. Rep. Chanc. 392.

MALINS, V.C.—In this case the testator, Jacob Hill, was entitled to a legacy of 5,000*l.* under the will of his brother, Josiah Hill. This legacy was charged upon Josiah Hill's general estate, real and personal; and it appears, from the chief clerk's certificate, that his pure personal estate amounted to nearly 15,000*l.*, and that the impure personalty and realty was rather less than 3,000*l.*

Now the rule is very clear that whenever property consists of the proceeds of sale of real estate, or is charged upon real estate, it cannot be bequeathed to a charity; because, in either case, it is an interest in land within the Statute of Mortmain. For this reason it has been decided that the owner of a mortgage debt cannot give it, by his will, to a charity. In *Ashworth v. Munn* I held—and my decision was affirmed on appeal—that a partner in a mercantile firm could not give the proceeds of sale of his share of certain real estate, which was held as partnership property, to charitable uses, because it was an interest in land within the Statute of Mortmain.

But is there any reason why this legacy should not be given to a charity, so far as it is payable out of the pure personalty? I can see none. I am met by the decision of the Master of the Rolls in *Brook v. Badley*; but I cannot read that case without seeing that the decision proceeded upon the assumption that the legacy was wholly charged upon the land, else, why should there not have been an enquiry to

ascertain the relative values of the real and personal estate? The Lord Chancellor also, before whom that case came on appeal, evidently proceeded upon the ground that the legacy was wholly charged upon the land. For the purpose of my decision in the case now before me, I assume the decision in *Brook v. Badley* to be correct, and that in that case the legacy was wholly charged upon real estate sufficient to pay it. Now here the real estate is clearly insufficient to pay the legacy—the legacy can only be paid out of the real estate to the extent of about one-seventh.

I hold, therefore, that so far as the fund coming under Josiah Hill's will was derived from the proceeds of sale of real estate or from personalty savouring of realty, the legacies to the charities fail; but so far as they are derived from pure personalty they are well given; and there must be a declaration accordingly.

Solicitors—A. J. Day, for the petition; Surr, Gribble & Co.; Bridges, Sawtall & Co.; Nichol, Manisty & Co., and R. Smith & Wilmer, for respondents.

MALINS, V.C. }
1880.
Dec. 18.

In re STEWART.
CROWDER v. STEWART.

One of Three Executors—Retainer—32 & 33 Vict. c. 46.

The statute 32 & 33 Vict. c. 46 (which abolishes the distinction between specialty and simple contract debts in the administration of the estate of a deceased person) does not affect the executor's right of retainer.

Adjourned summons.

This was an application on the part of the defendants (the three executors of the late William Stewart, the testator in the action) that the defendant, Henry Bissill, as one of the executors, might be at liberty to retain in respect of a debt due to himself and another under a bond of the testator dated the 28th of July, 1879.

The action was brought by George Crowder, on behalf of himself and all

In re Stewart.

other the creditors of William Stewart, against his executors for the administration of his estate.

William Stewart was entitled to one-fifth share of the residue of the estate of his father, the late Charles Stewart. This estate was being administered in another branch of the Chancery Division, and a receiver had been appointed.

William Stewart died in November, 1879.

Mr. H. Bissill now-applied for leave to receive a sum of 186l., being the amount in the hands of the receiver, payable on account of income due to William Stewart's estate, in respect of his share of the residue of his father's estate; and to retain the same in respect of the above-mentioned debt.

Mr. Glasse and Mr. Bissill, for the summons.—The question is, whether this sum of 186l., now in the hands of the receiver, is legal assets, so as to give the executor the right of retainer. The real test whether an item of property ought or ought not to be considered legal assets is, whether an executor has a right to recover the same, "*merely virtute officii*;" and it does not matter that the property is of an equitable nature, or that the executor has to come to a Court of equity to recover it—

Eddis on Administration of Assets, p. 5;

Cook v. Gregson, 3 Drew. 547, 549; 25 Law J. Rep. Chanc. 706

(cited with approval in

Attorney-General v. Brunning, 8 H.L. 243; 30 Law J. Rep. Exch. 379).

An executor may retain not only for debts to which he is entitled beneficially, but also for those to which he is entitled as trustee—

Sander v. Heathfield, 44 Law J. Rep. Chanc. 113; Law Rep. 19 Eq. 21.

The right of retainer is a well-established right of the executor, which the Court will not attempt to curtail—

Richmond v. White, 48 Law J. Rep. Chanc. 798; Law Rep. 12 Ch. D. 361.

They also referred to

Boyd v. Brooks, 34 Beav. 7; affirmed Vol. 50.—CHANC.

on appeal, 34 Law J. Rep. Chanc. 605;

Re Campbell, Law Rep. W.N. 80, p. 199.

Mr. J. Pearson and Mr. Badcock, for the plaintiffs in the action, the general creditors.—We do not dispute the authority of

Cook v. Gregson (*ubi supra*);

Attorney-General v. Brunning (*ubi supra*);

or

Boyd v. Brooks (*ubi supra*);

but all these cases were decided prior to the passing of the Act of 32 & 33 Vict. c. 46, which abolishes the distinction between specialty and simple contract creditors in the administration of the assets of a deceased person. That Act has incidentally abolished the right of retainer; for, if not, an executor can now retain (by virtue of the Act) for a simple contract debt against a specialty debt, which he could not have done under the old law, and the indirect effect of the Act will be to extend the right of retainer.

[*Mr. Glasse* referred to

Kent v. Pickering, 2 Keen, 1; 6 Law J. Rep. Chanc. 375,

as shewing that one of two executors has a right to retain his own debt out of a balance due from both to the estate.]

Here the sum claimed is not yet in the possession of the three executors.

Mr. Glasse was not called upon to reply.

MALINS, V.C.—The point in this case is as to the right of one of three executors to exercise the right of retainer. William Stewart, the testator in the action, appointed three executors, of whom Mr. Henry Bissill is one. William Stewart's estate is entitled to receive a part of his father's personal estate; and whatever share of the father's estate would have been payable to William Stewart, if living, will now be paid to his three executors, and they will receive that share as part of the personal estate of their testator, William Stewart. Therefore this case will come strictly within the rule laid down by Vice-Chancellor Kindersley in *Cook v. Gregson*, that every item of property which the executor has recovered, or has a right to recover merely *virtute*

In re Stewart.

officii—which comes to him as executor—is legal assets. That being so, the right of retainer applies, and applies equally whether he be sole executor or whether he be one of three executors.

Here, if the money were to be now paid, it would come into the hands of the three executors; and Mr. Henry Bissill would be entitled to exercise his right of retainer, though the other two executors dissented. So that, apart from the effect of the recent statute, there is really no dispute in this case, because Mr. Pearson declined to argue the general question. And it is settled law, as I said in giving judgment in *Sander v. Heathfield*, that an executor may retain “not only for debts which he claims beneficially, but also for those to which he is entitled as trustee.” Therefore, under the old law, Mr. Henry Bissill would clearly have the right of retainer.

But then Mr. Pearson says that the law has been altered by the Act of 32 & 33 Vict. c. 46. I should be very glad indeed to concur in such a view, because I think that, in many cases, the exercise of the right of retainer works great injustice. It is said that this Act must be construed with reference to the mischief intended to be remedied. I quite agree. The Act contains a recital that “it is expedient to abolish the distinction as to priority of payment between specialty and simple contract debts of deceased persons”—that, and that alone, is the object of the Act; that distinction was, in my opinion, quite as absurd as the right of retainer. Now I must read this enactment as being consistent with its title, and with the express recital of its object. It enacts that, in the administration of the estate of a deceased person “no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed or other instrument under seal, or is otherwise made or constituted a specialty debt; but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree”—that is, equally as between specialty and simple contract creditors—“and be paid accordingly out of the assets of such deceased

person, whether such assets are legal or equitable.”

Then it is said, that if the words “in equal degree” simply mean equally as between specialty and simple contract creditors, the effect will be to extend the right of retainer; that the Act having abolished the distinction between specialty and simple contract creditors, the executor may now retain against all such creditors—which, if he were only a simple contract creditor, he could not do under the old law. That may be so; but I cannot hold that to be a ground for extending the operation of the statute so as to affect the right of retainer.

In my opinion the words “in equal degree” simply mean equally as between specialty and simple contract creditors; and the Act does not in the slightest degree interfere with the executor's right of retainer. I therefore come to the conclusion that Mr. Henry Bissill is entitled to the right he claims. It is said that he is claiming to retain as trustee; but, as I decided in *Sander v. Heathfield*, the mere fact of his being a trustee does not affect the question. The order will be as asked for by the summons.

At the close of the judgment Mr. Glasse referred to

Williams v. Williams, 42 Law J. Rep. Chanc. 158; Law Rep. 15 Eq. 270

(approved of in

Re Stubbs. Hanson v. Stubbs, 47 Law J. Rep. Chanc. 671; Law Rep. 8 Ch. D. 154);

as shewing that the Act of 32 & 33 Vict. c. 46, though it abolished the distinction between specialty and simple contract creditors, did not affect the priority of judgment creditors.

Solicitors—Jones, Blaxland & Son, for summons;
Crowder, Anstie & Vizard, for plaintiff.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.

COTTON, L.J.

LUSH, J.

1880.

Dec. 1.

SEEAR v. LAWSON.
CHATTERTON v. LAWSON.

Practice—Title of Action—Assignment of Plaintiff's Interest—Order to carry on Proceedings in Plaintiff's Name—Rules of Court, Order L. rules 3 and 4.

When there is a valid assignment pendente lite of the plaintiff's interest in the subject-matter of the action, and an order has been made that the assignee shall have liberty to carry on the proceedings in like manner as the plaintiff might have carried them on, the statement of claim should be amended by the insertion of the new in addition to the original title, and of averments shewing how the title of the original plaintiff has devolved upon the new plaintiff.

The order obtained under Order L. rule 4 corresponds to the old supplemental order, and all proceedings taken subsequently to it should be headed in both actions.

Adjourned summons on behalf of the defendant for an order that the title of this action might be altered and the statement of claim set aside as irregular, on the ground that Seear was not the real plaintiff in the action.

Seear was the trustee in bankruptcy of Benjamin Webster, and on the 4th of March commenced the present action for the purpose of setting aside a certain indenture of assignment by B. Webster to the defendant of the equity of redemption in the Adelphi Theatre and other property, and of obtaining a declaration that the indenture should stand as a security only for the money actually advanced.

On the 16th of March, 1880, Seear, in consideration of 2,000*l.*, assigned to H. W. Chatterton all his right and interest in the property forming the subject-matter of the action, and on the 23rd of April Chatterton obtained an order of course, giving him liberty to carry on the action and the proceedings therein in like manner as the same might have been

carried on by the plaintiff if he had not assigned his interest.

The defendant moved to discharge this order on the ground that the assignment *pendente lite* was illegal. Bacon, V.C., held that the assignment was not illegal, and dismissed the motion (49 Law J. Rep. Bankr. 69; Law Rep. 15 Ch. D. 426), and his decision was affirmed by the Court of Appeal (49 Law J. Rep. Bankr. 69; Law Rep. 15 Ch. D. 426).

A statement of claim was delivered, in which Seear was treated as the plaintiff; and, with the exception of the formal note at the foot stating the name of the solicitor by whom it was delivered, namely, H. W. Chatterton, there was no reference to the fact that Chatterton was the person now prosecuting the action.

The defendant accordingly issued the present summons.

Nov. 5, 1880.—The Vice-Chancellor held that no amendment was necessary, and dismissed the summons with costs.

The defendant appealed.

Sir H. M. Jackson and Mr. Grosvenor Woods, for the appellant.—We are here fighting a merely nominal plaintiff. All we ask is to have the real litigant before the Court; the title should be altered so that we may see who the real plaintiff is—

Johnson v. Thomas, 11 Beav. 501.

We want to deliver a counter-claim against Chatterton, who is the real plaintiff, and we cannot do so unless his name appears on the record. Order XVI. rule 13 enables a plaintiff to be added in any stage of the proceedings.

Mr. N. Higgins, Mr. Winslow and Mr. Terrell, for the plaintiff, cited Order L. rule 1, as shewing that the original action was still proceeding.

JESSEL, M.R.—This is a summons asking practically (and it has been so treated in argument) that the pleadings may be properly amended. That being so, it is necessary to consider what the proceedings were. Mr. Seear, as trustee of a bankrupt, claimed to redeem what he alleged was a mortgage—that is, he alleged that that which purported to be a sale out and out, was really a mortgage. He

Seear v. Lawson, App.

sold his rights to Mr. Chatterton; thereupon Chatterton, as assignee, could only prosecute the action in his own name, and he obtained a proper order at the Rolls in the form of the old supplemental decree entitling him to prosecute the action. What was the effect of that? It was, in fact, from that moment to make him the plaintiff in the action and to make the old defendant the defendant in the action; and the course, I suppose ever since supplemental decrees were heard of—at all events the course for centuries—has been, in all subsequent proceedings, to put in both titles—that is, the title of the original cause and the title of what used to be called the supplemental cause, which was formerly a new cause. Since the Judicature Act—as there is a provision in the rules that where there is no rule upon the subject the old practice shall prevail—that practice has always been adopted. There would have been before the Judicature Act a supplemental order obtained; that practice obtained when there was a real supplemental cause before the Judicature Act in the Court of Chancery, and in the Court of Common Law, when there was an order; and was continued, of course, under the Judicature Act, as the practice was not altered by the rules. Consequently every proceeding taken after the order at the Rolls should have been headed (as I see this motion is headed) in both causes. The statement of claim ought to have been headed in the same way to shew who the present plaintiff is, and it ought to have contained a statement shewing how the plaintiff got his title; and the proper order is no doubt to direct the plaintiff to amend by inserting a new or second title and also by adding such words as he may think proper to shew how his title is derived.

COTTON, L.J.—I am of the same opinion. The respondent here contends that his pleadings are in proper form. In my opinion they are not. What he wishes to do is to treat the supplemental order as if it were a power of attorney from Seear enabling him to use Seear's name in the action. It is not so: it is the old supplemental order now obtained in a

different way from that in which it was obtained before when it was necessary to file a supplemental bill in order to obtain it. By virtue of the supplemental order, Chatterton, the new plaintiff, not in the name of Seear, but in his own name, carries on the action, as Seear might have done if he had continued entitled to the property; and that being so there ought, according to the old-established practice, to be averments introduced by way of amendment, instead of by supplemental bill, as would show how the title, originally that of Seear, had devolved upon the now plaintiff, Chatterton. In my opinion, upon the matter of substance the defendant was right; possibly his summons was wrong in form, but as it has been resisted throughout upon the question of substance where he was right, in my opinion the costs ought to follow the result.

LUSH, J.—I am entirely of the same opinion.

Solicitors—G. S. & H. Brandon, for appellants;
H. W. Chatterton, in person.

[IN THE COURT OF APPEAL.]

JAMES, L.J.	}	LLOYD'S v. HARPER.
COTTON, L.J.		
LUSH, L.J.		
1880.		
Nov. 9, 12, 18.		

Guarantee—Construction of—Revocation of—Trustee.

A guarantee given to Lloyd's against all the engagements of H. in the capacity of an underwriting member, held to continue after notice of the death of the guarantor, to include liabilities not only to the members of Lloyd's, but also to strangers to Lloyd's, contracted at Lloyd's through subscribers, and to be enforceable for the benefit of such strangers by the committee of Lloyd's as trustees for all the persons interested under the policies underwritten by H.

Judgment of FRY, J., affirmed.

Guarantees given for one entire consider-

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ation—e.g. the granting of a lease; and guarantees for a consideration supplied from time to time and divisible—e.g. making advances and supplying goods—distinguished.

West v. Houghton (Law Rep. 4 C.P. D. 197) observed upon.

This was an appeal from a decision of Mr. Justice Fry, holding that a guarantee given by a father on the admission of his son as an underwriting member of Lloyd's was not determined by notice to the committee of Lloyd's of the death of the father.

The case is fully reported 49 Law J. Rep. Chanc. 219.

The guarantee was in the following words:—

"London: 69 Cornhill,
"19th May, 1863.

"To the Committee for
Managing the affairs of Lloyd's,
&c., &c.

"Gentlemen,—My son, Mr. Robert Henry Harper, being a candidate for admission to Lloyd's as an underwriting member, I beg to tender my guarantee on his behalf, and do hereby hold myself responsible for all his engagements in that capacity.

"I am, gentlemen,
"Yours obediently,
"Samuel Harper."

Mr. R. H. Harper was thereupon elected a member. He stopped payment in December, 1878, at which date there was due to the plaintiffs, Jones, Price & Co., insurance brokers, the sum of 134*l.* 8*s.* 5*d.*

Samuel Harper died on the 15th of September, 1876, having made the defendants his executors, who a few days afterwards gave notice of his death to the committee of Lloyd's.

The order made by Mr. Justice Fry contained a declaration "that according to the true construction of the said letter of guarantee the estate of the said Samuel Harper is liable to satisfy all engagements incurred by the defendant, Robert Henry Harper, as an underwriting member of Lloyd's, down to the 17th of December, 1878, the date of his suspension of payment, whether

such engagements were incurred to or with members or subscribers of Lloyd's or any other persons, or whether in the lifetime of the said Samuel Harper or after his death;" and an enquiry was directed on the footing of such declaration.

The defendants appealed.

Mr. M. Cookson and *Mr. Cracknall*, for the appellants, renewed the arguments used in the Court below—that on the true construction of the guarantee it did not extend to engagements with the outside world, but only to those with the society itself, such as the ordinary subscriptions, &c.; that in any event the guarantee, however extensive, was not perpetual, but was revoked, if not by the death of the guarantor itself, at all events by the notice of the death that had been given to the committee; and cited, in addition to those cited below,

Coulthart v. Clementson, 49 Law J. Rep. Q.B. 204; Law Rep. 5 Q.B. D. 42.

Previous to the case of

Bradbury v. Morgan, 1 Hurl. & C. 249; 31 Law J. Rep. Exch. 462,

it was the generally accepted idea that an authority like this was revoked by death.

Smith's Mercantile Law, 4th ed. p. 425;

Williams on Executors, 8th ed. p. 1777,

were referred to as shewing what was the generally received idea of revocation by death at the date when this guarantee was given.

They further contended that the committee of Lloyd's had sustained no loss, and could not consequently sue, or were only entitled to nominal damages—

West v. Houghton (*ubi supra*);

they being under no liability in respect of any underwriting engagements either to their own members or strangers.

The committee were not trustees for all the persons who entered into contracts with the underwriters, and no such case was made by the statement of claim. The test would be, could Lloyd's by bill in Chancery have been compelled by outside

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policy holders to allow their name to be used as plaintiffs.

The guarantee might extend so as to be for the benefit of those who entered Lloyd's as members, and who might be assumed to have known of the existence of it, but could not fairly be held to apply to the outside world who had no knowledge of its existence. There was no proof that such a guarantee was a known indispensable condition of election.

Lloyd's could not sue, they were not the assigns of the committee of 1863, with whom the contract was entered into. The committee of 1871, when Lloyd's Act was passed, were not the same as the committee in 1863, and it was the rights of the then committee that were vested in the society.

Mr. North and Mr. Millar were not called upon.

JAMES, L.J.—Mr. North, we have had an opportunity of considering this case since it was on before, and we will not trouble you.

The question is this: a gentleman of the name of Harper was minded to be introduced as a member of Lloyd's, as what was called an "underwriting member" of Lloyd's association; and, in accordance with the custom which had been introduced some years before and was in existence at that time, the committee, before they admitted him to that position, required a guarantee. His father, who was at that time, I believe, himself an underwriting member of Lloyd's, gave the guarantee to the committee in the following words: "My son, Robert Henry Harper, being a candidate for admission to Lloyd's as an underwriting member, I beg to tender my guarantee on his behalf, and I hereby hold myself responsible for all his engagements in that capacity."

The first question which was raised on this appeal before us was that upon the construction of that guarantee; the guarantee did not extend to any liability the son might come under to the outside world, but was limited to engagements which he might be under by way of indemnifying the society itself—the committee of trustees of the body—as a member, or what might be called an

internal club engagement. It appears to us impossible to put that construction on the guarantee. The words are "engagements in that capacity." In what capacity? In an underwriting capacity as an underwriting member. Nobody could doubt, as it seems to me, at the time—neither the committee nor Mr. Harper, the father, who gave the guarantee, nor the son—that what were meant to be guaranteed were the engagements he might enter into as underwriter with the outside world so as to prevent any default which would have redounded to the injury and discredit of the association. It is quite clear that the engagements were the engagements he should enter into as underwriter with all the world, who came there to deal with him in that character.

That being so, is there any limit in those cases? It was contended that it was limited by the death of the guarantor. It appears to me impossible to say that it was so limited. It is "all engagements entered into of that character." Whether the engagements were entered into before or after the death, it appears to me utterly impossible to say they were not engagements entered into by him "in that capacity."

The representatives of Mr. Harper are bound by Mr. Harper's guarantee just as if he had entered into a covenant to indemnify against the covenants of a lease. The guarantee was apparently unlimited. The question is, whether it was *de facto* determined by the death of the guarantor. In order to explain the contention that it was determined at the death of the guarantor, it was suggested that the guarantor could himself, in his lifetime, have revoked the guarantee, and that therefore it must be assumed that the death would have operated in the same manner; that is to say, we should assume that the executors, if they had done their duty, would have revoked the guarantee, and are to be put on the same footing as if the testator had exercised the option to determine the guarantee. Now the foundation of that contention appears to me utterly to fail. The testator, in my opinion, could not have determined the guarantee; and it is in

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that respect that the case differs essentially from the case before Mr. Justice Bowen, following the case before the Master of the Rolls, with regard to the effect of death determining the guarantee. In those cases there is this distinction—whether that is sufficient to sustain them or not—the decision in those cases is that each advance of goods was a separate consideration. It might be considered very equitable and right that where a man is not under any obligation to make advances or to sell further goods, that the guarantor might say, “No, do not make any further advances or sell any further goods: I give you warning that you are not to rely upon my guarantee for any further advances or for any further goods.” That might be in many cases a very equitable view to take of the rule. It perhaps might be hardly equitable for a banker or merchant to be allowed to go on making advances without receiving the distinct notice from the guarantor that he was not further liable. But here the consideration is given once for all, just as in the case of the sale of pure property, or in the case of the lease of a leasehold property. If you are admitted to the *status* of an underwriting member, I will guarantee all your engagements. The moment he was admitted to that *status*, it was irrevocable until he had done some act which had brought him within the rules. If the testator could at any time have determined the guarantee, he could have determined it the next day. If at the moment his son was admitted to the *status* of an underwriting member with all its privileges he had said, “Now observe, I withdraw the guarantee,” then the guarantee would have been utterly futile and idle. If it could not be determined by him the next day, there would be no period of time at which it could be said to be within his power of determining it. That being so, it appears to me his estate is still liable for all the engagements which his son entered into with the persons who effected the policies of insurance with him.

Then the only other point was one which was rather of a technical character. The defendants said, “Oh, you cannot sue, because you are the committee of Lloyd's,

and are now representing Lloyd's; you have sustained no loss, and you can only recover nominal damages, because you could only recover for your own loss, and you cannot recover for the losses sustained by other persons.” The answer to that is, that that might be true in the case where they were not trustees. I am of opinion that Mr. Justice Fry was well warranted in the conclusion he arrived at, that the engagement was made with the committee as trustees for and on behalf of the persons beneficially interested. That brings it therefore within the cases, of which there are more than one, namely, the case before Sir William Grant—*Gregory v. Williams* (1)—and before the Court of Queen's Bench, in the time of Lord Tenterden—*Calvert v. Gordon* (2)—and many other cases which proceed on an obvious principle that if A is trustee for B, A can sue on behalf of B. It is a very common case where a person effects a policy of insurance with a broker on behalf of the persons interested; it is one of the common forms of policy of Lloyd's itself and nobody ever supposed that a broker could not sue on such a policy for the benefit of the persons interested. It appears to me, therefore, that that contention fails.

Then it was said, “But Lloyd's cannot sue, because they were not the persons with whom the contract was made.” But the Act of Parliament has transferred to Lloyd's, as a corporation, all the engagements which were entered into with the committee or any person on their behalf. It is said they only applied to the committee at the time the Act was passed; but the old committee, or whatever the body was in which that right was vested, were the persons in whom the right was vested on behalf of the new committee, and as it appears to me, according to the plain meaning of the section of the Act of Parliament to which our attention was called, it was transferred to, and vested in the corporation, as the successor of the managing bodies which existed before the corporation. Therefore, it appears to me that

(1) 3 Mer. 582.

(2) 3 Man. & Ry. 124; 7 Law J. Rep. (o.s.) K.B. 77.

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every contention on the part of the respondent has failed, and that the decree of Mr. Justice Fry must be affirmed with costs.

COTTON, L.J. — I am of the same opinion. The last point mentioned by Lord Justice James, if it was a good one, went entirely to the root of the action, namely, that the plaintiffs could not sue at all, because the right under the guarantee was not vested in them. But the 4th section of the Act of Parliament, which incorporated the present Lloyd's association, contains these words: "All property and right, of or to which the committee for managing the affairs of Lloyd's, or any person on their behalf, are or is possessed or entitled in title of law, shall be transferred to the corporation." Now, although the committee at the time this guarantee was entered into were not the committee at the time the Act was passed, the surviving members had this right of action vested in them on behalf of the then committee, and therefore that right of suing under this guarantee became vested in the plaintiffs, Lloyd's.

Now what is the right? The first point which one must consider is the point of construction. Well, really there is hardly anything to be added upon that. There were two sets of members of Lloyd's, underwriting and subscribing members. Here the guarantee recites or states that the son proposes or desires to be admitted as an underwriting member, and it is a guarantee "for all his engagements in that capacity." It was said that that was limited and confined to his engagements with members of the society, but there is nothing so to limit it. It is "all his engagements as an underwriting member in the capacity of an underwriting member," and not "his engagements on the policies which he underwrote as an underwriting member of Lloyd's."

I think it was put in another way, which partly deals with another objection. It was said that it was a contract only with a committee managing the affairs of Lloyd's, because it is only an engagement with them, and it is only a guaranteeing

of his engagements with that committee. But—and this is material on another point—the committee were, in my opinion, obtaining this guarantee not only on their own behalf (for, of course, this guarantee would cover all engagements with them made by Mr. Harper as an underwriting member), but it was obtained by them for the benefit of all those with whom Mr. Harper, junior, should enter into contracts of insurance; and that being so, you cannot possibly limit the words here by simply confining them to engagements with the managing committee of Lloyd's.

I will take the question of damages next. It is said here that, assuming they can sue, and that this guarantee does apply to these engagements of underwriting, yet the plaintiffs can get nominal damages only. That is answered by this, that the plaintiffs are suing here for the benefit of themselves, as trustees for all those with whom this Mr. Harper entered into contracts of insurance. That has been supported by the cases which have been referred to in the judgment of Mr. Justice Fry, the case of *Gregory v. Williams* (3), before Sir William Grant, and the older case of *Tomlinson v. Gill* (4), before Lord Hardwicke. Here, in the note to the 3rd Merivale, I see that in the case before Lord Hardwicke the plaintiff was a creditor apparently suing on behalf of himself and all the creditors, and he put it upon the ground that the person with whom the contract is entered into must be treated as a trustee for all the creditors, and that therefore the *cestuis que trust* could sue in equity. Lord Hardwicke is represented to say, "The plaintiff is proper for relief here for two reasons. He could not maintain an action at law if the promise was made to the widow, but he is proper here, for the promise was for the benefit of the creditors, and the widow is a trustee for them." The principle is, I think, a good and sound one, and one upon which we can properly act, and are bound to act in the present case, treating the plaintiffs, Lloyd's, as trustees for those with whom the contract was entered into.

(3) 3 Mer. 582, 590 n.

(4) Amb. 330.

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Now there is only one other point, and that partly turns upon the construction of this document, and partly on what was said to be the law as regards guarantees. It was said that this was determinable, and determined, by notice of death of Mr. Harper, senior. In my opinion that cannot prevail. When one looks at the contract itself, it is in its terms entirely unlimited as regards the time during which the engagements guaranteed were to be entered into. It is a guarantee given in consideration of an act once for all done by the persons to whom the guarantee was given; that is to say, it was a guarantee given in the event of Lloyd's admitting the son into their association. That is a thing which is done once for all, and even if the guarantee was recalled, or put an end to, he could not, under any of the rules of Lloyd's, be turned out of that association, and, in my opinion, if the guarantee did come to an end or fail, it is a matter not provided for by the rules, and they could not say you ceased to be a member of Lloyd's. In fact, as was stated to us, at that time there was not a universal practice that there should be that guarantee.

Now, how is it said to be determined by notice of death? It is said that the authorities have established this, that where there was a continuing guarantee for advances from time to time to be made to another person, that then that could be determined by the guarantor during his life, and that by notice of the death of the guarantor it was put an end to. I give no opinion upon how far that is a correct statement of the law, because the case may come before the Court of Appeal, and I wish to be entirely unfettered by what I say in a case where the point does not arise; but, assuming that is the law, it comes to this, that assuming there is such a guarantee as that, it is that the advances are made at the request given either once for all, or presumably from time to time, by the parties who give the guarantee; and that being so, before any advance is made, the person giving the guarantee may by saying that he withdraws the guarantee, say also, I no longer request you to make any advance. Therefore, it is only a guarantee

for advances made at his request, and if he makes no request, there is no liability under the guarantee. It may be—although I give no opinion upon it—that death, and notice of death, is sufficient to withdraw the guarantee for a person making further advances. However, that will have no application where the consideration given by Lloyd's committee was once for all admitting the son into this association. That was done once for all, and when that was done there was no power on the part of Mr. Harper, who gave the guarantee in consideration of their admitting him, to withdraw from the contract he had so entered into to be answerable for all engagements entered into by his son as an underwriting member. In my opinion none of the objections can prevail, and this appeal must be dismissed.

LUSH, L.J.—The primary and substantial ground of defence put forward here is, that the guarantee given by Mr. Samuel Harper as one consideration that his son should be admitted as an underwriting member of Lloyd's, expired with his death, or notice of the death being communicated to the committee. That is the primary and substantial ground of defence put forward in the statement of defence. Now it will be found, I think, that guarantees for the purpose of this case may be divided into two classes—the one in which the consideration is entire, and the other in which the consideration is fragmentary, supplied from time to time, and therefore divisible. An instance of the first is where a person enters into a guarantee that in consideration that the lessor will grant a lease to a third person he will be answerable for the performance of the covenants. The moment the lease is granted there is nothing more for the lessor to do, and such a guarantee as that of necessity runs on throughout the duration of the lease. In its very terms the lease was intended to be a guaranteed lease, and such as that it is impossible to say the guarantor could put an end to it at his pleasure, or that it could be put an end to by his death contrary to the manifest intention of the parties. Another illustration of it is

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found in the case quoted in the course of this argument, and upon which Mr. Justice Fry relied, of *Calvert v. Gordon* (2), which is one of a precisely similar kind. There the defendant, in consideration that the plaintiff would take into his service a given individual as collector and clerk in a responsible position, guaranteed that he would be answerable for his fidelity as long as he continued in that service. It was rightly held, I think, by the Court of Queen's Bench that that guarantee could not be put an end to as long as the service continued. The consideration there was, admitting the young man into the service of the plaintiff in that capacity; and that being done, it was to be a guaranteed service as long as he remained there. That therefore necessarily continued until the service ended.

Now instances of the second class are more familiar. They are where a guarantee is given to secure the balance of a running account at a banker's, or a balance of a running account for goods supplied. There the consideration is supplied from time to time, and it is reasonable there to hold, unless the guarantee stipulates to the contrary, that the guarantor may at any time terminate the guarantee. He remains answerable for all the advances made, for all the goods supplied upon his guarantee before the notice of its determination, but at any time he may say, I put a stop to this; I do not intend to be answerable any further, therefore do not make any more advances or supply any more goods upon my guarantee. As at present advised, I think it quite competent for a person to do that, where, as I have said, the guarantee is for advances or goods, and where nothing is said in the guarantee about how long it is to endure. In that case, as at present advised—I cannot myself entertain a doubt about it—the judgment of Mr. Justice Bowen in *Coulthart v. Clementson* is perfectly right, that notice of the death of the guarantor is a notice to terminate the guarantee, and has the same effect as a notice given in the lifetime of the guarantor that he would put an end to it.

Now the question is, To which class does the guarantee in question here

belong? Mr. Harper was to be admitted an underwriting member at Lloyd's. At that time Lloyd's was not an incorporated body, but the by-laws then made no provision whatever for Lloyd's expelling an underwriting member when once admitted, except for some default or crime of his own; there was not a word about guarantee, and the Act which incorporates Lloyd's in 1871 itself specifies the contingencies upon which members may be expelled, and every one of them is for some act or default of the underwriting member himself.

The Act authorises the society to admit a member upon any terms they think proper, but it does not authorise them to expel a member when once admitted, except, as I have said, for the specified defaults or misdeeds enumerated in the Act; and the Act expressly says that no by-laws shall be made by the society providing for exclusion from membership of the society in any case. It followed, therefore, that as soon as this young gentleman was admitted, even in 1863, under the by-laws then existing, as an underwriting member, until by some act or default of his own he forfeited his right to that position, the withdrawing of the guarantee would not alter his *status* there. They could not turn him out, and that enables one to put a meaning upon the guarantee. The guarantee says—[reads it].

They had no power to put an end to his underwriting until he had by some act forfeited his right to continue as a member. Of necessity, therefore, the guarantee must endure as long as he continued an underwriting member, because the manifest intention of the parties was, that all his engagements as an underwriter should be guaranteed engagements. Therefore, I come myself to the conclusion, without a particle of doubt, that this was a guarantee which the guarantor himself could not put an end to, and which, consequently, was not put an end to by his death, but that it must endure as long as the *status* of Robert Henry Harper as an underwriting member continued.

Then the next question, which is a very important and substantial one, no

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doubt is, that Lloyd's having sustained no damage themselves could not recover for the losses sustained by the underwriters by reason of the default of Robert Henry Harper as an underwriter. Now that to my mind is a startling and an alarming doctrine, and a novelty; because I consider it to be an established rule of law, that where a contract is made with A for the benefit of B, A can sue on the contract for the benefit of B, and recover all that B could have recovered if the contract had been made with B himself. The books afford innumerable instances of the application of the doctrine, and go further than the case referred to by Lord Justice James. Lloyd's policies from the time that Lloyd's was established have been always made in the name of the insurance broker on printed forms. The broker insures for the benefit of all whom it may concern, and the broker can bring an action, and is the person to sue and recover according to the interest of the parties. Further, the person who employed him has a right, if he pleases, to take action himself and sue upon the contract made by the broker for the principal, but if the assured sells the subject-matter of the policy with the benefit of the policy, his vendee cannot sue, because he was not a party to the contract. But the assured, the assignor, may sue upon the policy for the benefit of the person to whom he assigned it. That is the doctrine which runs through the whole of our law. I confess I heard the point pressed with something like surprise. I have not the slightest doubt that in this case Lloyd's could recover. The very object of making them the parties to the contract was, that they should recover for the benefit of all the persons who had sustained losses upon the default of Robert Henry Harper.

Then there were other questions which were hardly, I think, seriously pressed. It was argued that "all" engagements here did not mean engagements as an underwriter, although the words are, "all his engagements in that capacity"—that is, the capacity of an underwriter—but that the words only meant the obligations which every member incurs, namely, to pay dues and subscriptions, and so on, to

the committee. I do not think that needs any further answer than that which has been given to it in the course of the argument.

There is this one other point as to the right of the corporation of Lloyd's to sue. I think what Lord Justice Cotton has already said, referring to the terms of the Act of Parliament, is enough to make it to my mind perfectly clear, that all the rights of action which were vested at the time the Act passed in Lloyd's committee, or in the survivors of the committee—those gentlemen who formed the committee when this contract was made—passed over to the body corporate, and that they have a right to bring an action.

I think, therefore, on every ground the judgment of Mr. Justice Fry ought to be affirmed.

JAMES, L.J.—I entertain great doubts as to the correctness of the decision in the case of *West v. Houghton*.

LUSH, L.J.—So do I.

Solicitors—F. C. Greenfield, for appellant
Waltons, Bubb & Walton, for respondents.

JESSEL, M.R. }

1877.

Nov. 6, 8, 22,
26, 27, 28. }

WILLIAMSON v. BARBOUR.

Commission Agent—Opening Settled Accounts—Liberty to Surcharge and Falsify—Fraudulent Overcharges—Partnership—Knowledge of Principal.

The Court, instead of giving liberty to surcharge and falsify, opens accounts, although extending over a great number of years, and closed for a long period—First, where errors are shewn in them to a considerable extent both in amount and in the number of items; second, where, assuming fiduciary relations to exist between the parties, errors to a less considerable extent

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are shewn; or, third, where, the fiduciary relation existing, one or more fraudulent insertions or omissions in the account are shewn.

A fraudulent overcharge is an overcharge deliberately made which the man making it must know to be an overcharge.

An agent cannot turn himself into a principal without full and fair disclosure.

This was an action by Williamson, Brothers & Co., a firm of merchants in Calcutta, against the defendants, who carried on business at Manchester as merchants and commission agents.

The defendants acted as commission agents for the plaintiffs under an arrangement made in the year 1850, between Williamson, Heriot & Co., of Calcutta (the then name of the firm), and the defendants, that the defendants' Manchester firm should act as agents for them for the purchase and shipment of Manchester goods upon the terms then agreed upon.

These terms, as subsequently modified, were agreed upon between the firms of Williamson, Brothers & Co. and the defendants, and were embodied in letters between the parties, and had been acted upon for many years. The plaintiffs alleged that these terms allowed for a commission which was meant to cover all the defendants' profit in respect of the agency.

The suit was brought for the purpose of opening, as against the defendants, the accounts which had been settled in respect of the agency from the year 1853 until shortly before the commencement of the suit in 1872.

The defendants had, however, lost or destroyed in the ordinary course of business their books previous to 1860, and as they could not be produced, the evidence was limited to the period from 1860 to 1872.

The plaintiffs by their bill alleged that the defendants had during the whole period of their agency made false charges in their invoices; that the defendants when they purchased goods had in their account debited the plaintiffs with more than the prices they had themselves paid; that they did not credit the plaintiffs with the discount they had themselves received; that on the purchase of

grey goods (which were bleached and sold as white goods) they did not allow the plaintiffs the discount they had received from the bleacher as well as from the vendor, but also added a sum over and above the gross charge for the bleaching as a separate profit for themselves, with which they did not credit the plaintiffs; that they often supplied goods to the plaintiffs which they had bought before, in anticipation of an order from the plaintiffs, and that they charged them to the plaintiffs at what they called the market price of the day; that when they supplied packing-cases and tins, which were charged at a high nominal amount (but in respect of which large discounts of thirty or forty or fifty per cent. were allowed to the defendants by the makers), they did not credit the plaintiffs with this discount; that being ordered by the plaintiffs to insure the goods sent to India in some good public office, they often did not do so at all, sending them at their own risk, or else only insured to an amount smaller than that represented to the plaintiffs, at the same time charging the plaintiffs with the premiums for the full amount, which were often higher than would have been charged by the office.

They also alleged that they often paid the defendants by transmitting bills, and interest was charged on both sides of the account—the Manchester house when it had funds in hand of the plaintiffs' house allowing the plaintiffs five per cent., and when in advance charging the plaintiffs five per cent.; and that the defendants had frequently invoiced the goods as having been paid before they had been, and charged the plaintiffs with interest on such alleged payments from such alleged date; and that the plaintiffs sent their bills to the defendants to be discounted, when necessary, to provide for payments due from the plaintiffs, but that the defendants were in the habit of discounting these bills for their own purposes and using the money, and did not allow the plaintiffs five per cent. interest on such money; and they also on several occasions discounted the bills at three per cent., and when ordered by the Calcutta house to discount the bills, they charged them 4½ per cent. on those bills.

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The plaintiffs prayed that the defendants might be declared liable to pay the amount of the alleged overcharges, and the profits alleged to have been improperly made in connection with their agency, and that for this purpose proper accounts might be taken, and enquiries made and directions given.

The defendants raised various defences: one that they were not agents except for the buying of the goods; that in some respects they acted as principals; that so far as related to certain of the charges they were entitled to make a fair profit on the goods; and that they were only acting in accordance with the ordinary trade custom of Manchester, of which the plaintiffs were perfectly cognisant; and that, as regards the insurances, they were themselves the insurers and would have had to pay if any loss or injury had been sustained; and various other defences which are noticed in the judgment.

By an arrangement made on the hearing of the case, the plaintiffs' counsel pointed out two instances of overcharge under each head of complaint.

Numerous witnesses were called, the chief object on the part of the defendants being to prove that the plaintiffs had either actual or constructive notice of the course of business adopted by the defendants, and to prove a general trade custom in Manchester. It was attempted to prove actual knowledge on the part of Williamson, from an alleged conversation between him and other gentlemen in business in Manchester in 1850, in which he was alleged to have said that he knew "all about the Manchester charges and about their (the defendants') rates from Heriot (who was the plaintiffs' partner), who was brought up in the house of Barbour & Co., and heard all about it." This was denied by Williamson.

They also attempted to prove constructive notice by shewing that William Craik, one of the plaintiffs, had several years ago been in the house of Mr. Graham, a Manchester and India merchant, and had had the chief management of the department for buying, preparing and purchasing goods in Manchester for export to India.

Sir Henry James, Mr. Chitty, Mr. Robinson and Mr. Bryce, for the plaintiffs.

Sir J. Holker (Attorney-General), Mr. Benjamin, Mr. Marten and Mr. Romer, for the surviving partner of the defendants' firm, and for the representative of a deceased partner.

Mr. Southgate, Mr. Edwards and Mr. K. M. Mackenzie, for one of the defendants who had retired from the firm.

Mr. Davey and Mr. Levett, for one of the defendants who was dismissed from the suit.

THE MASTER OF THE ROLLS.—This is a bill by principals against their agents to take accounts or rectify accounts which have been settled. The period over which they extend is nearly twenty years, and the substance of the allegations is, that the accounts contain numerous and serious errors. The form of pleading, no doubt, is not quite in accordance with what the judgment will be, because by the form of pleading the Court is asked to do that which no Court can do, namely, to go through accounts and to disallow a large number of items in taking those accounts and making declarations accordingly. That is a thing which the Court, so far as I know, never did. The practice of the Court of Chancery, which, of course, is the practice of the High Court of Justice, is to consider whether the accounts shall be opened, or whether there shall be liberty to surcharge and falsify—that is, if the Court is of opinion that errors of sufficient number and sufficient magnitude are shewn. It is not, as I understand it, necessary that the errors shewn should amount to fraud. If they are sufficient in number and importance, whether they are errors caused by mistake or errors caused by fraud, the Court has a right to open the accounts. I have known cases—there is the case of *Clarke v. Tipping* (1), with which we are familiar—in which the Court abstained purposely from using the term "fraud," although no other term, I am afraid, could be properly applied. That is not necessary. But there is this to be considered, that when the account

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si between persons in a fiduciary relation, and the person who occupies the position of accounting party—that is, the trustee or agent—is the defendant, it is easier to open the account than it is in cases where persons do not occupy that position; that is to say, a less amount of error will justify the Court in opening the account.

Then I have one other observation to make, which is this, that where you shew a single fraudulent entry in the case of persons occupying the position of principal and agent, or trustee, and *cestui que trust*, the Court has actually opened an account extending over a greater number of years and closed for a much longer period than the account I have before me. I mean the case of *Alfrey v. Alfrey* (2) before Lord Cottenham. We therefore have this as a sort of guide, without laying down any general rule—because every case must depend on its own circumstances—that where the accounts have been shewn to be erroneous to a considerable extent both in amount and in the number of items, or where fiduciary relations exist, and a less considerable number of errors are shewn, or where the fiduciary relations exist, and one or more fraudulent omissions or insertions in the account are shewn, there the Court opens the account, and does not merely surcharge and falsify. The effect, of course, is very different. Where you open the account, the account is taken from the beginning; and in those cases where, as in this case, the books are lost for a certain period, the Court does not now do what it formerly did, namely, insert special directions in the judgment, which were necessary to protect the person accounting, who in the ordinary course of business, as has happened in this case, destroyed his books. Up to 1860 some of the books seem to have been destroyed—not improperly, because, of course, merchants do not keep their books for ever, and I wish to throw no censure upon those people. Formerly, when the accounts were sent to the Master, it was the custom of the Court to insert special

directions in the decree in order to avoid the hardship which the innocent loss of the books, or the innocent destruction of the books, might subject defendants to. That is not necessary now, because the same Judge presides over the taking of the accounts in chambers as orders the accounts to be opened. I merely mentioned that, because it might be said that the point has escaped notice.

Now, the substance of the case is really very simple indeed, although the details are enormous.

The plaintiffs say that they employed the defendants as agents to buy and ship goods for them. When I speak of the plaintiffs, I mean the firm for the time being; and in the same way, when I speak of the defendants, I mean the defendants' firm for the time being. They were not the same people throughout, but for all substantial purposes I treat them as one; though in drawing up the judgment care must be taken to make the separate defendants responsible for what occurred in their own time. Now the substance of the case is this: the plaintiffs say that from the very beginning of their connection they had two sorts of engagements or arrangements with the defendants' firm.

As to one class of business they make no complaint, and therefore the judgment will not relate to that in any way. But as to what I may call the commission business, they say that they employed the defendants as their commission agents in Manchester, they being a firm in Calcutta, though for many years one of the firm was resident in Scotland, and certainly visited Manchester some ten or twelve times a-year. The plaintiffs have a firm in Calcutta. They employed the defendants as agents to buy and forward goods to them at Calcutta. That is their allegation; and they say that, being such agents, and being paid on commission, the defendants throughout the period of the connection made gross and fraudulent overcharges in their accounts. That is the charge. It is not necessary, of course, to prove the whole of that charge, as I have already explained.

(2) 10 Beav. 353; 17 Law J. Rep. Chanc. 30; affirmed, 1 Mac. & G. 87.

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Some of the charges may not be fraudulent. Some of the charges complained of even may not be such as would justify me in opening the accounts; but if I once come to the conclusion that there are a sufficient number of errors proved, and of sufficient amount to entitle me to open the accounts, it will then be, of course, necessary to consider the other charges when we come to take the accounts in chambers.

If I arrive at the conclusion that one or more overcharges are proved, it may not be perhaps strictly necessary to consider so very nicely the number or the amount of the other overcharges; but I am bound before opening the account to shew that there are sufficient grounds for opening that account, and nothing more. I am not bound to decide upon the propriety of every item which is challenged by the plaintiffs in the defendants' account. Were I to do so, I do not know when my judgment would end.

Now, that being so, the first question to be decided between the parties is a question of fact: Were the charges made against the plaintiffs merely the prices paid by the defendants?

As to that there is no contest. For all material purposes that is made out by the defendants' books, or is admitted by the answers. The defendants justify the making of the charges on various grounds, but they do not deny making the charges—that is to say, they do not deny charging the plaintiffs on almost every item of invoice more than was paid throughout the period of their connection. I am told that the amount is very large during this period—very large indeed. The number of invoices is very great, and the forms of the invoices are substantially the same throughout. In fact, there is no dispute at all between the parties that on the items of invoice very frequently sums were charged which were not paid.

[His Lordship then went through the several charges contained in the bill, as regards the white or bleached goods; the sales by the defendants to the plaintiffs at the market price, as alleged, of their own goods; the non-allowance to the

plaintiffs of large sums of money for discount which had been allowed to the defendants; as respects the insurance; the discounting of the bills; and held that they were either admitted or that the defences set up were all untenable: and continued:] Now the first portion of the defence is rather a singular one. The defendants deny that they were agents except for buying. It is very difficult to appreciate that defence. The answer of Stewart and Blair, two of the defendants, says (paragraph 14), "We admit that the plaintiffs did decide to employ the said firm of Barbour Brothers, such employment being in the double capacity of buying agents for the plaintiff company and makers up, packers, &c., as principals, but not otherwise, as the Manchester agents of the said firm." The observation occurs: In what capacity did they ship the goods—when they shipped, insured and sent them to the plaintiffs—in what capacity did they act? They received no remuneration whatever, as they said. Certainly they were not shipped on their own account, but by them as agents.

Then it is said, that although they were agents for buying and forwarding, yet they were principals as regards packing, making up, &c.

The plaintiffs say they were simply their agents, and I confess it is extremely difficult to suppose that when a man employs an agent to buy the goods and forward the goods, that he becomes a principal as regards the packing. This, however, is intelligible, and is, I think, the true view of the relation between the parties. They were general agents; but, as regards at least the packing of the bales, they were entitled to make a charge for doing the business of a packer; and in that sense, if any agent who is entitled to make a fair charge in addition to his commission is to be named a principal, you might use the term principal. But that is not accurate. A man is not the less an agent because, as regards some part of the work, he is employed to do it on the terms of his having a fair profit.

Take an instance, with which I am very familiar by reason of the number of

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judicial sales which take place in this division. An auctioneer is employed to sell a freehold estate. He happens to be, as some auctioneers are, a surveyor as well; if it is necessary to have the estate surveyed and a plan of it made for the particulars of sale, he says, "I am a surveyor, I will do the surveying work myself." He does it and then sends in a bill as auctioneer, and he charges his usual commission on the proceeds of the sale, he charges what he has paid out of pocket for advertising, &c., and then he charges for surveying as surveyor—that is to say, he charges surveyor's price: not the mere sums he pays to his assistants for wages or otherwise, but the fair price of a surveyor. If he is not a surveyor he employs some other surveyor and puts the same price in the account as that man charges him, but nothing in addition. He is the agent to sell the estate, but the employer, knowing that he is a surveyor, and being willing that he should act in that capacity, is also willing to pay him the fair price which a surveyor ought to charge.

So my view of the relations between these parties is, that the defendants were commission agents in the ordinary sense of the term. The plaintiffs knew they were packers, and they knew that they packed bales, and they were willing that they should continue to pack bales, getting the fair profit which packers get. I think, although I am not going to decide this finally, the real bargain between the parties, looking at the correspondence, was, that they were to be allowed to get a fair profit for their labour in packing. They charge for packing-cases and tins, but they must have done something besides paying for the packing-cases and tins. They did something more, and that is an additional reason for opening the accounts, because when the accounts are taken *de novo*, I can do justice by allowing them a fair remuneration for whatever they did in relation to the packing. But it does not alter the main relation of the parties—that is, principals and agents and nothing else: the Calcutta house the principals and the Manchester house the agents, but entitled in

respect of the packing to make a fair charge.

[His Lordship stated that the counsel for the plaintiffs had proved four instances in which the defendants had added to the gross price at which they purchased the goods, and that he was satisfied on the evidence that when a commission agent bought goods there was no custom among the business men at Manchester to add to the price, and continued:]

This, therefore, is a proved overcharge. Is it a fraudulent overcharge in the sense in which that term is used in the Courts of justice? I must say that in my opinion it is. The meaning of fraudulent overcharge, as I understand it, is an overcharge deliberately made, and which the man who makes it must know is an overcharge. It is impossible for a Judge to dive into the recesses of the mind of any man. He cannot tell what his theory of morals may be, or to what extent his conscience may have been corrupted by a long course of bad habits. He must suppose that reasonable men, men carrying on business, must understand their own acts, and must be prepared to abide the consequences. When we find an agent buying goods, paying one price and invoicing them at a higher, we must take him to know that he is committing a breach of his duty as agent, that he has taken from out of the pocket of his employer a sum that belongs to that employer; and unless it were done on a single occasion by accident or mistake, he cannot treat that overcharge as being properly described by any other term than a fraudulent overcharge. In my opinion, to this extent at all events, the allegations of the plaintiffs are made out.

[His Lordship then referred to the charge of the plaintiffs as to the insurance, and held that there was no defence of or excuse for the proceedings of the defendants. Then, as to the addition to the cost of bleaching white goods, and as to the defence of knowledge by the plaintiffs, actual or constructive, and especially with reference to the effect of the alleged knowledge of Craik and Heriot, his Lordship observed:]

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I will examine the case as regards Mr. Craik, because he subsequently became a partner in the firm of Williamson & Co., and it is said that they are bound by the knowledge of Craik also. But before going into the evidence as regards Heriot's knowledge, I should like to say a word or two as to the principle which I think ought to guide the Court in deciding this question. The case set up by the defence appears to me to savour somewhat of novelty. As I understand the doctrine of partnership, which for this purpose is a branch of the law of agency, notice to a partner in a partnership matter during the continuance of the partnership is as a general rule notice to the firm. It has not, so far as I know, been held that notice to a man who afterwards becomes a partner is notice to the firm. It might be so held. We have the analogous case of notice to a solicitor who is also for this purpose an agent. Notice to a solicitor in the same transaction or in any connected transaction, while he is acting for the same client, is notice to that client, but notice to him even prior to his acting for the client may be constructive notice to the client, where it is clear that he must have had it present to his mind—that is, he could not be supposed to have forgotten it when he was transacting the business of the client. It might well be that such an extension of the doctrine might apply in some cases to the case of partnership, but I am not aware that it has ever been so applied.

Now when we come to a question of fraud different considerations arise. It is not true that the knowledge of a fraud by a partner is necessarily the knowledge of the firm. A very obvious instance of the absurd result that would follow from such a doctrine may be shewn, and perhaps is best shewn, by an example. Suppose there is a firm with half-a-dozen partners who have a clerk, and the clerk has been in the habit of receiving presents from one of the sellers to the firm in order to pass goods of short weight; and, further, suppose that the clerk, not having been found out, is taken into partnership as a junior partner and continues the practice: is it to be imagined

under these circumstances, that in a Court of equity the other partners could not sue the vendor of the goods for the fraud, and not only sue him, but their partner also? Could it be said that the knowledge of the partner was the knowledge of the firm for this purpose? I emphatically deny that any such doctrine could by any possibility be laid down by any Judge, and I need not say it never has been laid down. Of course fraud must be an exception. I put the case of a clerk knowing it before he became a partner and not interfering with it afterwards, but it is immaterial that the knowledge was acquired during the partnership. Suppose either from corruption—that is, from receiving presents or otherwise—or affection, the goods being supplied by a relative, one of the partners knows that the vendor is defrauding the firm: I am satisfied that according to sound doctrine that knowledge would not prevent the remaining partners from suing the parties to the fraud, and recovering in a Court of equity. It appears to me that that kind of notice will not do when it is applied to cases of fraud.

But when you come to notice before the partnership relating not to those transactions, but to prior transactions, there are some other considerations. First of all, if the clerk has been employed, we will say, in the house of the persons committing the fraud, and then goes into the house which has been defrauded, it by no means follows that he knows that the former house will continue their course of fraudulent conduct. He may think, "They are aware that I know all about it, and they will not attempt to go on now that I have become a member of the firm;" or if he has the opinion that they will go on, then you can only look on him as an accomplice. He may be influenced by gratitude, in the case of the former masters having recommended him to the firm in which he has become a partner, or he may be influenced by that curious feeling of honour which is said to extend to a very low class as regards morality, and think that he ought not to betray the interests of his former masters, but he ought rather to suffer the small loss

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attributable to his small share as junior partner in the house than be guilty of that which he may think a breach of duty. But in no way that I can see is actual knowledge of an antecedent fraud to be held to be carried into the new firm of which he becomes a partner, so as to impute notice to that firm of the fraud.

I am bound to say that, on looking to the evidence, I do not think it comes up to anything of the sort.

[His Lordship then went through the evidence by which the defendants attempted to shew that Mr. Heriot, when clerk in their house, had knowledge of the course of dealing of which the plaintiffs were now complaining, and held that there was no such evidence to shew any knowledge in the plaintiff Williamson; and on the point raised by the defendants that Craik, a partner in the plaintiffs' firm, knew from his experience of the Manchester business that the defendant had acted only in accordance with the custom at that place, he held that no such custom, as attempted to be set up by the defendants, existed, and that, consequently, no knowledge could be imputed to Craik; further, that the allegation of actual knowledge on the part of the plaintiff Williamson was clearly disproved; and after reviewing the charges and defences of the overcharge on the bleaching of the goods, he said:]

It appears to me that it is impossible to acquit these defendants either of the knowledge of what was being done or the knowledge that what was being done was being wrongly done, and I am compelled to qualify these overcharges by the same term which I have applied to the former overcharges.

[His Lordship then reviewed the charges of the extra discounts—that the defendants paid the vendor six weeks earlier, and got from two to two and a-half per cent. discount, which they put into their own pocket—and the defences raised.]

I can find no express bargain. Mr. Williamson swears most distinctly that the plaintiffs' house was to have the benefit of all discounts. It is the duty of the defendants in asserting an express

bargain to prove it. If they say they were to have the profit over and above their commission, they must shew most distinctly that there was such a bargain. If there was a doubt as to the sufficiency of the proof, that doubt must be determined against the defendants.

[His Lordship then reviewed other charges which he held to be overcharges; and, lastly, referring to the charges of discounting the bills, said:]

It is impossible to defend the discounting of the bills, left with them for safe custody merely, on any theory whatever. It is all very well to say that they were a rich house. Supposing they had become bankrupt, these bills would have been lost to the plaintiffs. But what can justify their not crediting them with the amount? What can justify them in charging a larger discount afterwards? I can find no justification at all. Reliance was placed on agreement. One or two passages in the letters and one passage in Mr. Williamson's cross-examination were relied on as shewing agreement. The passages are difficult to explain and are not clear. But an agent cannot turn himself into a principal and deal with his real employers or principals on that footing without full and fair disclosure. When the principal says, "I believed that I was dealing with an agent," it is no use saying, "You can pick out passages here and there in a letter of an ambiguous character." The real principal believing he is treating with an agent need not read every letter and probably he does not. They are read by his *employés* or his clerks. But even if he does, he does not pay attention to those little passages: he does not look into them to see if they by any possibility can be strained into an assertion that the agent is doing wrong. He believes he is acting rightly, and he knows perfectly well he cannot otherwise act legally without telling him so. In my opinion that does not discharge the obligation which is thrown on an agent, before acting as a principal and getting a profit, to make a full disclosure and obtain the assent of the principal to his changing his character from that of an agent to that of a man whose interest

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conflicts with his duty, because his duty is to discount at the lowest possible rate, while his interest is to discount at the highest possible rate, if he is discounting for himself with a view to future profits. It appears to me, therefore, that that obligation is not discharged by references to obscure passages in two or three letters or to a quite inexplicable passage in Mr. Williamson's cross-examination, where he says that his bills were better than cash. It seems to me on all these points the defendants fail. For the reasons I have given it is not necessary for me to go into the multitude of other accusations against the defendants as to overcharges in other points. When the accounts are taken in chambers I shall be able to do justice between the parties by allowing them remuneration where remuneration is due, though not charged in that character, and by disallowing other overcharges if it turns out that they are in excess of fair charges. But I do not make these other charges grounds of my present judgment. In my opinion the charges which I hold to be proved are fourfold more than enough to induce me to have the whole of the account opened from beginning to end, and therefore I refrain from going into other details.

The judgment will be to open the accounts in the usual way, with the limitation which I have before explained as regards each of the defendants, and that the defendants do pay the costs of the action up to and including the trial.

Solicitors—Phelps, Sedgwick & Biddle, agents for Sale & Co., Manchester, for plaintiffs; Milne, Riddle & Mellor, agents for Hinde, Milne & Sudlow, Manchester, for defendants.

MALINS, V.C. } In re LORD SOUTHAMPTON'S
1880. } ESTATE; ROPER'S CLAIM.
Dec. 4.

Mortgage—Notice to Solicitor—Constructive Notice to Olient.

A borrowed 8,000l. on mortgage from his solicitor, B. Of this money, 800l. belonged to C, a client of B's, who had handed it to B for investment. No notice was ever given to A, either by B or by C, that the 800l. belonged to C. Afterwards A paid off the 8,000l., and B shortly after died insolvent. On a claim made by C for the 800l. against A,—Held, that as C, by his negligence in not giving notice of his claim to A, had enabled A to pay back the whole of the mortgage money to B, he had no equity to compel A to pay part of the money over again; and claim refused.

Adjourned summons.

This was a claim by John Roper against the estate of the late Lord Southampton, for the sum of 800l. and an arrear of interest, under the following circumstances:—

By an indenture, dated the 2nd of March, 1860, Lord Southampton mortgaged the manor of Tottenham to Jacob Birt, his solicitor, to secure the sum of 6,000l. then advanced to him by Birt, and farther sums not exceeding 8,000l. The further sum of 2,000l. was afterwards advanced.

By an indenture, dated the 6th day of April, 1861, and made between Jacob Birt of the one part, and John Roper of the other part, after reciting the mortgage of the 2nd of March, 1860, and that there was then due to Jacob Birt the sum of 6,000l. with an arrear of interest, "and that 800l., part of the sum of 6,000l., was the proper money of John Roper, Jacob Birt, for himself, his heirs, executors and administrators thereby covenanted with John Roper, his executors, administrators and assigns, that he, Jacob Birt, would stand possessed of the said sum of 800l., part of the said sum of 6,000l., and the interest in respect of the same, in trust for the only proper use of John Roper, his executors, administrators and assigns."

It appeared that Jacob Birt had bor-

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rowed from other clients of his besides John Roper other sums of money forming part of the 6,000*l.* advanced on mortgage to Lord Southampton; and that, on receiving such sums, he had executed to each of his clients a declaration of trust, similar in its terms to the declaration of trust of the 6th of April, 1861.

There was no evidence to shew that Lord Southampton knew, or had any reason to believe that the 8,000*l.* advanced to him on the security of the Tottenham property was not the sole property of Jacob Birt.

There was no evidence of any notice of these declarations of trust having been given to Lord Southampton or to any person on his behalf.

On the 16th of July, 1872, Lord Southampton died. Shortly after his death, the amount due on the mortgage of March, 1860, was wholly paid off by the retention by Jacob Birt of moneys in his hands belonging to the estate.

Jacob Birt continued to pay John Roper interest on his 800*l.* down to the 6th of April, 1875.

In February, 1876, Jacob Birt died insolvent. After his death these declarations of trust were found in his possession.

It was admitted, on the part of the claimant, that, as between Lord Southampton and Birt, the money due on the mortgage of March, 1860, had been fully paid off.

Mr. Glasse and *Mr. Nalder*, for the summons. — Birt was the confidential solicitor of Lord Southampton. Part of the money advanced by Birt belonged to Roper. It was clearly the duty of Birt to have informed Lord Southampton of that fact; and Lord Southampton, therefore, must be presumed to have had constructive notice of it. That is a "presumption which the client cannot be allowed to rebut" —

Bradley v. Riches, 47 Law J. Rep. Chanc. 811; Law Rep. 9 Ch. D. 189, 196;

Rolland v. Hart, 40 Law J. Rep. Chanc. 701; Law Rep. 6 Chanc. 678;

Espin v. Pemberton, 3 De Gex & J. 547; 28 Law J. Rep. Chanc. 308.

They also referred to

The Saffron Walden Building Society v. Rayner, 49 Law J. Rep. Chanc. 465; Law Rep. 14 Ch. D. 406.

Mr. J. Pearson and *Mr. Vaughan Hawkins*, for the trustees of Lord Southampton's estate. — It was the duty of Roper to give notice of his charge to Lord Southampton, but he neglected to do so.

[MALINS, V.C. — I cannot see any neglect on the part of Lord Southampton.]

Roper was content to have the mortgage of March, 1860, taken in the name of Birt.

Bradley v. Riches (*ubi supra*)

was a totally different case.

They were then stopped.

Mr. Glasse, in reply.

MALINS, V.C. — This is a case in which the usual question arises, as to which of two innocent parties, his clients, is to suffer through the fraud of a solicitor.

On the 2nd of March, 1860, Lord Southampton executed a mortgage to his confidential solicitor, Mr. Birt, to secure 8,000*l.* Now Lord Southampton had no information from Mr. Birt, and had no reason to suppose that the 8,000*l.* was not the sole property of Mr. Birt. Lord Southampton never had, from the first to the last, the slightest intimation from Mr. Birt, or from anyone else, that the whole of this 8,000*l.* did not belong to Mr. Birt. But Mr. Roper, as innocent in the transaction as Lord Southampton himself, had also the misfortune to have Birt as his solicitor; and he put the sum of 800*l.* into the hands of Birt for investment, and Birt gave him the declaration of trust of the 6th of April, 1861. [His Lordship read it.] Time goes on, and the mortgage is paid off without the slightest intimation that any other person than Birt was interested in the matter.

Now I quite agree that it was the duty of Birt to inform Lord Southampton that the money was not his money, but the money of other persons; because then Lord Southampton would have been protected by paying those whom he had

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notice to be the real owners of the fund. Birt was a dishonest man, and did not perform the duty which was obviously imposed upon him. But Birt was also the solicitor of Mr. Roper; and surely it was much more his duty to Mr. Roper to tell Lord Southampton that Mr. Roper was the owner of the money. His duty to Mr. Roper made it absolutely incumbent upon him to do so; otherwise there was the danger of Lord Southampton paying Birt, and getting a discharge for the money, whereas, in fact, it ought to have been paid to Mr. Roper. I put this case in the course of the argument: Suppose that, after Lord Southampton had borrowed this money from Birt, Birt had transferred the whole debt to John Smith (without informing Lord Southampton), but retaining the mortgage deed; and then Lord Southampton, in total ignorance of what had happened, finding Birt in possession of the mortgage deed, pays him the mortgage money, and takes his receipt: does anybody say that John Smith would have any equity against Lord Southampton? What is the difference between that case and this? Mr. Roper, by omitting to give notice, has enabled Lord Southampton to pay Birt, and Lord Southampton has paid him. What possible equity has Mr. Roper to call upon Lord Southampton's estate to pay the money over again?

With regard to the case of *Bradley v. Riches*, so much relied on, it is only necessary for me to say that that case proceeds upon a totally different state of circumstances. Then Mr. Glasse relied upon the case of *Rolland v. Hart*. Now, the general rule undoubtedly is, that where there is notice to a solicitor of a transaction, notice to the solicitor is notice to the client; that is, in the particular transaction. For instance, where a man takes a mortgage, and his solicitor has notice of a prior mortgage, there notice to the solicitor is notice to the client. *Rolland v. Hart*, when you come to look at it, is nothing more than the ordinary application of that well-considered rule of the Court, although, as Lord Hatherley most properly says, the unfortunate client—if he be a purchaser

or a mortgagee—in ordinary cases never knows anything of the title, and relies upon the solicitor.

This case, I think, is different to any case that has been cited. Therefore, finding that there are two clients, each employing the same solicitor, who has been guilty of a failure of duty towards both—and, as I say, more flagrantly towards Mr. Roper than towards Lord Southampton—and there having been negligence on the part of Mr. Roper in not giving Lord Southampton notice, can I remove all the consequences of this from one innocent party to the other? If Mr. Roper had employed a totally indifferent solicitor, the neglect of himself and his solicitor to give notice would have deprived him of any claim against Lord Southampton; and I am unable to see any principle upon which Mr. Roper can be in a better position, because he employed the same solicitor as Lord Southampton. The summons must, therefore, be refused.

Solicitors—Collyer-Bristow & Co., agents for Stone & Simpson, Tonbridge Wells, for claimant; Farrer, Ouvry & Co., for plaintiffs and defendants.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.	} <i>Ex parte</i> THE CHARING CROSS ADVANCE AND DEPOSIT BANK; <i>in re</i> PARKER.
JAMES, L.J.	
COTTON, L.J.	
LUSH, L.J.	
1880.	
Nov. 11.	

Bill of Sale—Statement of Consideration
—*Explanation or Correction of by Receipt*
—*Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), ss. 8 and 10.*

A bill of sale, duly attested and registered, purported to be executed in consideration of a sum of 120*l.* advanced by the grantees to the grantor. In fact only 90*l.* was advanced, the balance being retained to pay for the interest on the sum advanced and the expenses connected with the advance. A receipt for 90*l.* signed by the grantor on the deed immediately

Ex parte Charing Cross Bank; in re Parker (App.), Bankr.

below the attestation clause stated that that sum, "together with the agreed sum of 30*l.* for interest and expenses, makes the sum of 120*l.*, being the consideration money within expressed to be paid to me"—Held, that the receipt formed no part of the deed, and could not be read so as to contradict the statement in the bill of sale, and that the bill of sale not containing in itself a statement of the true consideration, was void as against the trustee in liquidation of the grantor.

Ex parte The National Mercantile Bank; re Haynes (49 Law J. Rep. Bankr. 62; Law Rep. 15 Ch. D. 42) distinguished.

Appeal from a decision of Mr. Registrar Hazlitt, sitting as Chief Judge in Bankruptcy.

Parker executed to the bank a bill of sale, dated the 7th of November, 1879, of his furniture and other chattels, which, after reciting that he had applied to the bank for a loan of 120*l.*, witnessed that "in consideration of the sum of 120*l.* by the mortgagees paid to the mortgagor at or before the execution hereof (the receipt of which said sum the mortgagor hereby acknowledges)," the mortgagor assigned to the bank his furniture, &c., by way of security for the repayment of the 120*l.* in the manner therein mentioned.

Parker, however, actually received from the bank 90*l.*, the balance of 30*l.* being retained by the bank for payment of interest and expenses. The execution of the deed by Parker was duly attested by a solicitor, and the attestation clause stated that the effect of the deed had been before its execution explained by the solicitor to Parker.

Immediately below the attestation clause there was a receipt for 90*l.* signed by Parker, but the receipt stated that that sum, "together with the agreed sum of 30*l.* for interest and expenses, makes the sum of 120*l.*, being the consideration money within expressed to be paid by them to me."

The deed was duly registered. Parker in February, 1880, filed a liquidation petition, and the registrar on an application by his trustees made an order

declaring that the deed was void as against him on the ground that the true consideration had not been set out as required by the Bills of Sale Act, 1878, s. 8.

The bank appealed.

Mr. Gwiry, for the appellants.—Here the consideration is really set forth within the true meaning of the 8th section. It was not necessary to state the collateral agreement to retain the 30*l.* for expenses and interest, and the case falls within the principle of

Ex parte The National Mercantile Bank; re Haynes (*ubi supra*).

But even assuming that not to be so, the receipt, which here forms part of the bill of sale, and which could be seen by anyone inspecting the bill of sale, explains the true state of the facts, so that the mischief which was aimed at by the provisions of this section cannot arise; and taking the bill of sale and the receipt together, the true consideration appears.

The 10th section says that any defeasance or condition or declaration of trust to which a bill of sale may be made subject, and which is not contained in the body of the bill, shall be deemed part of the bill of sale, and shall be written on the same paper, &c. Here the receipt may be treated as a "condition" within that section.

[In answer to an enquiry of Cotton, L.J., as to cases under the old Act, in which an insufficient description of a grantor contained in the affidavit has been allowed to be supplemented by a statement on the bill of sale—

Mr. Winslow, *amicus curiæ*, referred to

Jones v. Harris, 41 Law J. Rep. Q.B. 6; Law Rep. 7 Q.B. 157;

Ex parte Mackenzie, 42 Law J. Rep. Bankr. 25.]

Mr. J. F. H. Bethell, for the trustee.

[JAMES, L.J.—The only point is, whether the deed can be supplemented by the receipt.]

I submit that it cannot. The 8th section means that the true consideration shall be stated in the usual way in the body of the deed, and not spelt out

Ex parte Charing Cross Bank ; in re Parker (App.), Bankr.

by some memorandum or statement at the foot or some other part of the deed, which may or may not be seen, and the effect of which statement may be, as here, entirely to contradict the statement in the body of the deed. The bill of sale contains a recital that the 120*l.* has been advanced; and, in fact, the parties are estopped from saying that the consideration was not to be 120*l.* This case is governed by the decision of the Chief Judge in the case of *In re Rogers* (1), holding that where part of the money which was stated in the bill of sale as the consideration had been retained to pay the solicitor's costs of the bill and the auctioneer's charges for valuing the property comprised in the bill of sale, that was not a true statement of the consideration as required by the Act.

Mr. Guiry, in reply.—From the position of the receipt here a true copy of the bill of sale could not be registered without setting out the receipt.

[JAMES, L.J.—The bill of sale is to be attested, and the attestation does not include the receipt.]

That is, I submit, immaterial; it is a mere formality.

JAMES, L.J.—I am of opinion that the judgment of the registrar must be affirmed. It is clear that the true consideration was not set out in the bill of sale. This was the very thing the Act was intended to prevent, namely, the setting forth as part of the consideration paid anything retained by the grantees of the bill of sale for interest and expenses. In the case of *Ex parte The National Mercantile Bank ; re Haynes*, we came to the conclusion that the true consideration was, in fact, set forth, that the loan stated was, in fact, a loan of 2,050*l.*, and that it did not make it the less a loan of that amount, that by a collateral agreement 550*l.*, part of it, was to go to pay a debt actually due at the time from the grantor to the grantees, and not arising out of the then transaction between the parties. In the present case there was really an evasion of the provisions of the Act, and it is not at

(1) 14th of June, 1880. Reversed on appeal since.

all like *Ex parte The National Mercantile Bank*. The only other point on which I felt any hesitation, was whether we could look at the receipt which was at the foot of the deed by way of supplementing, or rather correcting, the consideration expressed on the face of the deed. But it appears to me that, independently of the point of the position of the receipt, it is impossible to say that the receipt is any part of the bill of sale. The Act of Parliament says that the bill of sale shall set forth the consideration, otherwise it shall be void as against the trustee in bankruptcy of the grantor. Here the bill of sale did not state the true consideration.

The Act further requires that the execution of the bill of sale "shall be attested by a solicitor of the Supreme Court, and the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor." Here the execution is properly so attested, and after the attestation clause comes this receipt which has not been attested, and as to which there is no statement that it has been explained to the grantor. I am of opinion, therefore, that the receipt cannot be looked at as a statement of the consideration.

COTTON, L.J.—The first point to be decided is, whether the deed, independently of the receipt clause, does comply with the terms of the Act requiring the statement of the consideration of every bill of sale. In my opinion it does not. It states that 120*l.* was advanced, as meaning actually paid by the grantees to the grantor, whereas, in fact, 90*l.* only was advanced to the grantor, and 30*l.* retained, part in payment of expenses, and the rest for interest to be paid on the money advanced under the deed.

The case of *Ex parte The National Mercantile Bank* has been referred to, as to which, in my opinion, there can be no question. But this is not like that case, for there the retainer was for the purpose of satisfying a then existing debt, independently of the transaction of loan.

The great distinction between the two

Ex parte Charing Cross Bank ; in re Parker (App.), Bankr.

cases is this, that here the whole liability "for interest and expenses" arises out of the transaction of loan which the bill of sale completed and rendered effectual. There the debt existed independently, and would have so remained if the loan secured by the bill had not been made. I think that the kind of retainer in this case was the very thing aimed at by the Act. The object was to prevent the giving of a security for a sum said to be advanced when, in fact, a large part was retained by the grantee. Independently, therefore, of the receipt clause, there is an end of the case. But it is said that we ought to look at the receipt clause; and if we do so, the true consideration is set forth as required. It does state honestly the facts of the case. But we must be bound by the Act, and the Act requires the bill of sale to set forth the consideration.

It is impossible in this case to say that the bill of sale sets forth the consideration. The receipt is no part of the deed. It is said that it may be used to correct the statement in the deed, but that is not required by the Act.

I did at one time entertain a doubt by reason of those decisions upon the former Bills of Sale Act, 1854, to which Mr. Winslow has referred us. That Act required, on the registration of a bill of sale, an affidavit to be filed with the bill of sale, giving a description of the residence and occupation of the grantor; and it was held that the bill of sale itself might be referred to for the purpose of correcting an insufficient description contained in the affidavit. But those cases, I think, differ from the present. In *Jones v. Harris* the affidavit made by the attesting witness only stated that the grantor resided at Dynevor Lodge, and was an auctioneer. But the bill of sale described the grantor as "of Dynevor Lodge, in the parish of Llanarthney, in the county of Carmarthen, auctioneer," and the Court there held that by taking the affidavit and the bill of sale together, there was a sufficient description within the requirements of the Act. The other case of *Ex parte Mackenzie* decided that an insufficient description of the attesting witness to a bill of sale contained in his affidavit filed

on the registration of the bill of sale might be cured by reference to a sufficient description of him in the attestation clause of the bill of sale.

But here it is desired to refer to another document, not to correct an insufficient description in the bill of sale, but entirely to contradict a statement contained in the bill of sale. The Act requires the bill of sale truly to state the consideration. It has not done so, and I cannot say that because possibly no harm may be done in this particular case we ought not to give effect to the fair construction of the Act.

LUSH, L.J.—The Act says that every bill of sale shall state the consideration, otherwise it shall be void. Now the consideration is the amount which the grantor receives for giving the bill of sale, and is, of course, the true consideration. Now in the part of the bill of sale which states the consideration, the true consideration is not set forth. There is a statement in the receipt at the foot of the bill of sale which explains what the true consideration was. Is then the receipt any part of the bill of sale? In the first place, a bill of sale would be good even if there were no receipt at all. And certainly here the receipt is not part of the bill of sale, for the Act requires the execution of the bill of sale to be attested, and the receipt has not been attested.

Nor do I think that section 10, on which reliance has been placed, can assist the appellants. That section refers to a defeasance or condition, but does not refer to a receipt. I am, therefore, of opinion that the provisions of the Act have not been complied with.

Solicitors—J. E. Betts, for appellants; C. A. Swaine, for trustee.

BACON, V.C. }
1880. }
Nov. 4, 13. }

JENNER v. TURNER.

Will—Devise of Real Estate—Condition Subsequent—Restraint on Marriage—Validity.

Testatrix devised real estate to her brother for life, with remainders in favour of his wife and his sons, daughters and issue in tail, with remainder in favour of the plaintiffs; and provided that if her brother should have married or should thereafter marry a domestic servant, or a person who was or had been a domestic servant, then the devise in favour of her brother, his wife, sons, daughters and issue, should be void, and that the estate should go over as in default of issue of her brother. After the testatrix's death, her brother married a domestic servant:—Held, that the condition was valid, and that the gift over took effect.

Mary E. Turner, by her will dated the 20th of August, 1867, after giving certain specific and pecuniary legacies, and charging her real estate with the payment of such of her debts, funeral and testamentary expenses, and pecuniary legacies, as her personal estate should be insufficient to pay, devised all her real estate during the life of her father to trustees, and bequeathed the residue of her personal estate to the same trustees on trust for sale and conversion thereof, and on trust for the investment of the proceeds arising from such sale; and the trustees were to stand possessed of such real estate, and of the moneys so directed to be invested, on trust to pay the rents, profits, dividends and annual produce thereof to the testatrix's father during his life, and after his death, in case her brother, J. W. Turner, should not then have married, or should have married during her life with her consent in writing, or should have so married after her death some person not being or ever having been a domestic servant, the testatrix devised her real estate to the use of her brother, J. W. Turner, for life, with divers remainders in favour of his wife and sons, daughters and issue in tail, with remainder, in default of issue of the said J. W. Turner, to uses in favour of the plaintiffs. The

testatrix also bequeathed her residuary personal estate on trusts corresponding to the devises of her real estate, as nearly as the nature of the property would admit; she then provided that, if her said brother should marry during her life without her consent in writing, or if he should already have married or should thereafter (and whether he should at the time of such marriage be in the enjoyment of her said real estate as tenant for life or not) marry a domestic servant or a person who was or had been, or who should at any then previous time or times have been, a domestic servant, then and in such case she declared that the devises and bequests thereinbefore made in favour of her said brother, his wife and his sons, daughters and issue, and every or any of such persons or classes, should be absolutely null, void and of no effect, and in lieu thereof she devised her said real estate to the use of such persons with such limitations and in the same manner in all respects as the same were thereinbefore devised and limited, in case of default or failure of issue of her said brother, J. W. Turner.

The testatrix died in 1867. The testatrix's father died in 1871, and thereupon J. W. Turner entered into possession of the real estate, and on the 17th of December, 1872, married Mary Annie Sowerby (a person who on the evidence was held to have been a domestic servant at the date of the marriage). J. W. Turner died in 1879, leaving issue two infant daughters, and having remained in possession of the real estate till his death. After his death Mary Annie Turner went into possession, and the plaintiffs brought this action against Mary Annie Turner and her two daughters for recovery of the real estate, alleging that Mary Annie Turner was a domestic servant, and that the gift over took effect on the marriage of J. W. Turner, and claimed recovery of the land, and an account of rents and profits. The defendants by their statement of defence denied that Mary Annie Turner was a domestic servant, and contended that the condition subsequent in the will was illegal and void, as being in undue restraint of marriage and contrary to public policy, and that the plaintiffs had waived their right to an account of

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the rents and profits during the life of J. W. Turner, or in any case were only entitled to six years' arrears. The plaintiffs called witnesses who proved that Mary Annie Turner had been a domestic servant prior to her marriage. It appeared that the personal estate of the testatrix had proved insufficient for payment of her debts, &c., and that the deficiency had been supplied by a mortgage of part of the real estate.

Sir H. Jackson and Mr. Wolstenholme, for the plaintiffs.—The devise over is good, the condition being in partial restraint of marriage only.

Perrin v. Lyon, 9 East, 170, is an express authority in our favour. There a testator devised real estate to his daughter in fee, and if she should die under age and unmarried, then to his wife for life with remainder over, and added a condition that if either his daughter or wife should marry a Scotchman, then the estates given to them respectively should descend to such person or persons as would be entitled under his will, in the same manner as if his wife or daughter were dead. The daughter married a Scotchman, and on a case stated by the Court of Chancery, the Court of Queen's Bench certified that the devise over took effect. Lord Ellenborough, C.J., said that "he saw no ground for holding the condition to be void, as being in general restraint of marriage." They also cited

Jones v. Jones, 45 Law J. Rep. Q.B. 166; Law Rep. 1 Q.B. D. 279;

Hodgson v. Halford, 48 Law J. Rep. Chanc. 548; Law Rep. 11 Ch. D. 959;

Jarman on Wills (3rd ed.), vol. ii. p. 38.

Mr. Hemming and Mr. B. B. Rogers, for the defendants.—The rule that certain conditions in restraint of marriage are void as against public policy applies as well to real as personal estate, at any rate where, as in this case, the personal estate is bequeathed on the same trusts as the real estate—

Lloyd v. Lloyd, 2 Sim. N.S. 255; 21 Law J. Rep. Chanc. 596;

Bellairs v. Bellairs, 43 Law J. Rep.

Chanc. 669; Law Rep. 18 Eq. 510.

The condition in this case is void on two grounds: First, the restraint is too general. Thus, conditions not to marry a man of a particular profession—

1 *Eq. Cas. Abr.* 110, pl. 1 (n. in marg.)

or a man who is not seised of an estate in fee or of perpetual freehold of the annual value of 500*l.*—

Keily v. Monck, 3 Ridgw. P.C. 205, are too general to be legal.

Secondly, it is a principle of public policy that classes in England should intermingle freely, and any condition by which a testator attempts to perpetuate a class distinction, such as that of master and servant, is against that policy. There is no direct authority on this point, but we ask the Court to recognise this principle and decide in accordance with it.

In any case, the plaintiffs are not entitled to an account of rents and profits from the date of the marriage in 1872, but only from the issuing of the writ, or at the utmost for six years previously.

Sir H. Jackson, in reply.—The case in 1 *Eq. Cas. Abr.* (*ubi supra*) was a case on a legacy, not on a devise of real estate—see

Jarvis v. Duke, 1 Vern. 20.

Jarman (3rd ed.) vol. ii. p. 39, refers to it as a *dictum* only—see, too, *Theobald on Wills*, p. 311.

We ask for an account of rents and profits for six years previously to issuing the writ.

BACON, V.C. (on Nov. 13).—The question to be decided in this case appears to be one of law only, and is to be governed by well-settled principles of law, having regard to the construction of the will out of which the question arises. [His Lordship read the material parts of the will, and stated the circumstances of the case, saying that it had been proved that Mary Annie Turner was a domestic servant at the time she married J. W. Turner, and continued:] That being so, the only remaining question is as to the construction and effect of the will; and this is pointedly and explicitly raised by the submission in the defence that the condition or condi-

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tions subsequent in the will contained, were illegal and void, as being in undue restraint of marriage and contrary to public policy. In support of this contention reference has been made to the cases (of which no doubt there are many) in which gifts of personal estate, accompanied by conditions or restrictions upon the marriage of the donee have been held inoperative and *in terrorem* only. It is, however, needless to advert to such cases or to the principles involved in them, since it is the plain and settled rule of law that they have no application to legal limitations of real estate, which form the subject of the present action.

I may here observe that the suggestion which has been made that the trust fund disposed of by the will is a mixed fund of realty and personalty, and is therefore to be considered with regard to the well-established distinction between conditions applicable to personal estate, is not maintainable, since the testatrix charged her real estate with the payment of such of her debts and funeral and testamentary expenses and pecuniary legacies as her personal estate should be insufficient to pay, and her personal estate has been found to be insufficient for those purposes, and the deficiency has been supplied by means of a mortgage of the real estate, which remains undischarged.

The single question to be determined is, therefore, whether the limitation in favour of the plaintiffs is valid and took effect upon the marriage of J. W. Turner with Mary Annie Sowerby, she being a person who at the time of the marriage "was or had been or should at any previous time or times have been, a domestic servant." And upon this question it appears to me that there is no reasonable ground for doubt. In the first place, there is no reason nor any authority for saying that a testator may not make it a condition that the person, the object of his bounty, shall not marry any particular person by name, or any person of a particular nation, or belonging to a specified class. It is not competent to the Court to seek to enquire into the motives which may have induced the restriction. If it could be properly said they had been prompted by spite or malevolence, the

condition would nevertheless be valid, for the law does not prohibit testators such low feelings, provided no principle of public policy is thereby contravened. Under this will no question can arise in which public policy can be said to be involved. The condition is not in restraint of marriage generally, for it was competent for J. W. Turner to choose a wife from the whole female world except only that portion of it which comprises domestic servants. The point, however, is covered by a distinct and express and binding authority. In *Perrin v. Lyon* the testator devised his real estate to his daughter, subject to the condition that if she should marry a Scotchman then she should forfeit all benefit under his will, and the estate so given to her should descend to such person or persons as would be entitled to it under his will, in the same manner as if his daughter were dead. The daughter being under age married a Scotchman, who survived her, and she died leaving a son. A case was sent from the Court of Chancery for the opinion of the Court of King's Bench upon the question, "Who, under the circumstances, was entitled to the devised real estate?" It was elaborately argued by counsel of great ability, and it was determined by Lord Ellenborough and three other Judges, that the two children of the testator's nephew (who was named in the will) were entitled to the real estates. There is no detailed judgment of the Court of King's Bench, but there can be no doubt that the decision applying to the facts of the case as stated does determine that the condition upon which the estate devised to the daughter in fee was to go over to other persons was perfectly valid, and that, it being broken by the daughter's marriage with a Scotchman, the gift over took immediate effect and annihilated the estate, which, but for the condition, the daughter would have taken, and that by the breach of that condition, the titles of her heir-at-law and of her husband, as tenant by the courtesy, were excluded, and immediate effect was given to the subsequent limitations.

I am, therefore, of opinion that the plaintiffs have established the right they claim, and that they are entitled to a

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judgment in their favour, declaring them entitled to the possession of the several estates of the testatrix devised by her will. From the date of his marriage, in December, 1872, J. W. Turner was in wrongful possession of the estates, and from the time of his death, in July, 1879, the like wrongful possession has been continued by the defendant, Mary Annie Turner, and the moneys received by them were the moneys of the plaintiffs. I think, therefore, that the plaintiffs are entitled to an account of the rents and profits of the estates as against the assets of J. W. Turner and against the defendant, Mary Annie Turner, from the time of his death, but that such account should be limited to six years before the date of the writ in this action. If the representatives of J. W. Turner do not admit assets, there must be the usual order for the administration of his estate. Under the circumstances of the case, and inasmuch as the principal question in the action relates to the construction of the will of the testatrix, I do not think it right to make any order as to the costs of the action up to trial.

Solicitors—H. C. Beauchamp, for plaintiffs; Wilkinson & Son, agents for R. Perkins, York, for defendants.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.	} <i>In re</i> CLAY AND TETLEY.
JAMES, L.J.	
COTTON, L.J.	
1880.	
Nov. 3.	

Will—Implied Power of Sale of Testator's Real Estate—Executor—Administrator with Will annexed—22 & 23 Vict. c. 35. s. 16—Order dismissing Application—Not mere Refusal if it contains a Declaration of Title or Expression of Judge's Opinion—Order LVIII. rule 15.

An administrator with the will annexed has no such implied power to sell the testator's real estate as an executor has, the executor being a nominee of the testator to

pay his debts, the administrator being only an officer of the Probate Court.

Nor is such power given to the administrator by the 16th section of the 22 & 23 Vict. c. 35.

Whenever an order dismissing an application contains a declaration as such, or an expression of opinion of the Judge, it is not a simple refusal of the application within the 15th rule of Order LVIII., and the appeal need not be brought within the twenty-one days limited by that rule.

Thomas Clay, by his will dated the 20th of March, 1870, directed that all his just debts, funeral and testamentary expenses, should be fully paid and satisfied by his executors thereafter named; and in case his personal estate should be insufficient for that purpose, he charged all his real estate with the payment of the deficiency. He then gave all his real and personal estate to his wife Eliza for life, with remainder to his daughter for life, with remainder to his daughter's children equally, and directed that his executors should, upon his wife's death, sell and dispose of all his real and personal estate, for the purpose of dividing the same as therein mentioned.

He appointed Thomas Topham and Charles Severn his executors.

The testator died in April, 1879.

The two executors renounced probate, and letters of administration, with the will annexed, were granted to the testator's widow, who put up part of the testator's property—a freehold house—for sale by auction, which was purchased by Tetley.

Upon examination of the abstract of title, he objected that she had no power to sell, being administratrix with the will annexed.

Accordingly a summons was taken out by the vendor under the Vendors and Purchasers Act, 1874, in chambers, which was afterwards adjourned into Court, for the purpose of deciding that question.

The summons was heard before Vice-Chancellor Hall, on the 26th of June, 1880, when he dismissed the summons with costs, holding that, upon a fair construction of the 22 & 23 Vict. c. 35. ss. 14, 15, 16, 18, an administrator was not au-

In re Clay and Tetley, App.

thorised to exercise a power of sale, and made an order to the effect that the Court, being of opinion that a title had not been shewn to the property, did not think fit to make any order on the application, except that the applicant pay the costs of the application. This order, although made on the 26th of June, was not passed and entered till the 16th of July, and on the next day (Saturday) a notice of appeal was served by the vendor on the purchaser's solicitors at 2.10 p.m.

Mr. Simmonds, for the appellant, the vendor.

Mr. Cadman Jones, for the respondent, raised a preliminary objection that the appeal was too late, as the twenty-one days, under Order LVIII. rule 15, expired on the 17th of July, and that the service after two o'clock on Saturday must be treated as effected on Monday, the 19th of July—Order LVII. rule 8 (April, 1880).

The Court, however, overruled the objection.

Mr. Simmonds, in continuation, argued that the grantee of letters of administration, with the will annexed, could exercise the power of sale, which was one exercisable by the legal personal representative, even though not named in the will. If it were held that she could not sell, then the power could not be exercised at all, though she as administratrix was responsible for payment of the testator's debts, and for that purpose she ought to have the powers of an executor.

He referred to

Sabin v. Heape, 27 Beav. 558; 29 Law J. Rep. Chanc. 79;

Eidsforth v. Armstead, 2 Kay & J. 333; 25 Law J. Rep. Chanc. 237;

Robinson v. Lowater, 5 De Gex, M. & G. 272; 17 Beav. 592; 23 Law J. Rep. Chanc. 641;

22 & 23 Vict. c. 35. s. 16.

Mr. Cadman Jones, for the respondent, was not called upon.

That power is implied because they are appointed by the testator to pay his debts. There is no authority for saying that the Courts have ever implied such a power in an administrator who is not appointed by the testator, but is an officer of the Probate Court. The testator could not have anticipated that his executors would renounce probate. That being so, it cannot be right that the Court should now for the first time imply a power in the administrator to sell the testator's real estate.

The only other point was the construction of the 16th section of the 22 & 23 Vict. c. 35. But that section was carefully framed, so as to confine the power thereby given to the executors and persons on whom the office of executor devolves. It cannot be supposed that the Legislature had forgotten that there were such persons as administrators as well as executors. The words of the section are not fairly open to any construction but their natural meaning. I am therefore of opinion that the appeal must be dismissed.

With respect to the preliminary objection, I desire to say that, whenever an order dismissing an application contains a declaration as such, or as an expression of opinion of the Judge, so as to bind the rights of the parties, it is not a simple refusal of the application within the meaning of the 15th rule of Order LVIII., so as to compel the appeal to be brought within twenty-one days from the date of the refusal.

JAMES, L.J., and COTTON, L.J., concurred.

Solicitors—Dubois & Reid, agents for J. Close, Derby, for appellant; Gard, Corbin & Hall, agents for J. M. Owen, Derby, for respondent.

JESSEL, M.R.—I am of opinion that the decision of the Vice-Chancellor was well founded in law, and must be affirmed. The only implied power to sell the real estate of the testator is in the executors.

[IN THE COURT OF APPEAL.]

BANKRUPTCY. JAMES, L.J. COTTON, L.J. LUSH, L.J. 1880. Nov. 25.	}	<i>In re</i> STANLEY; <i>ex parte</i> MILWARD.
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Bankruptcy—Adjudication—Petition for Liquidation—Bankruptcy Act, 1869, ss. 28 and 80, sub-s. 10; s. 125, sub-ss. 4, 126—Bankruptcy Rules, 1870, rules 266 and 295.

Where there has been a simple adjudication of bankruptcy, without any stay of proceedings under it, under rule 266, such adjudication must override any liquidation proceedings that may be pending, and the Registrar has no authority to register resolutions for liquidation which have been passed subsequently to the adjudication.

Ex parte Davis; in re Russ (45 Law J. Rep. Bankr. 61; Law Rep. 2 Ch. D. 231), dissented from.

This was an appeal from an order of Mr. Registrar Pepys, sitting as Chief Judge, ordering the registration of certain resolutions for composition, under the following circumstances:—

On the 25th of September, 1880, Messrs. Milward & Co., judgment creditors of Stanley for the sum of 656*l.* 19*s.* 4*d.*, commenced bankruptcy proceedings in the Warwickshire County Court. On the same day Stanley filed a liquidation petition in London.

On the 4th of October Stanley was adjudicated a bankrupt on the petition of Messrs. Milward.

Notwithstanding this, Stanley continued his liquidation proceedings, and on the 11th of October the first meeting of the creditors in the liquidation was held, when resolutions were passed to accept sixpence in the pound.

On the 19th of October the first meeting of the creditors in the bankruptcy was held.

On the 22nd of October the second meeting of the creditors under the liquidation was held, and the resolutions were confirmed, although, prior to that meeting, the debtor's solicitors were served with

notice of objection to the resolution on behalf of Messrs. Milward, one being that the debtor had, on the 4th of October, been adjudicated a bankrupt.

On the 5th of November the Registrar, on the application of counsel for Stanley, and on hearing counsel for Messrs. Milward, ordered the resolutions to be registered.

Messrs. Milward appealed.

Mr. Finlay Knight, for the appellants.—These resolutions ought not to have been registered. An adjudication of bankruptcy had been previously made, and the only power which the Court has of annulling an adjudication when once made is under section 28 of the Bankruptcy Act, 1869, with the sanction of the Court.

In

Ex parte Foster; in re Pooley, 44 Law J. Rep. Bankr. 22; Law Rep. 10 Chanc. 59,

the adjudication was made by consent, with a stay of proceedings under it to a future day, the adjudication being merely provisional for the purpose of protecting the property—

Ex parte Walton; in re Dando, 44 Law J. Rep. Bankr. 37; Law Rep. 10 Chanc. 215.

The case of

Ex parte Davis; in re Russ (ubi supra)

is inconsistent with the rulings in the two other cases, and cannot stand.

Mr. M'Oall, for the respondents.—The resolutions complied with the requirements of the Act (Bankruptcy Act, 1869, s. 125. sub-s. 4; Bankruptcy Rules, 1870, rule 295); and the duty of the Registrar is only ministerial: he could not refuse to register—

Ex parte Levy; in re Varbetan, 40 Law J. Rep. Bankr. 40; Law Rep. 11 Eq. 619.

The whole scope and object of the Act is to enable creditors to choose their own way of administering their debtors' property; and the Chief Judge, in the case of

Ex parte Davis; in re Russ (ubi supra),

points out that bankruptcy and liquidation can go on contemporaneously.

In re Stanley; ex parte Milward (App.), Bankr.

JAMES, L.J.—I am of opinion that this order cannot be sustained. The difference between this case and the case before the Chief Judge, in *Ex parte Foster*, is that here there was an adjudication of bankruptcy, and after adjudication the whole thing vested in the trustee in bankruptcy. There was nothing further to be done by way of composition. Therefore the Registrar ought not to have registered these resolutions.

The case of *Ex parte Foster* was one of very exceptional circumstances. There was no simple adjudication of bankruptcy as here; no adjudication was made, except with the view of giving effect to the resolutions in liquidation which were intended to be made.

COTTON, L.J.—I am of the same opinion, because when there is a simple adjudication of bankruptcy once made there is no ground for proceedings in liquidation. It is said that there are various sections in the Act which render it obligatory on the Registrar to register these resolutions. Now rule 266 merely deals with proceedings in bankruptcy as and where ancillary to proceedings by arrangement. In such cases an adjudication is not an adjudication for administering the property of the debtor in bankruptcy, but for the purpose of holding it *in medio*, to see whether the creditors agree to act under the 125th and 126th sections.

Section 80, sub-section 10, gives power to the Court to stay proceedings in bankruptcy, to see what can be done by way of arrangement or composition.

Section 28 does give power to the Court to annul an adjudication, not under section 125, but under the general law, and with the assent of the creditors and trustee, and in confirmation of arrangements already come to.

In the absence of authority, then, I am clear that these resolutions ought not to have been registered. But is the case free from authority? If this case is the same as *Ex parte Davis*, then our decision must be taken as at variance with and overruling *Ex parte Davis*. If, before anything is done in a liquidation an adjudication of bankruptcy has been made, it must override the liquidation proceedings.

In *Ex parte Foster* the adjudication was made by consent, and proceedings were stayed to see whether there would be an adjudication. An expression of opinion was anticipated and provided for. In *Ex parte Walton* it was pointed out that the Court has jurisdiction either to postpone the adjudication till after the meeting of creditors, under section 80, sub-section 10, or to adjudicate the debtor a bankrupt, and stay the proceedings under the adjudication under rule 266, or to adjudicate him a bankrupt simply. Here there has been a simple adjudication, and I think that these resolutions cannot be registered.

LUSH, L.J.—I also am of opinion that this order cannot be sustained. The adjudication here was not formal and provisional, for the purpose of protecting the property *ad interim*, but complete, and intended to be so. The case of *Ex parte Foster* was in accordance with rule 266, but here no part of the Bankruptcy Act justified an adjudication other than final.

Solicitors—Whitehead, agent for Whateley, Milward & Co., Birmingham, for appellants; Ley & Brocklesby, for respondents.

JESSEL, M.R. } *In re THE ALMA SPINNING*
1880. } COMPANY.
Nov. 12. }

Company—Business to be carried on by not less than Five Directors—Call—Forfeiture—Ultra vires.

Where articles of association provide that the business of a company is to be carried on by not less than a minimum or more than a maximum number of directors, the words are imperative, not merely directory. Consequently, a forfeiture of shares for non-payment of a call made when there are less than the specified number of directors is invalid.

By the articles of association of the Alma Spinning Company it was provided (art. 4) that the directors might from time to time make such calls upon the

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members in respect of all moneys unpaid on their shares as they should think fit, provided that each call should not exceed one pound per share, and that at least twenty-one days' notice should be given of such calls; (art. 6) that if any member failed to pay any call due on the appointed day, the directors might at any time thereafter, during such time as the calls remained unpaid, serve a notice on him requiring him to pay such call, and such notice should also state that in the event of non-payment at the time and place appointed, the shares in respect of which such call was made were liable to be forfeited; (art. 35) that the business of the company should be conducted by not less than five, nor more than seven, directors; and (art. 45) that the directors might meet together for the despatch of business, adjourn and otherwise regulate their meetings as they thought fit, and determine the quorum necessary for the transaction of business. The 43rd article of association provided that the office of a director should be vacated if he became insolvent. There were originally appointed six directors of the company, of whom James Bottomley was one. One of these died before October, 1877. In that month, Bottomley presented a petition for liquidation, and shortly afterwards the other directors made a call on all the shareholders of the company. Neither Bottomley nor his trustee paid anything in respect of this call, or of another made soon afterwards. A notice was then served upon them, pursuant to the 6th article of association, requiring them to pay; and on their failure to do so, the remaining four directors held a meeting, at which they passed a resolution that Bottomley's shares should be forfeited for non-payment of the two calls. In the interval between the two calls, a meeting of the shareholders had resolved that the minimum number of directors should for the future be three instead of five; but it was admitted that this resolution was invalid, the meeting not having been properly convened. The directors had previously fixed three as the quorum necessary for the transaction of business.

In the year 1878 the company was wound up, and it turned out that there

was a surplus of assets, after paying all claims, divisible amongst the shareholders. This was a summons by the liquidator, asking for a declaration that Bottomley was not entitled to be registered or treated as the holder of any shares in the company, and that the assets remaining in the hands of the liquidator might be dealt with as if his shares had been forfeited.

Mr. Chitty and Mr. Romer, for the liquidator.—The shares have been duly forfeited. The 35th article of association was directory only, and any act of the directors was good, provided it was in pursuance of a resolution passed at a meeting at which three, the quorum, were present. It could not have been meant that if the number of directors at any time, or from any cause, happened to fall below five, the whole business of the company should be stopped; and yet that must be the conclusion if the article is to be read as imperative, for the word "business" must mean every kind of business, whether the forfeiture of shares or the execution of contracts. They cited

The Thames Haven Dock and Railway Company v. Rose, 4 Man. & G. 552; 5 Sc. (N.S.) 524; 12 Law J. Rep. C.P. 90;

and

The New Sombbrero Phosphate Company v. Erlanger, 46 Law J. Rep. Chanc. 425; Law Rep. 5 Ch. D. 73; (on app.) 48 Law J. Rep. Chanc. 73; Law Rep. 3 App. Cas. 1218.

Mr. Seward Brice, for Bottomley and his trustee.—The object of the 35th article of association was to protect the shareholders against there being less than five directors. The first call was made at a time when that article was in force, and as the forfeiture purports to be for non-payment of both calls, it would be altogether invalid even if the resolution reducing the number of directors were good. He cited

Kirk v. Bell, 16 Q.B. Rep. 290;

The Garden Gully United Quartz Mining Company v. McLister, Law Rep. 1 App. Cas. 39;

and

Johnson v. Lytle's Iron Agency, 46 Law J. Rep. Chanc. 786; Law Rep. 5 Ch. D. 687.

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THE MASTER OF THE ROLLS.—The first question is, whether the call was well made; and the second question is, whether the forfeiture was well made. As regards one of the calls, it is admitted that at that time there were only four acting directors, the office held by Mr. Bottomley having been vacated; for whatever the term "insolvent" may mean, as he had liquidated by arrangement and his property had vested in a trustee, there is no doubt of his being insolvent. At the next quarterly meeting a resolution was passed, which it was admitted was invalid, reducing the number of directors to four; and under that invalid resolution the four acted as the only directors of the company, and under that invalid resolution made a second call and declared the forfeiture.

Now, I think a great many of the observations made in the case to which I have been referred of *The Garden Gully United Quartz Mining Company v. McLister* apply to this case. In the first place it was decided in that case that there must be three properly appointed directors to make a call or declare a forfeiture. In the next place it was held that when directors took their nomination from a meeting which elected a full board, although some of those directors had been legally appointed before, they could not say they continued in office under their former appointment, and reject the irregular and invalid resolution of the meeting which made them a full board, that they must be held to be elected under that resolution.

Now, in the present case, it seems to me very difficult for the liquidator to say, admitting that the resolution reducing the number of directors to four was invalid, that those directors did not act under that resolution. They clearly did and acted as four directors only.

The next question is, whether a call or a forfeiture declared by them is valid. Now the words of the 35th article of association are these: "The business of the company shall be conducted by not less than five, nor more than seven directors." Very simple words. If there were no interpretation of them I should hold that equivalent to saying, there shall

never be less than five, nor more than seven directors. The words, no doubt, are, "The business of the company shall be conducted;" but they are meant to point out what the number of directors of the company shall be, not merely by whom the business of the company shall be conducted. It was so decided in *Kirk v. Bell*, where the words were practically the same as we have here; and therefore if I wanted a decision in point, here it is. The words there were, instead of "The business of the company shall be conducted by," "The management of the affairs of the company shall be entrusted to" (which of course is the same thing) "not less than five nor more than seven directors," and it was held that there must be at least five directors. I agree that is the fair meaning of it.

Now comes the question, that being the proper meaning of the clause, is it to be treated as directory only—that is, to go for nothing unless the company fill up the vacancy? Now, if there were no decision, I should have said on principle that could not be merely directory; it is a negative and an affirmative. The shareholders have entrusted the management of their business to a certain number of persons, not to any other number. They say "There shall not be less than five nor more than seven who shall manage our business, while they are less than five they shall be no longer the managers." If in an ordinary case persons appointed seven people to be their attorneys, and said, "They shall conduct the business not being less than five," would anybody say that if the attorneys were below five they could conduct the business? Is there any distinction? Or take the case of a man going away and leaving his business to three clerks, and giving them power to act for him, and to draw bills, not being less than two acting together, could any one of them draw bills? I do not see the distinction or principle. The contract of this partnership or quasi partnership is, that the business shall be managed by not less than a certain number of persons. What right has a Court of justice to say that it shall be managed by a lesser number without the shareholders being consulted?—that is what it

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comes to, it being admitted that the resolution reducing the number of directors to four was not binding on the company. It appears to me, irrespective of authority, that the principle is clear.

Then the argument of inconvenience is adduced. Now I have always said—and I am repeating, I am afraid, what I have said over and over again—that the argument of inconvenience is a very strong argument where the construction is ambiguous—where it is fairly open to two constructions. Then the argument of inconvenience, like the argument of absurdity, may be used with great force; but when the construction is clear beyond controversy, it is no answer to say that there are some consequences which will cause inconvenience which were probably not contemplated by the framers. It is said that if there were five directors only, and one died suddenly before the quarterly meeting, there might be an interval during which you could not conduct the business. The answer is, You should not have started with five. I see they started with six. They might have had seven if they had liked. Then it would not have been very likely that they would become five in the intervals between the quarterly meetings, or they could have called a special meeting. Therefore they might have provided for it. They might not have contemplated the number being reduced to five, but, as I have already said, that is not to control the meaning of the words.

Now, then, I come to two cases, by both of which I should be bound, because they are decisions of the Court of Common Pleas and the Court of Queen's Bench respectively, and have been decided long ago. If they were inconsistent, then the second decision—*Kirk v. Bell*—being in 1851, would of course be binding on me, as distinguished from the first decision, which was in 1842 in the Common Pleas; but I do not think they are inconsistent. *The Thames Haven Dock and Railway Company v. Rose* was really a question of construction. Now, as I read it, two of the Judges held it directory—great Judges they were—Chief Justice Tindal and Mr. Justice Maule; but at the same time the decision of the Chief Justice did not

turn on that. It turned on this, that if there were any grounds to dispute the debt they should have been pleaded. There was a good debt admitted, and it was too late after judgment for the defendant to take advantage of it. But the Chief Justice did say, in the middle of his judgment, that he thought it was a matter of discretion only. Mr. Justice Maule says, "The question depends upon sections 109, 110, 111 and 112," which he read at full length; and then he says, "It appears to me that the provision referred to is a mere arrangement as to the internal affairs of the company, and that it does not apply to their external affairs, or prevent them from enforcing calls that have been duly made." But here the question is, whether the call has been duly made. Now I will go to the sections, because it appears to me the case is quite distinguishable from this. The 108th section, on which it turned, said that "the business and concerns of the company shall be carried on under the management of twelve directors, to be chosen," and so on. It did not give the minimum and maximum, as here, and it was equivalent, in my opinion, to saying that the number of directors shall be twelve, just as here it says the number shall not be less than five nor more than seven. But then it went on, in section 109, to provide that nine individuals should be the first directors of the company, until the first general meeting: shewing that the business might be carried on by nine and not by twelve. That was section 109, which was one of the sections read by Mr. Justice Maule. I need not say he did not read sections for nothing. The next section, the 110th, provided that, "Any director who shall, by ballot or rotation, go out of office, may be immediately, or at any future time, re-elected." The 111th section said that no person holding any office under the company, or being concerned or interested in any contract, should be capable of being a director, and should not act—that he should vacate his office, and be disqualified. Then there was a clause that, until his disqualification being communicated, his acts should be binding. Section 112 was

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that, "Where any director shall die, or resign, or become disqualified," and so forth, "or shall cease to be a director by any other means than going out of office, it shall be lawful for the remaining directors to elect some other proprietor, and every such proprietor shall continue in office so long only as the person in whose stead he was elected would have been entitled to continue in office had he lived and remained in office." Then there were some other sections. The 116th was that the directors for the time being should meet, and that they should not be competent to determine on any business unless at least five directors should be present. Now all that shewed this, that it meant that the number of directors was to be twelve, not that no business was to be transacted unless there were twelve; but it clearly was that no business was to be transacted unless there were five present; and that shews the distinction between having a minimum and a maximum, and simply stating the number. When you state the mere number of directors, and then have provisions shewing that the directors are to meet during vacancies to fill up the number, and that they may transact business with a less number, and so on, it is obvious it means that shall be the number of directors as the normal number, but not that you shall not carry on business with a less number. But that has no application when you say that the number shall never be less than a certain number.

Now this sort of thing does not occur very often in companies, but it has occurred very often in the old Court of Chancery as regards charity trustees. In a great number of cases the point has been decided that where the foundation deed says the number of trustees shall be so and so, it does not prevent their going on with a reduced number; but when it says that when the number comes to be reduced to a certain number they shall fill up vacancies, they are compelled to fill up that number when the number becomes reduced; or if it says they shall only act not being less than a certain number, it is considered to be essential that not less than that number shall

act. Indeed, the very argument before me proceeded on that, because there is a quorum in this case by the articles, and the same observation applies to a quorum. When you say "the quorum shall be three," what does that mean? Put in full it amounts to this, that no business shall be transacted unless there shall be three directors present. That is the meaning of a quorum—three at least; consequently it comes to nothing more than this, that you may say that was directory only. The answer is, it is not. It is of the very essence of the authority that there shall not be less. It appears to me *Kirk v. Bell* is a distinct authority in favour of this. To shew how distinct it is, although the ultimate decision turned on another clause as to ordinary business, I will refer to what Lord Campbell says. There the deed was executed by four directors, very much as here. There had been five, and they were reduced to four. The deed was executed by four, and it was said that it did not bind the company, and so the Court held. Lord Campbell said it lay on the plaintiff "to prove that those who executed the deed had authority. It seems to me he failed to shew this, for though it is executed by all the directors, they are only four in number, and in the deed of the company we have this clause"—and then his Lordship read clause 4 as follows: "The management of the affairs of the company shall be entrusted to such a number of directors as the shareholders shall for the time being deem expedient, so that there shall not be less than five nor more than seven; and the number at present deemed expedient, and hereby appointed, is five." Then he says, "If this regulation stood alone five directors would be required, and four were not sufficient." So that he did not decide the case solely on the second ground, that there was a provision for ordinary business, but on the first ground also, that if the regulation stood alone four were not sufficient. Then Mr. Justice Patteson goes upon the second clause relating to ordinary business, and says this is not ordinary business; and then Mr. Justice Coleridge says this: "We must look to the deed of settlement to see what authority is given for the

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individuals who become shareholders to sue under the original contract in the deed. Assuming, what I do not say, that three directors out of four might exercise the powers of a board meeting, those powers are only for the transaction of ordinary business." Then he goes on: "But it is not clear that three out of four could transact ordinary business; it is analogous to many cases: a familiar one is the submission to three arbitrators, any two of whom may make an award, in which case the award made at a meeting of two is not good, unless the third had power to attend and join if he pleased." It is obvious from that very cautious judgment that Mr. Justice Coleridge thought that even ordinary business could not be transacted, nor was he frightened at that result. Then Mr. Justice Wightman says the same in rather plainer terms: "It seems to me that the interests of the shareholders have been too much lost sight of in the argument. The shareholders stipulate for and are entitled to have the supervision of at least five directors."

Here they have entrusted the management of their affairs to a certain number of managing partners, and they have stipulated that there shall not be less than a certain number. As I have said before, on principle I think that must be the conclusion; but still I am very glad to find that the last authority is tolerably clear to the same effect. I therefore decide that these directors neither had the power to make the call, nor to enforce the forfeiture, and consequently it is void.

Solicitors—Milne, Riddle & Mellor, agents for Murray & Wrigley, Oldham, for the official liquidator; Phelps, Sidgwick & Biddle, agents for Sale, Seddon & Co., Manchester, for Bottomley.

HALL, V.C. } PETERS v. THE LEWES AND
1880. } EAST GRINSTEAD RAILWAY
Nov. 16. } COMPANY.

Lands Clauses Consolidation Act, 1845, ss. 7 and 9—Sale by Trustees for Parties absolutely entitled—Appointment of one Trustee as Surveyor under section 9—Power of Sale, when determining.

A trustee holding property upon trust for a married woman absolutely for her separate use is a person enabled to sell and convey under the Lands Clauses Consolidation Act, 1845, s. 7.

Quære, whether a company can safely accept a title from such a trustee, in a case where the cestui que trust objects to the sale, and is herself desirous to contract.

Where trustees selling to a railway company, under section 7 of the Lands Clauses Act, appointed one of themselves, who was an able practical surveyor, to act as surveyor on their behalf, to make the valuation required to be made under section 9 of the Act,—Held, that such appointment was a fatal irregularity which invalidated the proceedings.

Semble, the above sections do not empower trustees to sell for a price to be fixed by valuation, but only to sell for a price fixed by agreement, and afterwards to ascertain by valuation whether such price is sufficient.

A testator devised and bequeathed all his residuary estate to trustees upon trust for his wife for life, and after her decease upon trust to pay, transfer, assign or assure the same unto his two daughters, in equal shares, for their separate use as tenants in common, with a substitutional gift over in favour of the issue of the daughters in certain events which did not happen, and "for the purpose of division" he thereby empowered his trustees to sell his residuary estate. The two daughters survived the testator and the tenant for life. On the death of the tenant for life,—Held, that the property being "at home," the power of sale given to the trustees had determined.

Thomas Hopkinson, by his will dated the 4th of May, 1874, appointed his son-in-law, John Gaines, and his friends, W. R. M. Glasier, of 41, Charing Cross, London, and G. H. B. Glasier of the same

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place, auctioneers and appraisers, executors and trustees, and after bequeathing certain legacies gave, devised and bequeathed all the remainder of his estate, real and personal, unto and to the use of his trustees, their heirs, executors, administrators and assigns, upon trust to pay the net income to the testator's wife, Caroline, during her life, and after her decease upon trust to pay, transfer, assign or otherwise assure the same unto his two daughters, Caroline A. Gaines (the wife of the said John Gaines) and the plaintiff, Catherine Susan Peters, in equal shares, for their separate use as tenants in common; and if either of his said daughters should have died without leaving issue who should attain the age of twenty-one years, then upon trust to the separate use of such surviving daughter; and if either or both of his said daughters should die leaving issue, such issue should be entitled to their, his or her parent's share, as well original as accruing on their, his or her attaining the age or respective ages of twenty-one years, with benefit of survivorship between them or any one or more of them dying under that age; and "for the purpose of division" the testator thereby empowered his said trustees or the survivors or survivor of them, his or her executors, administrators or assigns, to sell all his said residuary estate by public auction or private contract; and he declared that his trustees should be entitled to charge and to be paid out of his trust estate for all business (whether strictly professional or not) done by them in relation to his said trust estate, in the same manner as if they had not been trustees. The will contained a power of leasing and the usual maintenance and advancement clauses.

In the month of April, 1878, the defendants, under the powers of their special Act, and of the Lands Clauses Consolidation Act, 1845, incorporated therewith, gave the testator notice to treat for the purchase of a portion of a freehold estate (consisting of a house and grounds, known as Kingscote, in the parish of East Grinstead) of which the testator was seised in fee-simple.

On the 28th of July, 1878, the testator died, leaving a widow and two daughters,

the plaintiff and the said Caroline A. Gaines. The will was proved by John Gaines and W. R. M. Glasier only, G. H. B. Glasier having renounced and disclaimed.

On the 9th of January, 1879, the two trustees served a notice on the defendants under section 92 of the Lands Clauses Act, requiring them to purchase the whole of the Kingscote property, on the ground that such property was a "house" within that section; and in the same month the trustees and the widow, the tenant for life, commenced an action of *Gaines v. The Lewes and East Grinstead Railway Company* against the company for the purpose of enforcing such notice. In that action an order was made on the 16th of January, 1879, for the payment by the defendants into Court of a sum of 4,950*l.*, pending the decision of the action, with liberty to them in the meantime to take such portion of the Kingscote property as they required for the purposes of their undertaking. On the 29th of January, 1879, the widow, the tenant for life, died.

On the 6th of February, 1879, the defendants wrote to the solicitors of the trustees expressing their willingness to take the whole of the property, and their desire that the amount of the purchase-money should be determined by a jury under the provisions of the Lands Clauses Act; and on the 25th of the same month the defendants gave notice to the plaintiffs for the summoning of a jury, and at the same time offered the sum of 3,300*l.* for the property.

The trustees then entered into negotiations with the defendants for the sale of the property to them by private contract. No definite agreement was made, but as the result of such negotiations and with a view to a valuation of the property "by two able practical surveyors," as required by section 9 of the Lands Clauses Act, the two trustees, Messrs. John Gaines and W. R. M. Glasier, appointed the last-mentioned gentleman to act as their surveyor, and the defendants appointed a surveyor on their behalf. The two surveyors so appointed made their valuation, dated the 3rd of March, 1879, whereby the amount of the pur-

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chase-money was certified to be 3,400*l.* and the surveyor's fee to be 100*l.*

On the 23rd of June, 1879, the plaintiff and her husband gave formal notice in writing both to the defendants and to the trustees that she declined to concur in the sale, and objected to the sufficiency of the price, and required that the same should be ascertained in manner prescribed by the Lands Clauses Act.

On the 17th of July, 1879, an order was made in *Gaines v. The Lewes and East Grinstead Railway Company* that the sum of 3,400*l.*, part of the said sum of 4,950*l.*, should be carried over to the credit of the defendants in the matter of their special Act, "The Estate of Thomas Hopkinson deceased," and that the balance should be paid to the defendants' secretary.

On the 26th of July, 1879, the plaintiff instituted this action, alleging that the actual value of the Kingscote property was greatly in excess of 3,400*l.*, and claiming an injunction to restrain the defendants from entering upon, taking or retaining possession of or using the Kingscote property, or any part thereof, or executing any works thereon, until the amount of purchase-money, or compensation payable for the same, or the estate or interest of the plaintiff therein, should have been duly determined and paid or secured, and damages in respect of the taking of the property by the company otherwise than in accordance with their statutory powers.

By an indenture, dated the 22nd of August, 1879, and made between the trustees of the first part, the said John Gaines of the second part and the defendant company of the third part, the trustees conveyed the Kingscote property to the defendants, their successors and assigns. This indenture recited *inter alia* that the trustees had agreed to sell the property for a sum "to be determined by the valuation of two able practical surveyors," and recited also the appointment of surveyors and valuation by them, and by it the trustees purported to convey "in exercise of the powers for this purpose given to them by the Lands Clauses Consolidation Act, 1845, or otherwise."

On the 28th of November, 1879, on the

motion of Mr. and Mrs. Gaines, a further order was made in the action of *Gaines v. The Lewes and East Grinstead Railway Company*, under which a moiety of the 3,400*l.* cash was paid out to them, and the other moiety was carried over to the account of the plaintiffs.

On the present action coming on for hearing, evidence was tendered as to the insufficiency of the price, but his Lordship declined to go into that question, and the arguments were confined to the question whether or not the sale by the trustees to the company was valid and effectual, either by virtue of the power contained in the will, or under the powers of the Lands Clauses Act.

Throughout the arguments it was assumed that the gift over in case of the death of the testator's daughters leaving issue must be construed as applicable only to their death in the lifetime of the tenant for life.

Mr. Kekewich and *Mr. Shebbeare*, for the plaintiff.—First, we submit that the trustees could not sell, under the power contained in the testator's will, inasmuch as that power ceased when, on the death of the tenant for life, the plaintiff and her sister became absolutely entitled as tenants in common. And further, the power was only to sell "for the purpose of division," and no case for "division" had arisen. Nor does the conveyance purport to be in exercise of such power.

Secondly, the trustees are not persons empowered by the Lands Clauses Act to sell and convey. The whole scope and language of section 7 of the Act shews that that section was carefully framed to exclude the case of a trustee holding in trust for a person absolutely entitled. This is plain from the concluding words of the section, which limit its operation to trustees for persons under disability or incapacity. Where there is a simple trust for A, A is the person to sell and convey; and we ask you not to strain the language of the section so as to confer a power which is not in accordance with the grammatical meaning of the words, and is not required.

Thirdly, even if the trustees had power to sell under the statute they have not duly exercised it, for they have not com-

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plied with its provisions, and the appointment of one of themselves to act as surveyor is a fatal irregularity, because the object of section 9 obviously is to modify and put some check upon the power conferred on persons acting in a fiduciary position, and that object is entirely nullified if one of such persons is appointed to check himself.

Mr. W. Pearson and Mr. Prior, for the defendants.—First, we say that, independently of the Act, the trustees had power to sell and convey, and that by the conveyance they have purported to exercise, and have exercised, every power which they had under the Act, “or otherwise.” The words of the will shew that the power was intended to come into operation on the death of the tenant for life, when the necessity for “division” would first arise under the will.

Secondly, the trustees are expressly within the language of section 7 of the Act, and thereby authorised to sell and convey.

Thirdly, as to section 9. In order that that section should apply two things must concur: the party selling must not only be under disability or incapacity, but must also not have power to sell under the provisions of the Act, and the section does not therefore apply where trustees in fee are selling. But if the section does apply, the effect of it simply is that the price which is agreed upon shall not be less than shall be determined by the two able practical surveyors. No doubt, if there was any conflict of interest between the trustee acting as or appointing the surveyor and his *cestuis que trust* the appointment of the trustee as a surveyor might invalidate the proceedings; but here there was no such conflict of interest: the other trustee, by whom the appointment was made, was the husband of one of the beneficiaries, whose interest it was to get the largest possible price; and further, there was an express provision in the will for the purpose of enabling this trustee so appointed to act as surveyor in respect of the testator's estate.

No reply was called for.

HALL, V.C.—I think that the plaintiffs are substantially right in this action,

although some consideration may be necessary as to the precise form of the judgment to be pronounced.

Perhaps it is not necessary for me, taking the view I do, to determine the several points as argued by counsel; but, nevertheless, I mean to express my opinion upon them, because it possibly may be of use to the parties hereafter. With reference to the first argument on the part of the defendants, that the trustees can sell under the will without having resort to the Act of Parliament, it appears to me that the way in which the difficulty involved in that contention was met by *Mr. Prior* just now is not sufficient. Of course, an indefinite power of sale would be void. Such a power cannot exist for ever; there must be a time when the power will come to an end; and where the power is given indefinitely in an instrument creating life estates or estates tail, followed by a limitation of the remainder, the law, I conceive, has been settled that the power is effectual during the life estate or during the estates tail, because the estates tail are destructible or barrable, and therefore the power is supported, and that notwithstanding that there might be a succession of minorities. That appears to be determined as regards ordinary powers of this kind, as distinguished from powers and provisions which would change the beneficial interest—as, for instance, a provision for accumulation, it being, of course, understood that I am not now speaking with any reference to the *Thellusson Act*. But when the limitation in remainder comes into effect, although no limit may have been put upon the continuance of the power, yet there is an end of the power, because the property is then “at home,” and the party entitled in remainder becoming beneficially interested, it is not considered that the power is to be kept up beyond that time. If it were so, it would be exceedingly difficult to say when the power is to end. That principle, I think, was enunciated by Vice-Chancellor Wood in *Lantsbery v. Collier* (1), and has since

(1) 2 Kay & J. 709; 25 Law J. Rep. Chanc. 672.

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been generally accepted; and there are several other authorities to the same effect. Mr. Prior has said that here the power must be exercisable after the determination of the life estate, in order that there may be a power exercisable "for the purpose of division;" but that argument is quite sufficiently met by the consideration that in certain events provided for by the will the trust might go on after the determination of the life estate. If the ultimate gift over had taken effect (which it might have done), the operation of the trust to assign over immediately after the death of the tenant for life might have been suspended as to one or both of the moieties; and then the provisions in favour of the issue might have necessitated advances to children who were minors, which apparently could only be raised by the exercise of the power of sale, or, at all events, might be provided for through the medium of that power. I think it will be found that the law as I have stated it is sound, and is in accordance with the principles laid down by Lord St. Leonards in his work on *Powers*; and I think, therefore, that that first argument may be taken as out of the question—to say nothing of this, that I do not think, upon a fair consideration of all that has taken place here, notwithstanding the words in the conveyance, the parties were assuming to act in any way under such a power. There is nothing in the conveyance which points to that, so far as I can see, and much which leads the other way. The words expressing that the conveyance is made under the statute "or otherwise" seem to have reference to the power of transferring the property rather than to the power to make a title by selling otherwise than under the Act of Parliament. I may further observe that it is plain that, under such a power as this, the trustees could not sell at a price to be fixed by two able surveyors—a consideration which seems in itself to destroy the reliance placed upon the power in the will.

Then it is said, on the one hand, that the sale is effectual under the provisions of the Act, and on the other hand that

it is ineffectual, because the 7th section of the Act is inapplicable to this case, by reason of the *cestui que trust* being a married woman absolutely entitled for her separate use. It is said that trustees for a married woman can only sell under the 7th section if the married woman is not able to sell herself. Well, with regard to the married woman being able to sell herself, I should say that, as the Act of Parliament speaks of "a married woman seised," there is not in this case that which is provided for by the earlier part of the section. No doubt, a married woman, entitled for her separate use in fee, could act herself and negotiate for a sale; but in the absence of her so doing, where a trustee for her proceeds to act under this section, and does so without any interposition or objection by the *cestui que trust*, such trustee having the legal fee, I think that in such a case the trustee would be a person competent as a trustee to contract under the 7th section; and I think so, notwithstanding the concluding words of the section pointing to persons who are not competent persons to contract, and empowering trustees to convey on behalf of *cestuis que trust*, "whether infants, lunatics, *femes covert* or other persons, and that to the same extent as such *cestuis que trust* respectively could have exercised the same power under this and the special Act, if they had respectively been under no disability." If these married women are not persons who could exercise the powers of this Act and the special Act, which I am disposed to think they are not as not being seised, then no question can arise. If, however, they are persons who can exercise these powers, I do not think that the reference at the end of the section would be correctly construed to exclude the trustees, but that the effect of the section is to give a power to trustees irrespective of the fact of there being also a power to the *feme covert*, the *cestui que trust*. I conceive that the section must be construed as giving powers to each, subject always to this, that if the *cestui que trust* is absolutely entitled in fee and objects to the sale by the trustee, I apprehend that the person

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taking from the trustee under such circumstances would run a great risk of his title being called in question by the absolute beneficial owner; that a person buying from the trustee and knowing that the *cestui que trust* objected and was willing to contract himself and desirous so to do, would take the property at his peril. But subject to that, I think that the trustee would in such a case have power to contract and make a title.

In the present case the *cestui que trust* did not in fact object to the trustees as the persons dealing with the property and selling, and I do not think that it is open to her to complain on that ground. What the *cestui que trust* did require was that the price should be fixed in the way which the Act of Parliament provides, and she objected to the particular sum for which the trustees proposed to sell. Under these circumstances the question comes to this: Has what the trustees have done been in accordance with the provisions of the Act of Parliament?

Now, assuming at this stage that they had power to sell, it appears to me that the first and material and substantial objection is, that they have not in reality affected to sell as trustees for a sum ascertained by themselves. What I think the Act of Parliament means is, that they shall negotiate the sale and ascertain a price by arrangement, and that the sufficiency of the price is to be tested after it is fixed by the application of the 9th section. They are first to contract, and then in order to protect the *cestui que trust* they must ascertain that the price is enough by having the valuation made. It is argued that where the trustees who sell are not, within the meaning of the Act, persons who are both "under disability or incapacity," and also "not having power to sell or convey such lands except under the provisions of this or the special Act," the 9th section is inapplicable, but I think it must be read in connection with section 7. We must read it in a reasonable way, and it appears to me that these words "and not having power to sell and convey, &c.," are not to be read, notwithstanding the disjunctive "disability or incapacity," as

only applying where there are the disabilities or incapacities pointed out in section 7.

That is the fair construction. In the case of incapacity to sell there is no power given, because the Act of Parliament has not created the power to give receipts; and therefore the person under incapacity is not able to act at all except so far as he can sell by the aid of the 7th section, but the money must go into Court under the provisions of the 69th section.

On the whole it appears to me that the 9th section is applicable to the case, and I think I may say that such has been the practice in taking titles from railway companies in cases where trustees were only acting under the powers of the Act of Parliament. It appears to me, therefore, that there has been a miscarriage by the trustees in not selling through the medium of a contract entered into, failing which there are other provisions in the Act which come into operation—for instance, as to ascertaining the price by arbitration or by a jury. They must go through those proceedings, failing an agreement. The way in which they have come to an agreement is a way which was never intended by the Act of Parliament—by, as it appears to me, delegating their power by selling for a sum to be fixed by two able surveyors. That is not the way in which they are authorised to sell.

Assuming that there is nothing in that objection, there is still another question which has been discussed with regard to the appointment of one of themselves as one of the two able practical surveyors, and in my judgment it is clear that the 9th section supposed that some one would be appointed other than the parties themselves. Suppose there had been only one trustee, then the one would be appointing himself as one of two. It is manifest that it was intended, in selecting the person, to put a check on the value put on the property by the parties themselves, or agreed by the parties themselves, and that the sufficiency of the price should have the sanction of somebody else. Of course, if you appoint the man himself as one of the two you have not the test

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which was contemplated and intended by the 9th section. It appears to me, therefore, that there has been a fatal error in the proceedings in that respect. That being so I see nothing upon which the company can rest their title to this undivided moiety. They have got the conveyance of the fee in entirety, and they have got that erroneously under erroneous proceedings, but one of the beneficiaries entitled to an undivided moiety has adopted the sale and acted upon it, and therefore cannot complain of it. Under these circumstances it appears to me that such a judgment must be delivered as will not interfere with the railway company retaining possession as tenant in common with the other *cestui que trust* or the trustees on her behalf. Therefore the judgment must be in substance a declaration that the company have not acquired title to the undivided moiety of the plaintiff and her trustees, and that the plaintiff or her trustees are entitled to hold and enjoy that undivided moiety in common with the railway company, and that the railway company must be restrained from in any way interfering with the enjoyment by the plaintiff and her trustees as tenants in common of that undivided moiety. I do not see what more I can do. There will be liberty to apply, and the plaintiff will have the costs of the action.

By consent no mandatory order was made on this occasion, but simply declarations with liberty to apply.

Solicitors—Wyatt & Barraud, for plaintiff; Cope & Co., for defendants.

JESSEL, M.R. }

1880.

Nov. 16. }

ALLEN v. TAYLOR.

Vendor and Purchaser—Owner of House and Land—Sale of House and Land to Different Purchasers—Simultaneous Conveyances—Grant of all Lights—Right of Purchaser of Land to obstruct Lights of House—Easement—Injunction.

Where simultaneous conveyances are executed by the owner of a dwelling-house and of the adjoining land to different purchasers who have each notice of the conveyance to the other, the purchaser of the land cannot build thereon so as to obstruct the lights of the house.

The owner of a piece of land with two dwelling-houses thereon, possessing certain ancient lights, and of an adjoining piece of land, by his will devised his real estate to his two sons and a third person in trust for sale, and gave each of his sons an option of purchasing any part of his real estate. The trustees of the will by simultaneous conveyances granted the piece of land with the houses, "together with all lights thereunto belonging," to one son in fee, and the adjoining piece of land, "together with all lights thereunto belonging," to the other son in fee. The purchaser of the latter piece of land commenced building thereon in a way to obscure the lights in the two dwelling-houses:—

Held, that the purchaser was not entitled to build so as to obscure the lights in the two dwelling-houses, and an injunction was granted to restrain him from doing so.

Edward Allen, by his will, devised all his real estate to his two sons, Richard Allen and Matthew Henry Allen, and Samuel Stone, in trust for sale, and by a codicil to his will the testator gave his two sons, notwithstanding they were trustees, an option of purchasing either together or separately any part of his real estate that they should think fit at a valuation.

The testator died in July, 1863, seised in fee-simple of a piece of land at Leicester with two houses upon it, and of an adjoining piece of land with a warehouse at the further end thereof.

By an indenture of the 17th of March,

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1864, in pursuance of the powers vested in them by the will and codicil, the three trustees of the will conveyed for value the above first-mentioned piece of land with the two dwelling-houses thereon, "together with all buildings, . . . lights, easements and appurtenances thereunto belonging," and all estate, right, title, claim and demand of the trustees thereto, to the use of the plaintiff, Richard Allen, in fee.

By another indenture of the same date the trustees of the will conveyed for value the second above-mentioned piece of land with the warehouse on it, "together with all buildings, . . . lights, easements and appurtenances thereunto belonging," and all the estate, right, title, claim and demand of the trustees thereto, to the use of Matthew Henry Allen in fee.

Matthew Henry Allen subsequently died, and his widow and devisees conveyed the property comprised in the second indenture to the defendant Taylor in fee. In one of the houses conveyed to the plaintiff, Richard Allen, there were certain windows, being ancient lights, overlooking the defendant's land. The defendant commenced erecting some houses on his land which would have the effect of blocking up and obstructing the plaintiff's ancient lights.

The plaintiff now brought this action for an injunction to restrain the defendant from erecting any building upon his land so as to obstruct the plaintiff's lights.

Mr. Ince and *Mr. W. S. Owen*, for the plaintiff.—The defendant cannot any more than his predecessor in title obstruct our lights. If a house and land are conveyed by a vendor contemporaneously to different people, the purchaser of the land is presumed to take it, subject to the restriction that he cannot obstruct the lights of the vendor's house—

Palmer v. Fletcher, 1 Lev. 122; 1 Sid. 167, 227;

Compton v. Richards, 1 Price, 27

Swansborough v. Coventry, 9 Bing.

305; 2 Law J. Rep. C.P. 11.

The grant in the conveyance to the plaintiff is "together with all lights . . . thereunto belonging," and that means all

lights enjoyed at the time of the grant. On a grant of a tenement all those apparent and continuous easements, or easements necessary to the reasonable enjoyment of the property, and which are used at the time of the grant by the owner of the entirety, pass for the benefit of the grantee—

Wheeldon v. Burrows, 48 Law J. Rep. Chanc. 853; Law Rep. 12 Ch. D. 31;

Pyer v. Carter, 1 Hurl. & N. 916; 26 Law J. Rep. Exch. 258.

Mr. Chitty and *Mr. Cozens-Hardy*, for the defendant.—We submit that the defendant is entitled to his property freed from any right of easement of light. The case of

Pyer v. Carter (*ubi supra*) relied on by the plaintiff was disapproved of in

Suffield v. Brown, 4 De Gex, J. & S. 185; 33 Law J. Rep. Chanc. 249, where Lord Westbury said that if the owner of an entire estate sells part there will be no reservation in the absence of express stipulation in respect of the dominant portion of the estate of such continuous and apparent easements as have been previously used by the owner for the benefit of the unsold portion, on the ground that the grantor cannot derogate from his own grant so as to claim rights over the land, even though the easements desired to be reserved were *quasi* easements of an apparent and continuous character at the time of the grant, and a purchaser from the owner cannot be in any better position.

Pyer v. Carter (*ubi supra*) is also disapproved of in

Wheeldon v. Burrows (*ubi supra*).

In the general words, "lights thereunto belonging" mean lights belonging to the property in point of law at the time of the grant, and the *onus* is upon the plaintiff to prove his right thereto, and he must shew that his deed was executed first.

[THE MASTER OF THE ROLLS.—I must treat the conveyances as executed contemporaneously.]

If your Lordship holds that, then the plaintiff's deed was not executed before the defendant's, and he cannot claim any

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rights not expressly reserved to him by the defendant's deed.

THE MASTER OF THE ROLLS.—I wish if I can to follow the decision of the Court of Appeal. I hope I do not misunderstand it. There can be no doubt that the law as laid down by *Palmer v. Fletcher* is the law of the present day—that is, that where a man grants a house in which there are windows, neither he nor anybody claiming under him can stop up the windows or destroy the lights. That is based on the principle that a man shall not derogate from his own grant; and it makes no difference whether he grants the house simply as a house or whether he grants the house with the windows or the lights thereto belonging. In both cases he grants with the apparent easements or *quasi* easements. All that is now, I take it, settled law.

I take it also that it is equally settled law that if a man who has a house and land grants the land first, reserving the house, the purchaser of the land can block up the windows of the house. Then there comes a third case. Supposing the owner of the land and the house sells the house and the land at the same moment, and supposing he expressly sells the house with the lights, can it be said that the purchaser of the land is entitled to block up the lights—the vendor being the same in each case, and both purchasers being aware of the simultaneous conveyances? I should have said certainly not. In equity it is one transaction. The purchaser of the land knows that the vendor is at the same moment selling the house with the lights, and as part of one transaction he takes the land—he cannot take away the lights from the house. But, as I said before, it is a question of what is the settled law on the subject. I see the point is so stated in almost so many words by Lord Chief Justice Tindal in *Swansborough v. Coventry*. He says (p. 309), “In the present case, the sales to the plaintiff and the defendant being sales by the same vendor, and taking place at one and the same time, we think the rights of the parties are brought within the application of this general rule of law,

namely, that a grantor shall not derogate from his own grant.”

It appears that the same point was decided in *Compton v. Richards*. That was a case of a sale by auction at the same time of a house and some land, and it was held that the purchaser of the house was not to have his windows blocked up by the purchaser of the land. It was a single transaction in one sense, although it was a double transaction as between two persons, each being aware of what the other bought, and that it was intended that the man who bought the house with the lights should keep the house so.

The last case on the subject is *Wheeldon v. Burrows*. As far as I understand the decision of the Appeal Court in that case, the exception in *Swansborough v. Coventry* and *Compton v. Richards* was approved. In *Swansborough v. Coventry* the case was open to great doubt. There was a sale by auction which we have not here; and there is something here which was there. There was there and here a continuous and apparent easement. In the judgment in *Wheeldon v. Burrows* the case is treated as an exception to the general rule that if a grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. The late Lord Justice Thesiger says this (1): “It is said that even supposing the maxims which I have stated to be correct, this case is an exception which comes within the rule laid down in *Swansborough v. Coventry* and *Compton v. Richards*, namely, that, although the land and houses were not in fact conveyed at the same time, they were conveyances made as part and parcel of one intended sale by auction.” Then he says that will not do. Then he goes on to say, “In the cases which have been cited the conveyances were founded upon transactions which in equity were equivalent to conveyances between the parties at the time when the transactions were entered into, and those transactions were entered into at the same moment of time, and as part and parcel of one transaction.” So that he evidently means to

(1) 48 Law J. Rep. Chanc. 861; Law Rep. 12 Ch. D. 59.

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say that such a case as that is an exception to the general rule, and you cannot block up the lights.

The particular case before me is the strongest case of the kind I ever saw, for both of the purchasers were also vendors and were parties to both conveyances. It is not the mere case of a vendor by contemporaneous conveyance selling to two different purchasers, but the two purchasers were two of the three trustees of a will, by which an option was given to the two purchasers, or either one of them, to buy any part of the real estate that they thought fit, notwithstanding they were trustees; and then by contemporaneous conveyances each with the assent of the other exercised his option as to some of the houses and lands, for they both bought houses and both bought lands. It is not like the case of a man buying land alone or a house alone. The three trustees conveyed to the respective purchasers—each of them being a trustee—lands with houses built upon them, together with the lights thereto respectively belonging, and all the estate. Can people who have been parties to two transactions in this way say that they were otherwise than one transaction, and that both parties who bought houses with lights were not to get the lights? It appears to me, independently of authority, that in such a case as this there was a manifest intention shewn that the houses sold were to retain their lights, and that neither purchaser could on his land erect any obstruction which would block up or destroy the lights of his neighbour.

His Lordship accordingly granted the injunction asked for with costs.

Solicitors—F. Geare & Son, agents for J. Martin, Nottingham, for plaintiff; Field, Roscoe & Co., agents for Stone & Co., Leicester, for defendant.

FEY, J. }
1880. }
Nov. 30. } COCKBURN v. EDWARDS.
Dec. 1. }

Solicitor—Negligence—Mortgage—Sale—Notice—Measure of Damages.

A solicitor took a mortgage from a client with an unqualified power of sale, without explanation. He sold without giving notice to the mortgagor:—Held, that he was liable for damages to the extent, first, of the costs of the sale; second, the estimated costs of making a new investment; and, third, the difference between "solicitor and client" and "party and party" costs of the action.

In the year 1872 the plaintiff, who was then a rate collector at Ramsgate, bought a house in the High Street of that town for 600l. The defendant, acting as his solicitor, procured a loan of 450l. on mortgage of the house, and himself advanced 50l., and took a second mortgage of the property. This mortgage contained an absolute power of sale, which did not require notice to be given to the mortgagor before being put in force, or contain any other qualification. In 1873 the plaintiff borrowed a further sum of 300l. from the defendant on the security of a third mortgage on the house and a bill of sale on certain chattels. The defendant entered into possession of the house by receiving the rent. The plaintiff left Ramsgate, and set up as a tradesman in a town in Yorkshire. In December, 1877, the defendant sold the house under the power of sale for 630l. The purchase-money was applied in paying off the first two mortgages, and partly in reduction of the further debt due to the defendant. The statement of claim alleged that no explanation had been given to the plaintiff of the peculiarly onerous nature of the power of sale contained in the second mortgage, and that the property had been sold without notice having been given to him and without his knowledge, and at an undervalue. The plaintiff claimed a declaration that the omission of a qualifying clause in the power of

Cockburn v. Edwards.

sale was a breach of the defendant's duty as solicitor, and damages.

Mr. Cookson and *Mr. Wm. Barber*, on the question of what measure of damages the plaintiff was entitled to, contended that such damages ought to include all actual loss, such as expenses of sale, the increase of value of the property and a *pretium affectionis*, and also such additional sum as would include the whole costs of the action.

Mr. North and *Mr. Bardswell*, for the defendant, on this point contended that the house had a mere money value, and that the plaintiff had suffered no loss.

Mr. Barber replied.

Fry, J., held that it was the duty of the defendant, as solicitor, to explain the onerous nature of the power of sale; that the burden of shewing that he had done so lay on him; that he had failed to discharge that burden; and that he had not given notice of his intention to sell, and proceeded—If that be so, it appears to me to follow that the plaintiff has been injured, and has suffered a wrong at the hands of the defendant, because he has neither inserted that provision for notice which he ought under the circumstances to have done, nor given the notice which would have been required.

Then arises the third question, What is the measure of the damages I ought to award? The plaintiff, I think, fails in shewing that the sale was at an under-value. I think the property was sold at a fair market price, but the plaintiff was not bound to have it sold; and I think the true measure of damages is to be found in considering, in the first place, what costs the plaintiff has been put to by reason of the wrongful sale; secondly, what costs he would be put to if he were to make a new investment. I think, further, he ought to be allowed the difference between party and party costs and solicitor and client costs of the action. I come to these conclusions partly on the authority of a case—*Fair v. The London and North Western Railway Company* (1), referred to in *Saunders on Negligence*.

(1) 21 Law Times Rep. N.S. 326.

The plaintiff will have the costs as between party and party as a successful litigant, and the additional costs by way of damages, but they need not be separately taxed.

Solicitors—*Van Sandau & Cumming*, agents for *Mills & Bibby*, Huddersfield, for plaintiff; *F. Venn & Son*, agents for *Edwards & Son*, Ramsgate, for defendant.

Fry, J. }
1880. }
Dec. 6. }

EAMES v. HACON.

Conflict of Law—Domicile—Administration.

The personal representative in the country of domicile of deceased was held entitled to recover the residue, after administration, of the deceased's estate transmitted to this country by the personal representative in India.

The plaintiff was widow of the Rev. W. L. Eames, formerly a chaplain in the Bombay Presidency. He died in Ireland, where his domicile was. The plaintiff obtained letters of administration to her husband's estate in Ireland, and also in England.

Acting under a power of attorney from the plaintiff, Messrs. Forbes, of Bombay, obtained letters of administration in that presidency to the estate of Mr. Eames in the usual form of letters granted to an attorney for the use and benefit of the principal.

After administering the estate in India, Messrs. Forbes remitted the sum of 194*l.* 4*s.* 4*d.* (being the clear residue of the estate in their hands, after satisfying Indian claims) to the defendants, Messrs. Hacon & Turner, with instructions to pay the same to the parties entitled. The plaintiff required them to pay the money to her, but they refused to do so without the receipt of all the next-of-kin of the deceased; and the plaintiff, by this action, claimed payment to herself.

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Mr. North and Mr. G. E. Wright, for the plaintiff, argued, first, that she, as the legal representative of the deceased in the country of the deceased's domicile, was entitled to receive and give a discharge for the clear residue in the hands of any local administrator, and therefore, as between herself and Messrs. Forbes, or the defendants, their agents, she was entitled to the money the subject of the action. Secondly, Messrs. Forbes had obtained the administration as her agents only, and under the form of the letters she could give them or their agent a good discharge—

De la Viesca v. Lubbock, 10 Sim. 629;

Chambers v. Bicknell, 2 Hare, 536;

Anstruther v. Chalmers, 2 Sim. 1;

Edgar v. Reynolds, 4 Drew. 269; 27

Law J. Rep. Chanc. 562;

The Attorney-General v. Köhler, 9 H.L. Cas. 654;

In the goods of Hughes, Law Rep. 3 P. & D. 140.

[FREY, J., referred to

Enohin v. Wylie, 10 H.L. Cas. 1; 31 Law J. Rep. Chanc. 402.]

Even if the money was to be considered money of the deceased in England, the plaintiff was entitled as English administratrix.

Mr. Methold, for the defendants, contended that the administrators in a country not the country of domicile were directly liable to the next-of-kin, and the money in their agent's hands could not therefore safely be parted with without a discharge from the next-of-kin—

De la Viesca v. Lubbock (*ubi supra*);

Chambers v. Bicknell (*ubi supra*);

The Attorney-General v. Köhler (*ubi supra*);

Williams on Executors, 6th ed. p. 462, *et seq.*;

Currie v. Bircham, 1 Dowl. & Ry. 35.

FREY, J., said—The plaintiff in this action is the widow of the late Mr. Eames, who died in the year 1877, and left certain personal estate in India. On the 24th of June, 1877, letters of administration of his estate were granted to his widow. Those letters were limited

“until some will of the said deceased could be found and deposited in the said Court.” It appears to me, that being the frame of the letters of administration, I must consider that the Irish Court assumed itself to be the Court of the domicile of the testator, because that would be the proper Court in which the will of the testator would be deposited when found, and all parties appear to me to have proceeded on that footing.

What happened was this: In September, 1878, Mrs. Eames executed a power of attorney, by which she authorised Messrs. Forbes to take out letters of administration or apply for letters of administration in her name and as her attorneys. Two of the Messrs. Forbes did obtain such letters in April, 1879, and they were granted by the Court at Bombay, and they contained a recital that the applicants, the Messrs. Forbes, were two of the duly constituted attorneys of Henrietta Eames, widow and administratrix in England of the personal estate and effects of the Rev. William Leslie Eames, and the grant is to the use and for the benefit of Henrietta Eames, limited until she shall obtain letters of administration granted to her. The Messrs. Forbes have ascertained the clear residue; they have transmitted it to their agents in England, who are the defendants; and the question which is by agreement between the parties to be determined is, Who, under that state of circumstances, is entitled to give a receipt to the Messrs. Forbes? It appears to me that there are persons of three possible characters who may set up a claim of this nature. In the first place, there is the legal personal representative constituted by the forum of the domicile of the deceased. *Prima facie* that person is, in my judgment, entitled to receive the moneys belonging to the personal estate of the testator which represent the clear net receipts obtained in any country, wherever it may be, and through the intervention of any letters of administration, wheresoever granted. That is a conclusion to which I arrive, partly on general principles and partly because they have been very clearly explained in the case of *Enohin v. Wylie*, to which I have referred. The extreme

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difficulty and confusion which would arise if every Court in every place where assets might be found undertook the plenary administration of the estate, was there pointed out by Lord Westbury. He says, "The utmost confusion must arise if, when a testator dies domiciled in one country, the Courts of every other country in which he has personal property should assume the right of declaring who is the personal representative, and next of interpreting the will and distributing the personal estate situate within its jurisdiction according to that interpretation. An Englishman dying domiciled in London may have personal property in France, Spain, New York, Belgium and Russia; and if the course pursued by the Court of Probate and the Court of Chancery in the present case should be adopted by the Courts of those several countries, there might be as many different personal representatives of the deceased and as many varying interpretations of his will as there were countries in which he was possessed of personal property. It is unnecessary to dwell on the evils which would result from this conflict of jurisdictions. It was to prevent them that the law of the domicile was introduced and adopted by civilised nations. I am therefore of opinion that the executors might have excepted to the jurisdiction of the Court of Chancery as a Court of construction and administration. They might have insisted that it was the duty of the Court to hand over to the executors the clear English personal estate, and to remit the next-of-kin to the Court of the domicile of the testator;" and his Lordship went on to point out that the rights of the executors had been renounced by their submission to the jurisdiction of the Court of Chancery. I think, as I have already stated, that I must assume from what has taken place between the parties, and with no evidence on the point, that Mr. Eames died domiciled in Ireland, and consequently that the grant of letters of administration was a grant of letters which would cover the whole clear residue of the personal estate of Mr. Eames, wherever it was found.

In the next place, it has been sug-

gested that the defendants are liable to pay to Mrs. Eames, because she is the person for the use and benefit of whom the letters of administration were granted. It does not appear to me that I need consider what might be the question arising between such a person and a person named as the principal in letters of administration, if the person did not fill the character of legal personal representative constituted by the Court of the domicile, because I think in this case both characters concur in one person.

Then it has been suggested that the next-of-kin are entitled to sue in India, and that they are therefore necessary parties to the release to be given. If the judgment of Lord Westbury pronounced in the House of Lords be correct (and it appears to me to be the law), it is clear that the next-of-kin should be remitted to the Court of the domicile; and consequently that, instead of India being the Court where they should institute their claims, they must institute them in Ireland, which I assume to be the Court of the domicile. Then it is said that there are certain authorities which are inconsistent with that view, and I am very much pressed with the authority of the case of *Chambers v. Bicknell*. That case does not seem to me in any way inconsistent with the view I take; but undoubtedly the assets in one particular jurisdiction are liable to pay debts of the testator there contracted, and the creditors may maintain against the local administrator an action for that purpose, the clear net residue only being that which the administrator constituted by the Court of the domicile is entitled to; and in *Chambers v. Bicknell* all that appears is that the persons entitled as next-of-kin were allowed to maintain the action. One effect would be to ascertain the creditors in England, what shall be done with the surplus not being decided by the Court. Another case has been very much pressed on my attention of *The Attorney-General v. Köhler*. There it appears that the administration was taken out in England by the nominee of the Crown, or rather by a succession of nominees of the Crown; but it also appears that throughout England was treated as the

Eames v. Hacon.

Court of the domicile; and it further appears that, either by force of the bond given by the nominee of the Crown, or by force of the statute 15 Vict. c. 3, such nominee of the Crown was bound to distribute the assets according to the Statutes of Distribution. He did not distribute them according to the Statutes of Distribution, but paid them over to the Crown, and therefore as the legal personal representative was liable to the next-of-kin. That, it appears to me, is the whole of that case.

I hold, therefore, that the next-of-kin are not entitled to make any claim upon this fund, except through the intervention of the Irish administratrix; consequently they are not necessary to the action, and a valid discharge can be given to the defendant by the plaintiff. I think I must make that declaration, and give the costs of the action to the plaintiff.

It would have been more satisfaction to me if it had been proved that Ireland was the Court of the domicile; but as neither party thought fit to do that, I feel bound to act upon the presumption which appeared to me to result from the letters of administration.

Solicitors—John Wilkinson, agent for H. Davies, Oswestry, for plaintiff; Hacon & Turner, for defendant.

[IN THE COURT OF APPEAL.]

JAMES, L.J.
COTTON, L.J.
LUSH, L.J.
1880.
Dec. 11, 13. } *In re* THE WITHERNSEA
BRICK WORKS (LIMITED).

Company — Winding-up — Execution Creditor—Secured Creditor—The Bankruptcy Act, 1869, s. 87—The Judicature Act, 1875, s. 10.

The 10th section of the Judicature Act, 1875, merely abrogates the old rule which obtained in Chancery in the administration of assets of deceased persons, and in

the liquidation of companies, that a creditor holding security for his debt was entitled to prove for the whole of his debt, without making any deduction in respect of his security—provided he did not receive in the whole more than twenty shillings in the pound for his debt—and substitutes therefor the rule in bankruptcy, that a secured creditor can only prove for the balance of his debt after realising his security or giving credit for its value.

The section does not introduce any of the rules in bankruptcy as to the avoidance of securities any more than it introduces the bankruptcy rules as to fraudulent preference or order and disposition.

Where, therefore, a judgment creditor of a company issued a fi. fa., under which the sheriff seized, but, before sale, a petition was presented against the company, on which a winding-up order was subsequently made,—

Held (affirming the decision of MALINS, V.C.), that the judgment creditor was a secured creditor of the company.

In re The Printing and Numerical Registering Company (47 Law J. Rep. Chanc. 580; Law Rep. 8 Ch. D. 535) overruled; *In re* Richards & Co. (48 Law J. Rep. Chanc. 555; Law Rep. 11 Ch. D. 676) approved and followed.

Appeal from the decision of Malins, V.C.

On the 3rd of June, 1880, W. P. Burkinshaw recovered judgment against the above-named company in the Queen's Bench Division for 84*l.* 19*s.* 7*d.*

On the 8th of July execution was issued on the judgment, and on the 10th of July the sheriff seized some goods of the company.

On the 14th of July a petition was presented for the winding-up of the company, and on the 15th of July an *interim* injunction was granted, restraining the sheriff and execution creditor from proceeding further under the judgment.

On the 30th of July Malins, V.C., ordered the company to be wound up.

On the 5th of August the Vice-Chancellor, on the application of the judgment creditor, gave him leave to proceed with his execution.

The liquidator of the company appealed.

In re Withernsea Brick Works, App.

Mr. Glasse and Mr. Boome, for the appellant.—The question turns on the construction to be placed on the 10th section of the Judicature Act, 1875; that is to say, whether that section imports into the winding-up of a company the rule in bankruptcy that where a sheriff has seized the goods of a trader under a *fi. fa.* for a judgment exceeding 50*l.*, and bankruptcy supervene within fourteen days after sale, he must hand over the proceeds of sale to the trustee in bankruptcy—

The Bankruptcy Act, 1869, s. 87.

The authorities on the point are conflicting.

In

In re The Printing and Numerical Registering Company (ubi supra) the Master of the Rolls held that the rule in bankruptcy did apply to such a case as the present; but in

In re Richards & Co. (ubi supra)

Mr. Justice Fry came to the opposite conclusion, and the Vice-Chancellor followed the latter decision.

We rely on the decision of the Master of the Rolls.

Mr. Macnaghten and Mr. Nalder, for the execution creditor, were not called upon.

JAMES, L.J., said—I can see no reason for reversing the decision of the Vice-Chancellor, following that of Mr. Justice Fry, but differing from that of the Master of the Rolls. It appears to me, with all deference to the Master of the Rolls, that the fallacy of his view is this, that the object of the 10th section being to introduce into the administration of assets of deceased persons and the winding-up of companies, the same rules as between secured and unsecured creditors as had prevailed in bankruptcy, he thought that when, under certain circumstances, a security would be avoided in bankruptcy, the same result was intended to follow in the administration of assets of deceased persons, and in the winding-up of companies. But I see no ground for adopting that rule in a winding-up: there are no words in section 10 avoiding any security. The question under section 87 of the Bankruptcy Act is not how the fund is to be administered, but what

constitutes the fund—not what are the rights of secured creditors, but whether a secured creditor has, under certain circumstances, a security at all. It appears to me that the provisions of the 87th section can no more be imported into a winding-up than can the law of bankruptcy as to fraudulent preference or order and disposition. When the Judicature Act was passed there were different rules in the administration of assets under the then state of the law in Chancery and in Bankruptcy with respect to secured creditors, and all that was intended by the 10th section of the Act was to alter that and to adopt the rule in bankruptcy in all cases in the distribution of the assets between secured and unsecured creditors.

COTTON, L.J., said—I am of the same opinion. No doubt the question is an important one, especially having regard to the difference of opinion among the Judges. The 10th section of the Judicature Act provides that the same rule was to prevail in the administration of assets and the winding up of companies as to the respective rights of secured and unsecured creditors as in bankruptcy. What is sought by this appeal is not to administer the assets of the company, but to bring into the assets that which, independently of the 87th section of the Bankruptcy Act or some other statutory enactment, would not be assets of the company at all. Under the 85th and 163rd sections of the Companies Act, 1862, the Court has a discretion as to allowing an execution creditor to proceed with his execution after the winding-up has commenced; but, if the construction put by the Master of the Rolls on the 10th section of the Judicature Act is right, the effect of it is to do away with that discretionary power altogether. The 87th section of the Bankruptcy Act does not purport to interfere with the rights of secured and unsecured creditors *inter se*, except in so far as its effect is to bring into the assets something which would not otherwise have belonged to them. In my opinion the Court cannot properly give that effect to the 10th section which has been given to it by the Master of the

In re Withernsea Brick Works, App.

Rolls. Upon the fair construction of that section, I think it is not applicable to a case where the effect of applying it will be to alter the property to be administered, and not merely to alter the rule of administration.

LUSH, L.J., said—I am of the same opinion. I think the whole object of the 10th section is that when a claim is made against the assets of a deceased person or a company in liquidation, a secured creditor shall stand in the same position as a secured creditor making a claim against the assets of a bankrupt. In the present case the creditor is not claiming to share in the assets at all, but is claiming to have the benefit of his security.

Appeal accordingly dismissed with costs.

Solicitors—Weed & White, agents for Thorp & Firth, Hull, for appellant; Collyer-Bristow & Co., agents for Leak, Till & Stephenson, Hull, for respondent.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.	} <i>In re</i> RAGGETT; <i>ex parte</i> WILLIAMS.
JAMES, L.J.	
COTTON, L.J.	
LUSH, L.J.	
1880.	
Nov. 25.	

Mortgage—Consolidation—One Security determined—Mortgage by Three Persons and Mortgage by two of them as Trustees for the three.

A and B mortgaged to W. certain premises which they held under a lease, such lease being determinable by the lessor on the bankruptcy of the lessees. They subsequently took C into partnership, and A and B declared that they held the leasehold premises subject to the mortgage in trust for the three partners as part of the assets of the partnership. A, B and C subsequently mortgaged to W. a debt due to the firm from X, and the securities they held

for its repayment, and shortly afterwards became bankrupt, whereupon the lessor determined the lease under the proviso.

Upon motion by W. claiming to consolidate the debt and securities due from X mortgaged to him with the mortgage on the leasehold premises,—

Held (affirming the Registrar), that the doctrine of consolidation cannot be extended so as to be applied to a case where one security is gone.

Quære, whether a mortgagee can consolidate a mortgage made to him by three persons with one made to him by two of the three persons as trustees for the three.

This was an appeal from an order of Mr. Registrar Pepys acting as Chief Judge.

On the 4th of April, 1877, a lease of certain premises in Gresham Street was granted to Raggett and Williams, two of the bankrupts. That lease contained a proviso enabling the lessor on the bankruptcy of the lessees to determine the lease and re-enter.

On the 7th of April, 1877, Raggett and Williams mortgaged these premises to another person named Williams (the present appellant) to secure the payment of 500*l.*, which, by the terms of the deed, became due and payable in October, 1878.

On the 13th of June, 1877, Raggett and Williams took Beadon (the remaining bankrupt) into partnership with them. In the deed of partnership was a clause providing that the office of the firm (being the premises in Gresham Street) should be held by Raggett and Williams in trust for the three as part of the capital of the partnership, they being indemnified against all liability in respect of the covenants of the lease.

The three partners subsequently entered into transactions with a certain Count Alvo, and made advances to him. By an indenture dated the 22nd of November, 1877, Count Alvo assigned a leasehold house in Mansfield Street and the furniture therein to Beadon as a trustee for himself and his two partners for securing the advances.

The greater part of these advances was repaid to the mortgagees in an action instituted for the purpose of ascertaining

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how much was really due to them. But a sum of 750*l.* was still left unpaid on the mortgage.

On the 21st of March, 1879, the partners mortgaged the debt due from Count Alvo and the securities for its repayment to the appellant Williams, to secure a further advance, and notice of this mortgage was given to Count Alvo.

On the 23rd of July, 1879, the partnership became bankrupt, and thereupon the landlord of the Gresham Street premises re-entered in pursuance of the proviso in the lease and determined the lease.

Williams (the creditor) moved claiming a right to consolidate the debt due from Count Alvo with the debt secured by the premises in Gresham Street—in other words, that the mortgage on the Mansfield Street house should not be redeemed unless he were first paid the money secured by the mortgage of the Gresham Street premises.

The Registrar, on the 25th of May, 1880, dismissed the motion on the ground that the lease of the Gresham Street premises having determined by the bankruptcy of the lessees and the re-entry of the landlord, there was nothing left to consolidate.

Williams appealed.

Mr. Romer (Mr. Benjamin with him), for the appellant.—I submit that the Registrar was wrong in refusing my claim to consolidate. The right to consolidate arose immediately the mortgage of the debt due from Count Alvo was given to me. At that time the Gresham Street premises were a subsisting and valid security, and even assuming that there is no right to consolidate if, at the time the second mortgage is given, the first has become worthless, yet where as here it was then of value, whether small or great is immaterial, as the Court does not go into the question of the value of the security, the right must still exist.

Upon the question of value I will not admit that the lease is worthless.

The very point is decided by Vice-Chancellor Hall in the case of

Barrow v. Manning, Law Rep. W. N. 1880, p. 108,

in favour of the mortgagee, where the Vice-Chancellor held the doctrine of consolidation to be applicable, although the first mortgage had turned out to be worthless.

[JAMES, L.J.—“Consolidation” is an inaccurate phrase, it is really a question whether you can tack. How can you consolidate what does not exist?]

I take a mortgage of estate A and also of estate B from the same mortgagor. Then a right to consolidate ensues—that is, each debt becomes charged on both properties, and both debts become as if pledged on each property. If after that anything happens to one of these properties, it cannot surely take away the right which once existed—

Selby v. Pomfret, 1 Jo. & H. 336; 3 De Gex, F. & J. 595; 30 Law J. Rep. Chanc. 770;

Cummins v. Fletcher, 49 Law J. Rep. Chanc. 117, 563; Law Rep. 14 Ch. D. 699;

and the principle is based on this, that if A make a mortgage to B to secure a debt, and borrow a further sum from B upon the mortgage of another estate belonging to him, he must be taken to know that he is borrowing on both estates—pledging the two estates for the whole amount.

[COTTON, L.J.—Does not consolidation involve the right of the mortgagor to say, “Hand me back both estates”?—and how can he say that when one is gone?]

But can the mortgagor be allowed to say, “Because I have lost one estate on which my mortgagee would have had a security I am to be in a better position”?

Then the point arises that one mortgage is made by three persons, and the other by two of them, as trustees for the three—and it is objected that there cannot be consolidation in that case.

That really was decided in

Beevor v. Luck, 36 Law J. Rep. Chanc. 865; Law Rep. 4 Eq. 537,

—not to go to earlier authorities; and the correlative right of a mortgagee to consolidate a mortgage to himself directly with a mortgage to trustees for him is decided by

Tassell v. Smith, 2 De Gex & J. 713; 27 Law J. Rep. Chanc. 694;

In re Raggett; ex parte Williams (App.), Bankr.

which case, although it has been observed upon and questioned in

Mills v. Jennings, 49 Law J. Rep.

Chanc. 209; Law Rep. 13 Ch. D. 639,

on another point is untouched on this.

Fisher on Mortgages, 2nd ed. 679.

If A, mortgagor, assigns the equity of redemption in one mortgage to B, and then mortgages another estate to the same mortgagee, B could not redeem without paying off both mortgages. Is there any difference if A, instead of assigning to B, declares himself a trustee for B of the equity of redemption? and if the assignee of the mortgagor could not redeem without redeeming a subsequent mortgage by the mortgagor there must be the correlative right, which I ask for here.

The three partners could have required the two trustees to convey the property to them.

Mr. Winslow and Mr. G. W. Lawrence, for the trustee, were not called upon.

JAMES, L.J.—We are all of opinion that the decision of the Registrar must be affirmed. For myself, I am bound to say that, having frequently had occasion to consider the operation of the doctrine of consolidation, which has, as I have stated, in many cases worked monstrous injustice, I am not at all prepared or willing to extend that doctrine to any case where I do not find it has been clearly laid down as applicable by some authority, or where it cannot be logically deducible from some authority.

I do not find any authority at all from which I can derive assistance on this question whether there can be any consolidation as between two mortgage debts where one of the estates mortgaged has ceased to exist. It is not accurate to speak of this as a consolidation. It is an attempt to tack a debt which had once existed as a mortgage debt to an existing mortgage security. It is not suggested that it could really be tacked independently of the question of consolidation, one of the securities being absolutely gone. That is enough to dispose of the case, in the absence of authority, which it is admitted there is none; and that was

the view of it entertained by the Registrar. As regards the case before Vice-Chancellor Hall, to which we have been referred, we have not the facts of that case before us; but, with all deference to the Vice-Chancellor, if our decision is inconsistent with that case his decision must give way.

On the second point, as at present advised, I do not know of any authority, and I cannot myself suggest any principle on which a mortgagee can consolidate a mortgage made by three persons with one made by two of those persons in trust for the three. There was no communication with the mortgagee, and there is no reference in the second transaction to the first, and no privity between the mortgagee and the *cestuis que trust*.

But it has been suggested by Mr. Romer that the *cestuis que trust* could have called on their trustees to reconvey the property to them. No doubt; but the mortgagee has no right to look into transactions between his mortgagor and other persons.

But the first ground is sufficient for the dismissal of the appeal.

COTTON, L.J.—I am also of opinion that upon the ground on which the Registrar has based his decision this appeal fails. The question is one of consolidation. Consolidation arises when the owner of a mortgaged estate comes into equity to obtain the assistance of the Court in getting back his property. The Court says, "You shall not get back this property if your mortgagee has another property of yours as a security, which is insufficient for the payment of the debt charged upon it. You must pay both debts; if not, you cannot get back either property."

That, in my opinion, assumes a right in the mortgagee to hold both properties till he is paid both debts, and a right in the mortgagor, when both debts are paid, to have the two properties returned to him; and consolidation cannot exist where one property only is in mortgage.

This is an attempt to make one property in mortgage liable to two debts; but the right of the mortgagee to retain both properties is co-extensive only with his

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obligation to hand both over, and if he has parted with one property his right has ceased to exist. That being so, it is not right to deal with this case as if, to use the words of Vice-Chancellor Wood in *Selby v. Pomfret*, "both estates became pledged for the whole amount."

It is only when both properties remain in specie in the same mortgagee that they are treated as if both the properties were originally pledged to secure both debts; and one cannot be taken out of his hands unless both the debts are paid.

But it is said we must not consider the relative value of the two properties. That is so; but there is an enormous difference between a property of small value or no value and one that does not exist at all: one can be handed over to the mortgagor, the other cannot.

On this point I agree with Lord Justice James. If we had to decide the other question, I should desire time to consider the matter, for I cannot but think that where a mortgage is made by A and B of property in which A, B and C are beneficially interested, and A, B and C come to recover a property mortgaged by them, it may very well be said against them, "You shall not obtain the assistance of the Court in recovering this property unless you pay the debt on the property of which you are the beneficial owners." It is, however, unnecessary to decide this point; the other is decisive.

LUSH, L.J.—I also am of opinion that this appeal should be dismissed, and on the ground that where one security has ceased to exist the right to consolidate is gone.

Solicitors—Lawrence, Plews & Baker, for appellants; W. W. Aldridge, for respondents.

JESSEL, M.R. }
1880. } DENT v. THE LONDON TRAM-
Nov. 16. } WAYS COMPANY (LIMITED).

Tramway Company—Repairs—Depreciation—Loss of Capital—Reserve Fund—Ordinary Shareholders—Dividends out of Capital—Preference Shareholders—Dividends depending on Profits of Particular Year.

The articles of association of a tramway company provided that "no dividend should be declared except out of profits;" that the directors should, with the sanction of the company, declare annual dividends "out of profits," and that the directors should, before recommending a dividend, set aside "out of profits," subject to the sanction of the company, "a reserve fund for maintenance, repairs, depreciation and renewals." For several years previous to the year 1878, no proper reserve fund had been set aside by the company, and no sufficient sum had been expended by the company in the maintenance, repairs and renewals of their tramways, so that in the year 1878 they had become much out of repair. The company had for several years previous to, and also for the first half-year of, 1878 paid dividends on their ordinary shares, and had declared a dividend for the half-year ending the 31st of December, 1878. In an action by a shareholder to restrain the directors from paying the dividend, and it appearing that the amount available for the dividend was less than the sum required for the renewal and repairs of the tramways,—Held, that the company could only declare a dividend out of net profits, and that there could be no net profits until the tramways had been restored to a proper state, and provision for that purpose had been made out of the company's assets; and an injunction was accordingly granted to restrain the directors from paying to the ordinary shareholders the dividend declared.

Certain preference shares had been issued by the company to bear a preferential dividend "dependent upon the profits of the particular year only." A dividend had also been declared on the preference shares for the half-year ending the 31st of December, 1878, but the directors declined to pay the same until the capital of the company

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had been restored by the amount previously improperly paid away in dividends. For the year 1878 the accounts of the company shewed a net profit, after making due provision for repairs, depreciation and renewals, and to place the tramways of the company in the same condition on the 31st of December, 1878, as they were in on the 1st of January, 1878, sufficient to pay the stipulated dividend to the preference shareholders:—Held, that the preference shareholders were co-adventurers for each particular year only, and inasmuch as the accounts for the year 1878 shewed a net profit on the working of that year, after making all due provision for repairs, depreciation and renewals, sufficient for the payment of a dividend to the preference shareholders, that they were entitled to be paid such dividend without deduction, and that they were under no liability to recoup the amounts which had previously been improperly paid away in dividends.

Motion for judgment.

From the statement of claim it appeared that the defendant company was incorporated under the Companies Acts on the 14th of December, 1870, with a capital of 250,000*l.*, divided into 25,000 shares of 10*l.* each, the whole of which capital had been issued and fully paid up.

That a special resolution of the company was duly passed and confirmed in March, 1874, whereby it was resolved that the capital of the company should be "increased by the issue of 8,000 shares of 10*l.* each, bearing a preferential dividend of 6*l.* per cent. per annum, over the present shares of the company dependent upon the profits of the particular year only."

That in accordance with the resolution 8,000 preference shares of 10*l.* each had been issued and were fully paid up, and that during the year 1878 and at the time of action brought, the plaintiff was the holder of 100 fully paid-up preference shares.

That in the half-year ending the 30th of June, 1878, the company had earned profits sufficient for the payment of a dividend of six per cent. per annum both on their preference and ordinary shares, which dividend was paid, leaving a

balance of profits amounting to 2,522*l.* 12*s.* 3*d.*, part of which, to the amount of 2,400*l.*, was specially set aside to meet the six months' interest on the preference shares to fall due on the 31st of December, 1878.

That in the half-year ending the 31st of December, 1878, the company earned profits sufficient for payment of a dividend at the rate of six per cent. per annum upon the preference shares, and at the rate of six per cent. per annum on the ordinary shares; and at a general meeting of the company held on the 20th of February, 1879, such dividend was duly declared and became payable to the plaintiff and other preference shareholders in the company.

That the company refused to pay such dividend, and that the sum of 30*l.* was due to the plaintiff in respect of his preference shares.

That the tramways and works of the company were in a state of efficiency and good working order, and that no expenditure beyond the expense occasioned by ordinary wear and tear was required.

The plaintiff, who sued on behalf of himself and all other preference shareholders, claimed a declaration that he and the other holders of preference shares were entitled to a dividend on their shares at the rate of six per cent. per annum for the half-year ending the 31st of December, 1878, payment of such dividend and ancillary relief.

The amended statement of defence admitted the issue of the preference shares, but alleged that from the year 1871 down to the end of 1878, the accounts of the company were made up so as to shew a considerable net balance of profits in each year available for the payment of dividends to the shareholders in the company, and that on the faith of these accounts and that proper provision had been made for all legitimate and proper expenses and deductions chargeable against revenue, and that the balances were in fact properly available for the payment of the dividends, that the company had paid dividends to their ordinary and preference shareholders.

That the company had only recently ascertained that from the year 1871 to

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the end of the year 1878 the accounts of the company had been kept and made up in an improper and misleading manner; that the company had been thereby deceived, and that no proper sums had been expended and no proper allowance had been made for and in respect of the maintenance, repairs, depreciation and renewals of the tramways property and buildings, rolling stock and horses belonging to the company; and that the amounts from time to time actually charged against the revenue in respect of such maintenance, repairs, depreciations and renewals were grossly inadequate, and were far below what ought properly to have been so charged.

That during the years 1871 to 1878 inclusive the actual net profits of the company, after making allowance for the matters aforesaid, amounted in the aggregate to the sum of 26,950*l.* 9*s.* 6*d.*, but that, owing to the improper manner in which the accounts had been kept, they shewed during the same period a net balance of profits of 141,411*l.* 8*s.* 2*d.*, and that (with the exception of a sum of 10,090*l.* 17*s.* 4*d.*, being the net balance of profits appearing on the face of the accounts for the half-year ending the 31st of December, 1878) the whole of such sum had been paid away by the company during the above years in dividends to their ordinary and preference shareholders and scrip-holders.

That the only fund which, according to the accounts of the company in their improper form, was available to meet the diminution in value of the capital of the company was the reserve fund of the company, amounting to a sum of 2,723*l.* 15*s.* 8*d.*

That the accounts for the year 1878 purported to shew a net balance of profits for the year of 21,178*l.* 10*s.* 10*d.*

Paragraph 20 of the statement of defence was as follows:—

“If a proper proportionate amount had been charged against the revenue of the year 1878 for the matters referred to in paragraph 6” (being in respect of maintenance, repairs, depreciation and renewals), “the accounts would have shewn, as the fact is, that there was a balance of revenue, and in that sense a net profit of

only 14,932*l.* 5*s.* 4*d.*, whereof the sum of 5,953*l.* 14*s.* 2*d.* is attributable to the half-year ending the 30th of June, 1878, and the sum of 8,978*l.* 11*s.* 2*d.* to the half-year ending the 31st of December, 1878.”

That on the faith of the accounts for the half-year ending the 30th of June, in accordance with a resolution of the company, dividends at the rate of six per cent. per annum for the half-year were paid to the preference shareholders, and of three per cent. per annum to the ordinary shareholders. That on the 20th of February, 1879, the company resolved to pay dividends at the rate of six per cent. per annum to the preference and ordinary shareholders for the half-year ending the 31st of December, 1878.

In March, 1879, in an action of *Davison v. Gillies* (1), on a motion for an injunction

(1) JESSEL, M.R.
1879.
March 14. }

DAVISON V. GILLIES.

This was a motion by the plaintiff on behalf of himself and all other shareholders of the London Tramways Company, for an injunction to restrain the defendants, the directors of the company, from applying any part of the assets of the company which represented capital, or ought to be retained to represent capital, in the payment of dividends on the shares in the company, and from submitting to the shareholders any resolution to confirm or permit the payment of dividends out of capital, or summoning any meeting for the purpose of authorising payment of dividends, without first fully and properly disclosing to all the members of the company the true state of the capital, and other accounts of the company, and without disclosing the fact that no dividends could be paid except out of assets, which ought to be retained to represent capital.

The motion was based on the facts stated in the defence in *Dent v. The London Tramways Company*, that the tramways had become worn out, requiring the expenditure of a large sum for repairs, which had not been properly provided for by the company in their accounts, and that in consequence the company had no right to pay the dividend declared on the 20th of February, 1879, until the tramways were restored to a proper state, and until the amount expended out of capital had been replaced. The other facts are sufficiently stated in the judgment.

Mr. Chitty and *Mr. Stirling*, for the plaintiff.

Mr. Davey and *Mr. Romer*, for the defendants.

THE MASTER OF THE ROLLS.—The articles of association, which are binding on the directors and on the company, are very plain. The 107th article is this: “No dividend shall be declared except out of the profits of the company.” A general meeting can-

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tion, which by consent was turned into the trial, the Master of the Rolls granted

not get over that. The dividend can never be declared but out of the profits, and the allegation on the part of the plaintiffs is that this dividend is not declared out of profits at all—that there are no profits available. The right to declare a dividend depends on the facts. The word “profits” by itself is a word which is certainly susceptible of more than one meaning, and one must ascertain what it means in these articles. The 103rd article says this: “The directors shall, with the sanction of the company, in general meeting, declare annual dividends, to be payable to the members out of the profits of the company, not exceeding the rate of six per cent. per annum for each year on the paid-up capital for the time being of the company; and of one-half of the profits of the company above that amount, and they shall declare the other half of such surplus profits to be payable to the scrip-holders.” Scrip-holders are another class who are not shareholders, who have subscribed moneys, and are to be entitled to half the surplus profits. It is quite clear that whatever their profits are, they are profits of the same kind: half the surplus is to go to the shareholders, and the other half to the scrip-holders.

Then the next article is this: “The directors shall, before recommending any dividend, set aside out of the profits of the company, but subject to the sanction of the company in general meeting, such sum as they think proper, as a reserve fund for maintenance, repairs, depreciation and renewals.” It is quite plain that the profits mean something after payment of the expenses, because you do not get a reserve fund at all until you have paid your current expenses. It is obvious that the word “profits” means net profits. The next article is this: “The directors shall also, before recommending any dividend, set aside out of the profits of the company a sum equivalent to one per cent. per annum on the amount of the paid-up capital for the time being, as a contingencies fund.” There again “profits” obviously mean net profits. The result therefore of the articles, as I read them, is that a dividend shall only be declared out of net profits.

Then I have to consider the question, What are net profits? A tramway company lays down a new tramway: of course, the ordinary wear and tear of the rails and sleepers, and so on, causes a sum of money to be required from year to year in repairs. It may or may not be desirable to do the repairs all at once; but if, at the end of the first year, the line of tramway is still in so good a state of repair that it requires nothing to be laid out on it for repairs in that year, still, before you can ascertain the net profits, a sum of money ought to be set aside as representing the amount by which the wear and tear of the line has, I may say, so far depreciated it in value so that that sum will be required at some future period. Take the case of a warehouse: supposing a warehouse keeper, having a new warehouse, should find at the end of the year that he had no occasion to ex-

an injunction restraining the directors from paying the dividend to the ordinary

pend money in repairs, but thought that, by reason of the usual wear and tear of the warehouse, it was 1,000*l.* worse than it was at the beginning of the year, he would set aside 1,000*l.* for a repair or renewal or depreciation fund, before he estimated any profits; because, although that sum is not required to be paid in that year, it is still the sum of money which is lost, so to say, out of capital, and which must be replaced. I should think no commercial man would doubt that that was the right course—that he must not calculate net profits until he had provided for all the ordinary repairs and wear and tear occasioned by his business. In many businesses there is a regular sum or proportion of some kind set aside for this purpose. Shipowners, I believe, generally reckon so much a year for depreciation of a ship as it gets older. Experience tells them how much they ought to set aside, and whether the ship is repaired in one year or another makes no difference in estimating the profits, because they know a certain sum must be set aside each year to meet the extra repairs of the ship as it becomes older. There are very many other businesses in which the same thing is done.

That being so, it appears to me that you can have no net profits unless this sum has been set aside. When you come to the next year, or the third or fourth year, what happens is this: As the line gets older the amount required for repairs increases. If you had done what you ought to have done—that is, set aside every year the sum necessary to make good the wear and tear in that year—then in the following years you would have a fund sufficient to meet the extra costs. Now, when I come to look at these articles, I think that is what is intended, and that that is the meaning of the reserve fund. What the company intended to do was this: Inasmuch as they knew that a sum for maintenance, repairs, depreciation and renewals would be wanted, and inasmuch as they knew that, according to the ordinary commercial rules, they ought not to calculate the net profits until they had provided for what was sure to happen, they said, “We will set aside a sum of money which we will call a reserve fund for those purposes;” although not expended during the year, it is a reserve fund set aside for expenditure in the following years, taken out of profits before a dividend is earned. It appears to me, therefore, that these articles do recognise what seem to me sound commercial principles. That being so, from year to year, as the line got older, it would get worse, and would no doubt require a larger expenditure every year for repairs and renewals as a general rule. I say “as a general rule,” because sometimes the repairs might be so extensive as to make the renewal of a large portion of the line requisite in one year, and then the next year there might be a falling off in the amount required; but, as a general rule, as the line got older it would require more money.

Now, the line having been established seven

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shareholders, on the ground that the same would be a payment out of capital, and

years, I find an eminent engineer telling me, in his affidavit in support of the motion, that to put it in a good state of repair will require 80,000*l.*—in other words, if you take the deterioration of the line from want of repair from its commencement, it is worth 80,000*l.* less than it was at starting; that is the summary of that gentleman's evidence. He also thinks that the repairs, or the greater part of them, should be done at once. That is a matter of opinion on which engineers may fairly differ and do differ. The defendants' engineer, who, I am told, is also an eminent engineer, says he thinks they should not be done at once, but should be done gradually. But still, as I said before, they have to be done. That sum of money is required, or something like it. I cannot ascertain from the affidavit of the defendants' engineer what sum he considers sufficient. I have no doubt he would fix a much smaller sum. However, for the purpose of my judgment, I am willing to take a very large discount off the 80,000*l.*, because it is a very much larger sum indeed than is required to wipe away the whole of the dividend the company have declared. Therefore one need not consider whether it is 80,000*l.* or 40,000*l.*—either sum would do; but a very large sum it is, and the defendants' engineer does not tell me how much.

I do not wish to prejudice any future application the company may make under the leave I am going to reserve to them, but I will say that unless they give me something a great deal more definite as to the amount actually required for putting the line into repair than I have at present, I should certainly not be of opinion that the amount they propose to divide among the shareholders is fairly divisible. [His Lordship then commented on the account for the half-year ending the 31st of December, 1878, observing that the existing "reserve fund" was altogether inadequate for the purposes of ordinary maintenance, and that the "contingency fund" was not applicable to such purposes. His Lordship then continued:] That being so, on the present evidence I am satisfied that there are no profits at present available for division. It may happen that there would have been profits, if the company had properly applied the surplus of former years. I must say, looking at the accounts of the company, it appears to be a flourishing company, and I hope nothing I say will damage its future success; but still I am bound by the articles to say that no dividend is to be paid except out of profits, that there are no profits available, and therefore I grant the injunction asked. At the same time, I wish to give the defendants every possible opportunity of shewing that there are profits available, and I also feel that my intervention is likely to be injurious to the company. If the defendants can shew at any time that there are profits available for the purposes of this dividend, I will give them an opportunity of doing so; and therefore I give them leave to move to dissolve the injunction I now grant.

that for some years no proper allowance had been made in the accounts in respect of maintenance, repairs, depreciation and renewals.

The defendant company then submitted that the preference shareholders were not entitled to be paid any dividends out of the moneys of the company until the company, by means of sums earned since the 30th of June, 1878, increased their reserve fund by the sum of 114,460*l.* 18*s.* 8*d.*, by which the capital had been diminished, or until the preference shareholders had accounted to the company for the sums of 1,969*l.* 18*s.* 6*d.*, 4,800*l.* and 3,572*l.* 16*s.* 9*d.*, which had been improperly paid by the company to them as dividends in the years 1874, 1875 and 1876.

The defendant company denied that the tramways were in a state of efficiency or good working order, and they alleged that a considerable sum would have to be expended before the tramways would be in a state of efficiency or good working order, and to renew the company's rolling stock, and to provide funds for the renewals of their leases, and to provide the company with horses and other necessary and proper amount of stock.

Messrs. Waddell, the accountants, furnished to the directors a report in March, 1880, on the accounts of the company, with a view to giving an opinion as to the amount of profit available for the preference dividend for the year 1878; and they stated that, in their opinion, following the judgment in *Davison v. Gillies*, the proper course was to reserve out of revenue each year a contribution towards the ultimate repairs equivalent to the wear and tear for that year, and that, treating the accounts for the year 1878 on that basis, there still remained the above-mentioned profit of 14,932*l.* 5*s.* 4*d.*,

The injunction granted was to restrain the defendants from authorising or making any payment out of the assets of the company in respect of the dividend declared in February, 1879, on the ordinary shares.

By consent the motion was afterwards treated as the trial of the action, and thereupon the injunction was made perpetual.

Solicitors—W. Heggarty; H. C. Godfray.

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more than sufficient for the payment of the preference dividend of the year.

The plaintiff now moved for judgment on the admissions in the defence, and by consent the above report was referred to.

Mr. Davey and *Mr. Stirling*, for the plaintiff.—According to the terms of the resolution under which the preference shares were issued, the preference shareholders are entitled to a preferential dividend dependent upon the profits of each year; and, as it appears from the defence, and also from Messrs. Waddell's report, that there was a net profit for the year 1878, after making all allowance for expenses and wear and tear of that year, we submit the preference shareholders are entitled to their dividend, whatever payments may have been made out of capital in previous years, and that their position is entirely different from that of the ordinary shareholders whose rights were determined in *Davison v. Gillies*. The plaintiff for the present purpose has only to consider the year 1878, and if improper payments have been made to the shareholders in preceding years, that is a matter for which the directors may be personally liable, or the shareholders may be under a liability to refund, but it cannot affect the plaintiff's right to a dividend for the year 1878.

They were stopped.

Mr. Chitty and *Mr. Romer*, for the defendant company.—We submit that no dividend can be paid to the preference shareholders until the amount has been made good which has been previously improperly paid away in dividends, and not expended or set aside, as it should have been, in or towards the repairs, depreciation and renewals of the tramways. There is really no net profit to divide until the tramways of the company have been restored to that state of efficiency which they would have been in if those moneys had been so expended. But, in any event, the preference shareholders, before they receive any dividend, should at least make good the sums which have been improperly paid to them as dividends. According to the articles of association which were considered in *Davison v. Gillies*, no dividend can be de-

clared except out of net profits; and so far as regards the payment of a dividend, the preference shareholders stand in no better position than the ordinary shareholders, and should only be paid out of sums which are really profits.

THE MASTER OF THE ROLLS.—I have no doubt what ought to be my decision on this question. What would have become of the action of *Davison v. Gillies*, if it had gone to trial and been fully argued out, I do not know, but the order made on the motion for injunction seems to have been the right order on the then state of facts, although I think it has been assumed that I then decided a great deal more than I did really decide. The present question is, to my mind, a very simple one. There is a bargain made with the company that certain persons will advance them money as preference shareholders—that is, that they shall be entitled to a preferential dividend of six per cent. over the ordinary shares of the company, "dependent on the profits of the particular year only." That means this, that the preference shareholders only take a dividend, if there are profits for that year sufficient to pay their dividend. If there are no profits for that year sufficient to pay their dividend they do not get it—they lose it for ever; and if there are no profits in one year, and twelve per cent. profit the next year, they would only get six per cent., and the other six per cent. would go to the ordinary shareholders. So that they are, so to say, co-adventurers for each particular year, and can only look to the profits of that year. Now, what happened was this: the company improperly allowed their tramways to get out of repair, and paid away their receipts to the ordinary shareholders in the shape of dividends. The result was, that on the 1st of January, 1878, the tramways were very much out of repair, and wanted a large sum to put them in a proper state of efficiency.

Notwithstanding that, the company did work, and they earned a good deal of money, and the profits for the year 1878 were upwards of 14,000*l.*; and the dividend required being only six per cent. on 80,000*l.*, it is quite clear they earned

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more than sufficient to pay the preference shareholders, supposing these were fairly earned profits. Now, to see whether they were fairly earned profits, I must look at the report which I have before me of the eminent accountants, Messrs. Waddell, who say they were. They say in effect that, considering the state of the tramways on the 1st of January, 1878, and their state on the 31st of December in that year, after setting aside sufficient to make good the wear and tear for that particular year and paying all expenses, there was a net balance of 14,932*l.* 5*s.* 4*d.* profit. Now that is admitted by the statement of defence, paragraph 20. [His Lordship read the paragraph, and continued:] Therefore, if "profits for the year" have any meaning at all, these were the profits for the year. "Profits for the year" mean, of course, the surplus in receipts after paying expenses and restoring the capital to the position it was in on the 1st of January in that year. I have had the advantage of having Mr. Waddell present in Court, and ascertaining from him that his report in the sense I have stated is expressed according to his meaning, and that there is no mistake in the admission in the defence—that is, that there was an actual net profit for the year 1878 of over 14,000*l.*

Then what is there to argue? The argument for the company amounts to this, that inasmuch as they have improperly paid to their ordinary shareholders very large sums of money which did not belong to them, they are entitled to make good that deficiency by taking away the fund available for the preference shareholders to an amount required to put the tramways into proper order. When the argument is stated in that way it is clear it cannot be sustained. The company have either a right to recover back from their shareholders the sums overpaid or not. If they have a right they must recover them. If they have no right to recover them, *a fortiori* they have no right to recover them from the preference shareholders, and of course still less right to take away the dividends from the preference shareholders. It appears to me the defence is founded on a misconception, and I am afraid a misconception of

what I was supposed to have decided on a former occasion; but I have no hesitation in making the declaration which I am asked to make in deciding in favour of the plaintiff on the present occasion. There will, therefore, be a declaration that the preference shareholders are entitled to be paid the dividend for the half-year ending the 31st of December, 1878.

Solicitors—King & Peto, for plaintiff; Harrison, Beal & Harrison, for defendants.

FRY, J. }
1880. } SLACK v. THE MIDLAND RAIL-
Nov. 20. } WAY COMPANY.

Practice—Enquiry—Costs.

The costs of an enquiry were reserved in order to keep the control over undue expense with the Judge.

This was an action by a tanner for injury done to his manufactures by the spoiling of skins by tar discharged into a river from gasworks belonging to the defendant company. The Judge gave judgment for the plaintiff, and directed an enquiry in chambers to assess the amount of damages to be paid by the defendants, and gave the plaintiff the costs of the action.

Mr. Davey (Mr. P. Beale with him) asked that the costs of the enquiry might be reserved, in order to prevent the plaintiff having the power of unnecessarily increasing them.

Mr. Aston, Mr. North and Mr. Field, for the plaintiff.

FRY, J., reserved the costs of enquiry, saying that he did not do so with any intention of exonerating the defendants from bearing them, but that the Judge in disposing of the matter might see that they had not been improperly increased.

Solicitors—Field, Roscoe & Co., agents for Gratton & Marsden, Chesterfield, for plaintiff; Beale, Marigold & Co., for defendants.

JESSEL, M.R. }
 1880. } EVANS v. WILLIAMSON.
 Dec. 6. }

Will — Construction — Devise of Real Estate — Bequest of Farming Stock — Growing Crops.

A gift of "farming stock" by will passes the growing crops to the legatee, although the real estate on which the crops are is devised to another person.

Vaisey v. Reynolds (5 Russ. 12; 6 Law J. Rep. (o.s.) Chanc. 172) *dissented from.*

Margaret Roose, who died in December, 1879, gave all her real estate to her daughter, the defendant Grace Williamson, for her separate use for life, with remainders to her children. She gave to her granddaughter Catherine Evans Williamson 1,000*l.* and all "the household furniture, farming stock, goods, chattels and effects which should be in and about" a freehold farm called Frondeg, belonging to her, at the time of the testatrix's decease.

The question in the case was, whether the growing crops on Frondeg farm passed by the will to Grace Williamson and her children, or to Catherine Evans Williamson.

Mr. Ince and *Mr. J. M. Lloyd*, for the plaintiff.—We submit that the words "farming stock" pass the growing crops to the granddaughter. In

West v. Moore, 8 East, 339, there was a devise to A in fee, and a gift to the testator's executors of all his money, stock upon his farm, with the implements of husbandry and all other his personal estate, of what nature or kind soever, in trust to pay debts; and it was held that the gift of the stock upon the farm took the growing crops away from the devisee of the land and gave it to the executors. This case followed

Cox v. Godsalve, 6 East, 604 *n.*, and was in its turn followed in

Rudge v. Winnall, 12 Beav. 357; 18 Law J. Rep. Chanc. 469.

Mr. Russell Roberts, for Grace Williamson.—At the time when the testatrix died, namely, in December, the crops

were not even above ground, and it would be a very strong construction, therefore, to include them in the "farming stock." In

Vaisey v. Reynolds (*ubi supra*) it was held that these words do not pass crops on the ground, as between a specific and a residuary legatee, and Sir J. Leach pointed out that the decisions in *Cox v. Godsalve* (*ubi supra*)

and *West v. Moore* (*ubi supra*) proceeded on the manifest intention in each case that the executor should take all the personal estate, rather than on the precise words.

THE MASTER OF THE ROLLS.—I think I am bound by the authorities to hold that the specific legatee takes the emblements—that is, the growing crops. The case is almost identical with *Cox v. Godsalve*, which appears to be the first case on this point. There the words were: "I give and bequeath unto my mother all my goods and chattels, plate and household goods, stock of my farms of Patching Hill, &c., bonds, bills, book debts and all my movables whatsoever." It was argued that if the devisee of the land had the corn growing at the time of the testator's death, it was only against the executor, but not against the devisee of his goods, and it was hard to give it to the devisee by implication against an express bequest; and Lord Holt gave his opinion that the corn belonged to the executor—that is, to the mother, who was also executrix—and not to the devisee of the land.

The point next came before Lord Ellenborough in 1807, in the case of *West v. Moore*, and he considered the matter concluded by *Cox v. Godsalve*, "though," he adds, "but for that case I should have been more inclined to think that the stock on the farm meant movable stock."

Those cases having been thus decided, the question again arose before the Master of the Rolls (Lord Gifford), in 1825, in a case of *Blake v. Gibbs*, which is reported in a note to *Vaisey v. Reynolds*. The will there dealt with a West Indian plantation, of which the testatrix was tenant for life, and she was disposing of

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her slaves and cattle and other personal goods, and the only question was, whether the words "other live and dead stock on the plantation" passed the growing crops to a specific legatee, or whether they fell into the general residue. Lord Gifford says, "The two cases which have been cited prove that the emblements are part of the stock, and will pass under the description of stock on a farm; and I cannot help thinking that the claim of the specific legatee is stronger here than in either of those cases, from the circumstance of the testatrix having been only tenant for life;" and he declared the specific legatees to be entitled to the emblements. So far, then, all the decisions are one way.

Then, however, we have the case of *Vaisey v. Reynolds*, which came before Sir John Leach in 1828. There the testator gave to his wife "all my farming stock of every kind and description whatsoever," and gave the residue of his personal estate to his executors. Under those words Sir John Leach refused to allow the growing crops to pass to the wife, and he did so on the ground that the words in question were not accompanied by a gift of all the residue of the personal estate, and therefore the case was different from *Cox v. Godsalve* and *West v. Moore*. Well, with all respect to that learned Judge, I must say that, in my opinion, he certainly made a mistake in thinking that those cases rested upon that ground. I think they were clearly decided upon the words themselves, and how it could make any difference that the words were unaccompanied by other words, I do not understand. We have not only the expressions used by Lord Holt, but Lord Ellenborough clearly considered that "stock on the farm" alone passed the crops, and so did Lord Gifford. Sir John Leach, referring to the two former decisions, says, "Those cases were between the executor and the devisee of the land"—that is not quite correct as regards *Cox v. Godsalve*; it is true the mother to whom the gift was made was executrix, but she was only one of two executors—"and the rule is that, although crops on the ground are personal estate, and, generally speaking, pass to the

executor, yet as between the executor and the devisee the devisee will take them with the land unless the intention of the testator appears to be otherwise. In those two cases such intention seems to have been inferred rather because the executor was plainly meant to take the whole personal estate than from the mere force of the words 'stock of my farm' or 'stock upon my farm.'" All I can say is, that I have read the case before Lord Ellenborough, and that Sir John Leach is mistaken: it is clearly decided on the words "stock on the farm." I think, therefore, that the reasoning in *Vaisey v. Reynolds* is quite untenable in the face of the previous decisions.

The only other case is *Rudge v. Winall*, decided by the late Master of the Rolls in 1849. That was a gift of live and dead stock, together with the general personal estate. The judgment, however, is very short, and I cannot find from it whether he held the crops to pass to the legatee in consequence of there being a gift of all the personal estate, or only on the words "live and dead stock."

Here, however, I have a case in which the whole personal estate is not given along with the farming stock, and therefore I must decide the point. The gift is of "all the household furniture, farming stock, goods, chattels and effects which shall be in or about Frondeg." Now, I do not see how it is possible to hold, after Lord Ellenborough's decision, that the words "farming stock" are not an indication of an intention to give the crops. Lord Ellenborough said, "The case of *Cox v. Godsalve* . . . must conclude it, though, but for that case, I should have been more inclined to think that stock on the farm meant movable stock." By that he evidently means that that decision included stock not movable. Then, after remarking that the distinction between the heir and the devisee is capricious enough, he continues: "The only difference between the case before Lord Holt and the present is, that there the mother to whom the standing corn was conveyed by the devise of the stock on his farm was not the sole executor; but if she did not by her will make a disposition for the payment of certain sums which he

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bequeathed, it was to go to the other executor for the same purpose. There is therefore no material distinction between the cases, and a construction having been once put upon these words, the question is now concluded." He says "these words," so that he reasons upon the words "stock on the farm" alone. That is so evident that Lord Gifford says that the two cases cited "prove that the emblements are part of the stock, and will pass under the description of stock on a farm."

In my opinion, therefore, a construction having been put upon these words by decision, we must consider the question concluded, especially as it is probable that the draftsman relied upon those cases in drawing this will.

There will be a declaration that the growing crops belong to Catherine Evans Williamson.

Solicitors — Peacock & Goddard, agents for J. L. Griffith, Holyhead, for plaintiff; Chester & Co., agents for Paynter, Alnwick, for defendant.

HALL, V.C.
1880.
Nov. 12. }

In re WILKES'S ESTATE.

Tenant for Life and Remainderman—Lands Clauses Consolidation Act, s. 74—Property subject to Leases—Application of Dividends arising from Purchase-money—Form of Order.

A tenant for life of lands settled by a will, in exercise of a power contained in the will, granted repairing leases of the lands. The lands were subsequently taken by a railway company, and the purchase-money was paid into Court under the Lands Clauses Consolidation Act. The income arising from the purchase-money was in excess of the aggregate rental reserved by the leases:—Held, that the tenant for life was entitled only to so much of the dividends as was equivalent to the amount he would have received as rent in case the lands had not been taken by the railway company, and that the rest of the dividends must be accumulated and applied according to the prin-

ciple of In re Wootton's Estate (35 Law J. Rep. Chanc. 305; Law Rep. 1 Eq. 589).

Form of order in such a case providing for the apportionment of the purchase-money among the several properties comprised in the several leases, and giving liberty to the tenant for life to apply in chambers for payment to him of the increased dividend to which he would become entitled at the several times at which the leases would respectively have determined.

Petition.

Under the will and codicil of one John Wilkes, who died on the 24th of August, 1843, the petitioner, Robert Heard, was in and prior to the year 1880 entitled as tenant for life (subject to the payment of one-third part of two life annuities of 250*l.* and 150*l.* respectively to the co-petitioners, Isabella L. Marshall and Marion J. Marshall) to a certain estate in the county of Middlesex, with power to grant leases thereof for any term not exceeding twenty years, or repairing leases not exceeding sixty years.

In the year 1880 the Great Eastern Railway Company, under the powers of the Great Eastern Railway Act, 1876, and of the Lands Clauses Consolidation Act, 1845, incorporated therewith, required and took for the purposes of their undertaking certain lands forming portion of the above-mentioned estate.

The lands so taken were subject to eight several leases for different terms of years expiring at different times. All of these leases, with one exception, were either repairing leases or contained covenants of a character beneficial to the reversion, and some contained covenants to rebuild. Five of these leases had been granted by the petitioner under the power above referred to, two others had been granted by the trustees of the testator's will and codicil, under a power conferred on them by the will to grant leases during the minorities of tenants for life, and the remaining lease (which appeared to be at a rack-rent) had been granted by the testator. The aggregate rental reserved by the eight leases was 419*l.* 4*s.*

The purchase-money payable by the company was assessed at 21,000*l.*, which

In re Wilkes's Estate.

sum they accordingly paid into Court under the provisions of the Lands Clauses Consolidation Act, 1845. This sum, however, did not represent the value of the whole fee, but only of the reversion subject to the leases, the company having purchased the lessees' interests separately.

This was a petition praying that the fund in Court should be invested, that a sufficient part of such investment should be carried over to satisfy the annuities, and that the dividends on the residue thereof should be paid to the petitioner, R. Heard, until further order; and upon the hearing of this petition the question arose, whether or not R. Heard was entitled to the entire dividends.

Mr. W. Renshaw, for the petitioners.—The petitioner, R. Heard, is entitled to the entire dividends. The authorities are no doubt conflicting, but I submit that the present case is governed by

In re Steward's Estate, 1 Drew. 636, and

In re The Hampstead Junction Railway Company; ex parte The Dean and Chapter of Westminster, 26 Beav. 214; 28 Law J. Rep. Chanc. 144,

rather than by

In re Wootton's Estate (ubi supra) and

In re Mette's Estate, 38 Law J. Rep.

Chanc. 445; Law Rep. 7 Eq. 72, in which it was no doubt held, under somewhat similar circumstances to those of the present case, that the tenant for life was only entitled to so much of the dividends as would compensate him for loss of rent sustained by the company having taken the land, and that the remainder of the dividends should be accumulated until the end of the lease, so that there might then be in Court a sum representing the value of the whole fee. In the present case, however, most of the leases were granted by the tenant for life under the power of leasing conferred on him by the testator, under which he might have granted leases at rack-rent, and thus secured to himself the full income of the property.

At all events, he is entitled to the dividends on the ten per cent. additional

purchase-money, which always is (and was here) allowed for compulsory purchase; for the property is compulsorily taken from the tenant for life just as much as from the remainderman.

Mr. Alfred Bailey, for the remainderman.—I ask your Lordship to follow the later authorities, and to give the tenant for life only such proportion of the dividends as he would have received as rent if the property had not been taken by the railway company, and to direct the surplus dividends to be accumulated according to the principle of those authorities. Then when the time arrives at which each lease would have determined in due course, there will be a fund in Court attributable to the property therein comprised, to the whole dividends of which fund the tenant for life will be entitled. As regards the ten per cent. extra for compulsory purchase, I submit that your Lordship can make no distinction between that and the rest of the purchase-money.

Mr. Jason Smith, for the railway company.

HALL, V.C., held that the case was governed by the two later authorities which had been cited, and that the order must be framed according to the principle contended for by the counsel for the remainderman. He declined to draw a distinction between the ten per cent. extra for compulsory purchase and the rest of the purchase-money.

Some discussion then took place as to the form of order, Mr. A. Bailey suggesting that it would be convenient that the order now to be made should contain directions ascertaining once for all the proportion of the purchase-money attributable to the property comprised in each lease, so as to obviate the trouble and expense of a separate application to the Court as each term expired.

HALL, V.C., accordingly directed that the order should be so drawn up according to minutes to be settled by counsel.

The form of the order as finally drawn up was (as to its material parts) as follows: "This Court is of opinion that

In re Wilkes's Estate.

the petitioner R. Heard, as the tenant for life in possession of the estates, &c., devised by the will of the testator John Wilkes, is entitled (subject to the payment of the one-third part of each of the annuities of 250*l.* and 150*l.*, &c.) to be paid during his life out of the income arising from the investment of the purchase-money of 21,000*l.*, &c., such a sum as, until the 25th of March, 1885, when the first to determine of the eight leases in the petition mentioned subject to which the properties were purchased, would have determined, will amount to 419*l.* 4*s.*, being the total yearly amount of the several rents reserved by such leases; and, after the time or respective times at which each of the said eight leases would have respectively determined, to be paid the like sum of 419*l.* 4*s.*, after deducting therefrom an amount equivalent to the rent or rents respectively reserved by the lease or leases which for the time being would have so determined; and also to be paid in addition thereto the income of the investments representing the whole of such portion or portions of the said purchase-money of 21,000*l.* as arose from, or is or are attributable to, the property or properties subject to such determined lease or leases, and the income of the accumulations arising from so much as is hereinafter directed to be accumulated of the same portion or portions of the said purchase-money;" [then followed directions to invest and carry over sufficient funds to satisfy the annuities and for payment of the dividends to the annuitants]; "and it is ordered that the residue of the said 21,000*l.* be invested in consolidated three per cent. annuities to the credit of, &c., and out of the dividends as they accrue on the consolidated three per cent. annuities so to be purchased as last aforesaid, it is ordered that the annual sum of 285*l.* 17*s.* 4*d.* (being a sum equivalent to 419*l.* 4*s.*, the net amount of the said rents after deducting therefrom the sum of 133*l.* 6*s.* 8*d.*, being one-third of the total amount of the said annuities) be, until the 25th day of March, 1885, during the life of the petitioner R. Heard, if the petitioners R. Heard, J. L. Marshall and M. J. Marshall shall

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long live, paid to the petitioner R. Heard by equal quarterly payments, &c. &c.; and it is ordered that the residue of the said dividends be from time to time invested in consolidated three per cent. annuities, and the petitioner R. Heard is to be at liberty to apply at chambers on the death of the said J. L. Marshall and M. J. Marshall or either of them, and also from time to time after the date or respective dates when each of the said leases would have determined, touching the payment to him of such increased income as he may for the time being have become entitled to, as he may be advised; and it is ordered that enquiry be made what are the respective portions of the said purchase-money of 21,000*l.* which arose from, or are attributable to, each of the eight several properties purchased by the company subject to the eight leases under which the same were held."

Solicitors—C. Langley, for the petitioners; Capel A. Curwood, for the company.

MALINS, V.C. } *In re* THE ASSOCIATION OF
1881. } LAND FINANCIERS (LI-
Jan. 20. } MITED).

Company — Winding-up — Salaries of Clerks—Bankruptcy Act, 1869, s. 32. sub-s. 2—Judicature Act, 1875, s. 10.

The rule in bankruptcy giving clerks' salaries due from the bankrupt (Bankruptcy Act, 1869, s. 32. sub-s. 2) priority over his other debts applies, under section 10 of the Judicature Act, 1875, to a company in liquidation.

Motion to discharge an order made at chambers on the 20th of December, 1880.

By this order, the claims of Mr. Ashton and five others, for their salaries as clerks in the service of the company at the time of the winding-up, were allowed in full, "not exceeding four months' salary, and not exceeding fifty pounds each," under

In re Association of Land Financiers.

Section 32, sub-section 2 of the Bankruptcy Act, 1869, in priority to the other debts.

The official liquidator admitted that these claims were "debts provable" in the winding-up.

Mr. Whitehorne, for the official liquidator.—The question is, whether section 10 of the Judicature Act, 1875, has the effect of importing special sections of the Bankruptcy Act, 1869 (such as section 32, sub-s. 2) into the winding-up of an insolvent company. In

Re The Albion Steel and Wire Company, 47 Law J. Rep. Chanc. 229; Law Rep. 7 Ch. D. 547,

the Master of the Rolls decided that section 32, sub-section 1; in

Re The Coal Consumers' Association, 46 Law J. Rep. Chanc. 501; Law Rep. 4 Ch. D. 625,

your Lordship decided that section 34; and in the recent case of

Re The Withernsea Brick Works, 29 W. R. 178; *ante*, p. 185,

the Court of Appeal (affirming your Lordship) decided that section 87,—did not apply to a company in liquidation.

No doubt the Master of the Rolls, in

Re The Norton Iron Works Company, 26 W. R. 53,

decided that section 32, sub-section 1, applied to an insolvent company, but that decision was commented upon by Vice-Chancellor Hall in

Re The Bridgewater Engineering Company, 48 Law J. Rep. Chanc. 389; Law Rep. 12 Ch. D. 181.

He also referred to

Re Richards and Company, 48 Law J. Rep. Chanc. 555; Law Rep. 11 Ch. D. 676;

Re The Printing and Numerical Company, 47 Law J. Rep. Chanc. 580; Law Rep. 8 Ch. D. 535.

Mr. Buckley, for the claimants, was not called upon.

MALINS, V.C.—This case raises a very important question, although the particular case relates only to the salaries of six clerks, and is therefore a mere question of a debt of 300*l.* in a company, where the debts probably amount to hundreds of thousands of pounds.

Now the question is one of general application. If the liquidator is right in his contention, it will follow that, in every case of an insolvent company, every common labourer with a few weeks' wages unpaid, instead of being paid in full, will have to come in as a general creditor, and claim for a dividend. That that is the state of the law I cannot persuade myself. It must have been the intention of the Legislature to extend the benevolent provisions of section 32, sub-section 2, of the Bankruptcy Act, 1869, to such a case as this. That section provides (by sub-section 2) that "all wages or salary of any clerk or servant in the employment of the bankrupt at the date of the order of adjudication, not exceeding four months' wages or salary, and not exceeding fifty pounds," shall be paid in priority to all other debts. As I said, in giving judgment in the case of *The Xeres Wine Shipping Company* (1)—a view which the Legislature have since adopted in section 10 of the Judicature Act, 1875—"the winding-up (of a company) is a *quasi* bankruptcy." It is, and always has been, my opinion that the rules of bankruptcy shall be applied, as far as possible, to the winding-up of an insolvent company. I am sorry that, in section 10 of the Judicature Act, 1875, it was thought better to particularise certain classes of cases to which the rules of bankruptcy should be applied, instead of making the section general in its language.

Here the only question is, whether the words of section 10 sufficiently warrant the present application. That section provides that, in the winding-up of an insolvent company "the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors"—these claimants are unsecured creditors—"and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt." If then the rules of bankruptcy as to unsecured

(1) 37 Law J. Rep. Chanc. 415; 39 *ibid.* 112; Law Rep. 3 Chanc. 769.

In re Association of Land Financiers.

creditors are to be applied, it is very plain that these clerks (under sub-section 2 of section 32) are to have priority over the general creditors to the extent of four months' salary; and it is obviously just that this should be so, otherwise these applicants might be left utterly destitute.

No authorities have been cited except favourable to this view. The case of *Re The Norton Iron Works Company* is not fully reported, and it only deals with one week's wages. But if section 10 applies to the wages of workmen for one week it must also apply to the payment in full of their wages for all the weeks, within the limits prescribed by section 32, sub-section 2. The Master of the Rolls in giving judgment says, "They are not secured creditors." It is therefore a decision in point. I quite agree that in the case of *Re The Albion Steel and Wire Company*, decided only two months afterwards, the Master of the Rolls held that local rates had no priority over the other debts of the company. These two decisions seem inconsistent; but in *Re The Printing and Numerical Registering Company* the Master of the Rolls seems to have expressed great doubt as to the propriety of his decision in the case of *Re The Albion Company*. Therefore, on the whole, I must consider the Master of the Rolls as taking the same view as I do.

Upon these grounds, and upon a consideration of what must have been the intention of the Legislature, I come to the conclusion that these clerks are entitled to priority. Their claim must therefore be allowed, and the liquidator must pay the costs of this application.

Solicitors—Winter & Co., for the official liquidator;
J. Cotton, for respondents.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.

JAMES, L.J.

BRETT, L.J.

COTTON, L.J.

1881.

Feb. 3.

In re MACCOLLA;
ex parte MACLAREN.

Liquidation Petition—Composition Resolutions—Seizure under Fi. Fa. between First and Second Meeting of Creditors—Secured Creditor—Acquiescence—"Extraordinary Resolution"—The Bankruptcy Act, 1869, s. 126. sub-ss. 2 and 4.

A resolution accepting a composition passed at the first meeting of creditors, held under the 126th section of the Bankruptcy Act, 1869, does not become an extraordinary resolution until it has been confirmed at the second meeting, and is of no validity until it has been duly registered; therefore, any creditor of a compounding debtor, who signs judgment and levies execution for his debt before such registration, obtains a valid security on the debtor's property, unless he has done something to raise an equity against himself.

Merely attending the first meeting to ascertain what is going on, without voting or proving, does not raise an equity; and in such a case silence is not acquiescence.

This was an appeal from the decision of Mr. Registrar Brougham, acting as Chief Judge.

On the 3rd of August, 1880, J. J. MacColla, a trader, filed a petition for the liquidation of his affairs by arrangement or composition with his creditors.

The first meeting of creditors under the petition was held on the 2nd of September, and was adjourned to the 9th of September, when resolutions accepting a certain composition were duly carried, and were registered the same day.

The second meeting of creditors was held on the 24th of September, when the resolutions passed at the first meeting were duly confirmed, and were registered the same day.

The appellants, Messrs. MacLaren & Walker, co-partners, had issued a writ against the debtor for 121l. odd on the 21st of July, and were entered in the debtor's statement of affairs as unsecured

In re Maccolla ; ex parte Maclaren (App.), Bankr.

creditors. They attended the first meeting under the petition, but did not prove their debt, or vote, or take any part in the proceedings. On the 15th of September they signed judgment for their debt and costs (the money not having been paid), and on the 17th of September levied execution for their judgment debt and costs on the goods of the debtor.

On the 18th of September a receiver was appointed under the petition, and the same day an *interim* injunction was granted against the appellants, restraining them from proceeding with their execution until after the 25th of September.

On the 18th of October the injunction, on the application of the debtor, was made absolute, on the ground that, under the circumstances, the appellants were not, by virtue of their execution, secured creditors and entitled to be paid in full.

This was the decision appealed against.

Mr. E. C. Willis, for the appellants.—I admit that, after filing of a liquidation petition, the Court has a discretionary power to grant an injunction to restrain creditors; and if an injunction is granted the creditor loses his security, but if he gets his security before the injunction is granted, he cannot be deprived of the fruits of his diligence—

Ex parte Jones, 44 Law J. Rep. Bankr. 124; Law Rep. 10 Chanc. 663.

Further, there is no extraordinary resolution until the resolutions passed at the first meeting of creditors are confirmed at the second meeting; and it has no valid and binding effect until it has been registered—

The Bankruptcy Act, 1869, s. 126. sub-s. 4.

Mr. Winslow and *Mr. Doria*, for the debtor.—The appellants had due notice of the filing of the petition, were duly scheduled in the statement of affairs, attended the first meeting, knowing that they were, and were treated as unsecured creditors, and did not dissent from the proposed resolutions. We submit, therefore, that by their presence and silence at the meeting they led the debtor and other creditors to suppose that they were

willing to be bound by such resolutions as the statutory majority might pass. Their conduct was tantamount to acquiescence in the proceedings, and it was not competent for them after the first meeting to wholly alter their *status*, and to make themselves secured creditors by signing judgment by default and levying execution on property appearing by the statement of affairs to be the principal asset for the payment of the composition. Further, the "extraordinary resolution" referred to in the 126th section of the Bankruptcy Act is the resolution passed at the first meeting. The second meeting is merely confirmatory, and the filing is a ministerial act, which gives force and validity to the whole proceedings which relate back to the date of the first resolution. The case is within the principle of

Ex parte Balbirnie, 45 Law J. Rep. Bankr. 156; Law Rep. 3 Ch. D. 488.

JAMES, L.J., said—In my opinion these execution creditors have a clear right to retain their security. At the time when the sheriff levied they were under no obligation, equitable or otherwise, not to enforce their legal right. It is true they were present at the meeting, but they only attended to see what was going on, and took no part in the proceedings. They did not vote or prove their debt. How then can they be said to have acquiesced in what took place at the meeting? The Act of Parliament says that an extraordinary resolution shall be of no validity until it has been registered. That being so, and this extraordinary resolution not having been registered at the time the sheriff seized under the *fi. fa.*, the appellants cannot be deprived of the fruits of their diligence.

BRETT, L.J., said—I am of the same opinion. The appellants have done nothing to raise an equity against themselves; therefore the case must be considered as though they were not present at the meeting. That being so, the case of *Ex parte Balbirnie* does not apply. Then the question is, whether at the time the sheriff levied there was anything to

In re Maccolla ; ex parte Maclaren (App.), Bankr.

prevent the appellants from getting the benefit of the security they had thus obtained. Now the only thing in existence was a resolution accepting a composition, but it had not been confirmed or registered. The Act of Parliament says, "An extraordinary resolution of creditors shall be a resolution which has been passed by a majority . . . of the creditors of the debtor assembled at a general meeting, . . . and has been confirmed by a majority . . . of the creditors assembled at a subsequent general meeting." Therefore the resolution passed at the first meeting of the creditors does not become an extraordinary resolution until it has been confirmed at the second meeting. So far *Ex parte Jones* is in favour of the appellants. But even then the extraordinary resolution is not available so as to bind dissentient creditors, because the Act says it is the duty of the registrar to register the extraordinary resolution, "but until such registration has taken place such resolution shall be of no validity." In my opinion, therefore, a valid security may be obtained by any creditor before an extraordinary resolution accepting a composition has been duly registered, unless the creditor has done something to raise an equity against himself.

COTTON, L.J., said—I agree. It is said that the appellants acquiesced in the proceedings. In my opinion there was nothing like acquiescence in their conduct. If they had a legal right to issue execution on their judgment, the not saying they intended to do so raised no equity against them. There was nothing misleading on their part. If a creditor votes at a meeting, or in any other way takes part in the proceedings, then he may raise an equity against himself, which will preclude him from obtaining a security that he might otherwise have acquired. Here the conduct of the appellants raised no possible equity against them. They were merely silent at the meeting. Then is there anything in the Act which prevents them? The only thing that could bind them was a resolution accepting a composition, but that resolution did not become an extraordi-

nary resolution or binding upon them until it was confirmed at the second meeting of the creditors and registered. Until then it had no existence as an extraordinary resolution. In my opinion, therefore, no creditor, unless he has raised an equity against himself, is precluded from obtaining a security on the property of the debtor during the interval between the first and second meeting of creditors held under the 126th section of the Act.

JAMES, L.J., said—I think it should be understood that the Court adopts the opinion of Lord Justice Brett, that an extraordinary resolution accepting a composition has no legal validity until it has been duly registered.

Solicitors—Bellamy, Strong & Co., for appellants
C. T. Forster, for respondent.

MALINS, V.C. }
1880.
Dec. 14, 15. }

In re BARTLETT.
NEWMAN v. HOOK.

Sale under Direction of the Court—Auction—Private Contract—Re-opening Biddings—Sale of Land by Auction Act, 1867 (30 & 31 Vict. c. 48), s. 7.

A contract for the sale of land under the direction of the Court, which has been confirmed by the chief clerk, will not be set aside or varied even at the instance of beneficiaries on the mere ground of an advance in price where there is no suggestion of fraud or improper conduct in the management of the sale.

The principles of the Sale of Land by Auction Act, 1867, apply as well to sales by private contract as to sales by auction.

Adjourned summons.

This action was commenced to administer the estate of George Bartlett, deceased, and the plaintiff was the trustee for sale under the will of Bartlett.

In the course of the administration an estate called the Highfield House Estate was ordered to be sold, and the chief clerk fixed the reserve price at 18,500*l*. The estate was put up for sale by auction

In re Bartlett.

on the 5th of August, 1880, but the highest offer being only 15,700*l.*, it was not sold. Alfred Walker afterwards offered to purchase the estate by private contract for 18,000*l.*, and a conditional contract was entered into on the 20th of September for sale of the estate to him for that sum, such contract, however, to be void unless approved of by the Judge within ten days.

On the 24th of September a summons was taken out before the chief clerk to confirm the sale, when Aird, the solicitor for the parties beneficially interested in three-fourths of the property, informed the chief clerk that he believed he could obtain a purchaser who would give a much larger sum than 18,000*l.*, and asked that the matter might be adjourned for a fortnight; but the plaintiffs' solicitor having called the attention of the chief clerk to the limit of ten days fixed by the contract, the summons was adjourned till the 29th of September. On that day Aird asked for a further adjournment, stating that he was in negotiation with an intending purchaser, but the chief clerk refused to adjourn the matter and made an order confirming the contract entered into with Walker, who, on the 1st of October, paid a deposit of 1,800*l.*, and shortly after an abstract was delivered to him.

On the 8th of October Aird took out a summons that the order of the 29th of September might be set aside or varied, and that an offer to purchase the property for 20,000*l.*, made by one Mainprice after the 29th of September, might be accepted.

This summons had been adjourned into Court and now came on to be heard. It appeared that the order of the 29th of September had not been passed and entered, and that all the parties beneficially interested in the property were desirous that the latter offer should be accepted.

Mr. Glasse and *Mr. C. H. Anderson*, in support of the summons, for the parties beneficially interested in three-fourths of the property.—The order of the chief clerk has not been passed and entered. The contract was subject to the approval of the Court. The passing of the order

has been intercepted by this summons, and the whole matter is now open.

The Court has power to interfere and re-open the sale, though it is not a sale by auction—

Osborne v. Foreman, 8 De Gex, M. & G. 122; 25 Law J. Rep. Chanc. 340.

The parties applying here are the persons beneficially interested in the property, and not mere strangers—

Millican v. Vanderplank, 11 Hare, 136.

This case does not come within the Sale of Land by Auction Act, 30 & 31 Vict. c. 48.

Mr. Everitt and *Mr. E. Ford*, for the parties beneficially interested in the remaining one-fourth of the property, supported the application.

Mr. Pearson and *Mr. Robson*, for Walker.—The contract having been confirmed by the chief clerk the Court cannot interfere, as there is no ground for suggesting fraud in the conduct of the sale. The only reason for setting aside the sale is the increase in the price.

In

Osborne v. Foreman (*ubi supra*) the sale was by sealed tenders, and a sale of that description is to be treated in the same way as a sale by auction. That case came by way of appeal to the House of Lords, *sub nom.*

Barlow v. Osborne, 6 H.L. Cas. 556; 27 Law J. Rep. Chanc. 308, and if the sale could have been treated as one by private contract, the decision would have been reversed.

They also cited

Waterhouse v. Wilkinson, 1 Hem. & M. 636.

Mr. Higgins and *Mr. Dobbs*, for the trustee for sale.

Mr. Glasse, in reply, referred to

Ware v. Watson, 7 De Gex, M. & G. 739; 25 Law J. Rep. Chanc. 199.

MALINS, V.C., after stating the facts of the case, proceeded as follows: Between the 5th of August, the day of the auction, and the 24th of September, the day the summons was before the chief clerk, *Mr. Aird* had the opportunity of getting a better offer, but even on the latter day

In re Bartlett.

he had not found a purchaser. On the 29th of September could the chief clerk have acted otherwise than he did? There was a binding contract for 18,000*l.*: could he let the one purchaser go on the mere speculation that another would be found? It has been argued that there was no confirmation of the contract because the order of the chief clerk was not drawn up, passed and entered. I dissent entirely from that view. The confirmation took place when the chief clerk decided to make the order of confirmation.

The real point is, What ought the chief clerk to have done on the 29th of September? If the matter had on that day been brought before me personally, I should unquestionably then have confirmed the contract. My opinion is, that the chief clerk was right in what he did, and that he did what I myself should have done. It was not till after the 29th of September that anyone was found who would give anything more than the 18,000*l.*

Now what is the principle of the Court? If this had been a sale by auction before the Act 30 & 31 Vict. c. 48, the bidding would have been re-opened. That was, in my opinion, a most pernicious practice, and most prejudicial to the interests of owners of property. But now, since the Act, biddings on sales under the authority of the Court cannot be re-opened except on the ground of fraud or improper conduct in the management of the sale. I think that the principle of the Act is applicable to sales by private contract as well as to sales by auction, and that a sale by private contract, as in this case, is not to be disturbed except on some of the grounds specified in the Act.

I am, therefore, of opinion that the chief clerk was right in confirming this contract. This summons must therefore be dismissed, and the purchaser may deduct his costs from the purchase-money.

Solicitors—Henry Aird, for defendants; Marchant, Purris & Benwell, for the purchaser; Newman, Jeans & Co., for trustee.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.

JAMES, L.J.

COTTON, L.J.

LUSH, L.J.

1880.

Dec. 9.

Ex parte LACEY; in re LACEY.

Composition—Creditor omitted—Application to admit Proof—Close of Proceedings—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 126.

When resolutions for composition under section 126 have been registered, and there is no trustee appointed to receive and distribute the composition, and no security given for its payment, a creditor whose name has been omitted from the debtor's statement of affairs, and who has taken no part in the composition proceedings, cannot come in and prove his debt.

The Court of Bankruptcy has no jurisdiction to entertain a claim for a personal demand against the debtor himself, when there is no property for the Court to administer. (Per JAMES, L.J.)

Ex parte Carew (44 Law J. Rep. Bankr. 67; Law Rep. 10 Chanc. 308) explained and distinguished.

This was an appeal from a decision of the Chief Judge in Bankruptcy.

W. R. Lacey, on the 9th of August, 1877, filed a liquidation petition, and at a general meeting of his creditors held on the 1st day of September, 1877, resolutions were passed to accept a composition of 1*s.* 11½*d.* in the pound, payable in two years from the date of complete registration of the resolutions. No trustee was appointed, nor was any security given for the payment of the composition.

These resolutions were subsequently confirmed at a second meeting of the creditors on the 15th of September, 1877, and were registered on the 6th of December, 1877. The composition was duly paid at the time fixed to all the creditors whose names were inserted in the debtor's statement of affairs.

Bond claimed to be a creditor of Lacey, but no mention of his claim had been made in the statement of affairs, nor had he attended either of the meetings of the

Ex parte Lacey ; in re Lacey (App.), Bankr.

creditors. He made an application in March, 1880, to the County Court, asking that Court to admit his proof, but the Registrar, acting as Judge, declined to admit it, and refused his application on the ground that, the composition proceedings having come to an end, the Court had no jurisdiction to admit it.

Bond had in May, 1879, taken out a debtor's summons against Lacey, but unsuccessfully. He denied all knowledge of the resolutions for composition prior to the early part of 1880.

On the 7th of June, 1880, Bond appealed to the Chief Judge, who reversed the decision of the Registrar.

The debtor appealed from the decision of the Chief Judge.

Mr. E. C. Willis and Mr. F. O. Willis, for the appellant.—This is the case of a claimant whose claim has not been mentioned in the debtor's statement of affairs, who is not bound by the composition, coming in after registration of the resolutions, and asking for the admission of his proof. But it is too late to do so now; the proceedings are ended and the Court has no jurisdiction to admit this proof. There is no trustee, and there is no fund which can be in any way attached.

This claimant has nothing to do with the composition, which is only a matter between a debtor and his admitted creditors—

Melhado v. Watson, 46 Law J. Rep. C.P. 502; Law Rep. 2 C.P. D. 281, 291.

A creditor whose name is left out is at liberty to waive the conditions imposed by statute for his benefit, and to come in and join in passing the resolution for composition, and he will be thereby bound—

Campbell v. Im Thurn, 45 Law J. Rep. C.P. 482; Law Rep. 1 C.P. D. 267;

but in that case the creditor came in during the pendency of the proceedings and concurred in the appointment of a trustee, and there was in the trustee's hands a fund sufficient for the payment of the composition. So, in

Ex parte Carew (ubi supra), the claim, which was in respect of a breach

of trust, was mentioned in the debtor's statement of affairs, and it was stated that a fund was in the trustee's hands to meet the claim of that particular claimant when ascertained.

It appears, if the opinions of the Judges in

Breslaue v. Brown, 47 Law J. Rep. C.P. 729; Law Rep. 3 App. Cas. 672,

are carefully looked at, that they treated the case of

Ex parte Carew (ubi supra) as depending on its own peculiar circumstances, and were not laying down a general rule that a creditor omitted from the list might at any time, even after the composition proceedings had terminated, come in and enforce in bankruptcy his demand which is purely personal against his debtor.

Mr. Winslow and Mr. G. Rose-Innes, for the creditor.—The creditor is coming to enforce the composition. If it is for his advantage he may enforce it, and he has a right to determine the question for himself. Then, is he barred now because his name is omitted, or his debt is disputed? A creditor is not to be injured by reason of the debtor omitting his name from the list, or entering his name, but saying that he is owed nothing, or that his claim is disputed.

That is the view which the House of Lords took of

Ex parte Carew (ubi supra) when cited before them in

Breslaue v. Brown (ubi supra). Lord Blackburn there (p. 745) approves what was said by Mellish, L.J., namely, that an application to the Court might be made under section 126, not only by a creditor who is bound—that is, by the composition—because his name, address and the amount of his debt had been properly entered in the statement, but by any creditor of the debtor who would, in case of his being made a bankrupt, or in case of a liquidation, have been entitled to prove his debt. And the Lord Justice in that case said it was necessary to decide whether a creditor who was not bound by the composition might, if so minded, take advantage of the composi-

Ex parte Lacey; in re Lacey (App.), Bankr.

tion. So it is clear that that was part of the actual decision, and no *obiter dictum*.

Mr. E. O. Willis, in reply.—After registration of the composition resolutions no proof of debt can be admitted. There is no property to which the debt can attach. It is otherwise in bankruptcy and liquidation proceedings, because then there is property in the hands of the Court. The proceedings cannot go on for ever, there must be some limit. A surety cannot be proceeded against in the Bankruptcy Court, but in the High Court—

Ex parte Mirabita; in re Dale, 44 Law J. Rep. Bankr. 119; Law Rep. 20 Eq. 772.

JAMES, L.J.—I am of opinion that the decision of the Chief Judge in this case is an extension of the doctrine supposed to be laid down in *Ex parte Carew*, which we ought not to sanction. In this case there is no property to be administered, there are no trustees, and no proceedings pending; there is nothing now to be done in the composition except to enforce a personal demand of a creditor against his debtor. I am of opinion that the Court of Bankruptcy has no jurisdiction to entertain a claim for a personal demand against the debtor himself when there is no property for the Court to administer.

When the judgment of Lord Justice Mellish in *Ex parte Carew*, in which I seem to have concurred, was read to us, it did strike my mind as something which I was not prepared to accept. But it must be read with reference to the facts of the case.

In that case the debtor in his statement of affairs mentioned the fact of a claim being made against him, stating that the amount of the claim was under discussion in another Court; and then a fund was put into the hands of trustees not merely to meet the composition due to those creditors whose claims were admitted, but also to provide for the other particular claim when ascertained. The debtor applied to the trustees for the return to him of the surplus remaining after paying the admitted creditors' claim, and the Court held that it had jurisdiction to determine his claim to the surplus, and

refused to hand over the surplus to him as long as the debt was not ascertained to meet which, among others, the fund had been placed in the trustees' hands. That was the whole of the decision. And what the Lord Justice really said was that a creditor might waive a condition imposed for his benefit by section 126, and come in and bind himself by a composition while the whole thing was *in fieri* and incomplete.

And that was the view of Lord Hatherley in *Breslau v. Brown*, in which Lord Blackburn concurred, that such conditions could be waived by creditors whose debts were not admitted during the pendency of the proceedings. Now here, in my opinion, there is nothing that can be alleged to be pending. If there is to be no limit of this kind a creditor might come in at any time, any number of years after registration of the composition resolution, and say, I am a creditor: you have engaged to pay your creditors so many shillings in the pound. You have omitted my name from the list of those creditors, which you ought to have entered. Now pay me those so many shillings in the pound on my debt. The creditor whose claim was omitted was not bound to take the composition; he can bring his action for the whole debt. Why then should he come for the smaller sum? The whole thing seems to me to be unreasonable. He is coming simply to enforce a personal remedy against his debtor for a smaller sum, when he has never bound himself to give up his whole debt.

In the case of *Breslau v. Brown* the creditor had come in, and was put in the list of creditors for a smaller sum; and he claimed payment in respect of a larger sum which had not been inserted in the debtor's statement. His acceptance of a composition in respect of the smaller debt could not entitle the debtor to say that he had bound himself by the composition in respect of the other debt; and it was therefore held that he was still a creditor and entitled to sue the debtor for the whole amount of the larger debt. So, here, the respondent might have taken proceedings against the debtor for his

Ex parte Lacey ; in re Lacey (App.), Bankr.

debt, and, indeed, he seems to have done so, but did not succeed; and having failed in those proceedings, he now attempts to fall back on the composition. But he cannot do this. He must be taken to have known of the composition proceedings, of which the statutory notices were given, and if he did not choose to attend them it was his own fault. This case is not really governed by *Ex parte Carew*, when rightly understood.

COTTON, L.J.—I am of the same opinion. The appellant here filed a liquidation petition in 1877; but the proceedings resulted in an arrangement for a composition, which became binding by virtue of resolutions duly passed, and the registration of the resolutions. The respondent alleges that he was then and is now a creditor, but his claim is disputed. His name was not inserted in the debtor's statement of affairs, nor did he take any part in the proceedings under the petition. Therefore, under section 126 of the Bankruptcy Act, 1869, he is clearly not bound by the composition; and the question is, whether he should resort to the ordinary tribunals to have the debt ascertained and to obtain a judgment for it against the debtor, or whether he is at liberty to come in and prove for his debt in the Bankruptcy Court, and obtain a composition of 19s. 11½d. in the pound. In my opinion he is not entitled to come to the Court of Bankruptcy. Section 126 provides that a composition shall not affect the rights of any creditors other than those properly named in the debtor's statement of affairs. But it is said, Can any creditor be excluded from the benefit of the composition by fraud of the debtor or other circumstances? If in the debtor's statement a debt is improperly set down, the statement can be corrected under a subsequent clause in the section, before the resolution becomes binding, and if any creditor is not named in the list of creditors and comes in and asserts his claim before the composition becomes binding, the statement can be amended before registration. If he does not come in, that case is provided for by section 126, for he is not bound by the composition, and he

can follow his ordinary remedy and sue his debtor for the full amount of the debt. And, moreover, there is the further clause in the section enabling the Court to make the debtor a bankrupt if it appears to the Court that a composition cannot, for any sufficient cause, proceed without injustice or undue delay to the creditors or the debtor.

That clause could be made available for the purpose of preventing a composition, which ought to provide for all the creditors, being made for the benefit of some only, exclusive of others who ought to be inserted in the list. But here there is no suggestion of anything of that kind. We are not asked to decide whether any such measures ought to be taken, or whether the composition is bad through fraud, but whether an alleged creditor, omitted from the list, can, after registration of the resolutions, elect to take proceedings against his debtor in the Court of Bankruptcy instead of before the ordinary tribunal. In my opinion he can not. There is no provision in the Bankruptcy Act or the rules to that effect. When the resolutions have been registered all the Court of Bankruptcy can do is to enforce the provisions of a composition. On the construction of the section alone, independently of decision, I am of opinion that the appeal ought to be allowed.

But two cases are relied upon on behalf of the respondent.

The case of *Ex parte Carew* really presents no difficulty, because the claim there was mentioned in the debtor's statement of affairs as a claim the amount of which could not be ascertained, and as of such a nature that it could not be stated definitely; and a fund was placed in the hands of trustees, and a trust deed was executed which regulated the distribution of the trust fund among the creditors mentioned in the debtor's statement, and also the particular claimant. Lord Justice Mellish in his judgment says, that "if it were a case of bankruptcy or liquidation it would be clear that a creditor who was suing the debtor with other persons in Chancery might present his claim and might ask the Court of Bankruptcy to postpone the

Ex parte Lacey; in re Lacey (App.), Bankr.

proof of the debt until the case had been decided in Chancery." And why, it is said, should not that be done here? But that case was not like this, where the only question is as to the right to proceed against the debtor personally in the Court of Bankruptcy; but the question there was, whether a fund was to be handed over to the debtor without regard to the claim in the Chancery suit, when the claim was mentioned, and stated for the purpose of account to be 1,500*l.*, and the amount put into the trustees' hands was calculated on the basis of providing for the claim when and if properly ascertained and established. The decision in that case may well be right without being in favour of the respondent here. No doubt there are observations made by Lord Justice Mellish which go further, but a Judge's observations must always be considered with reference to the case before him. The claimant in that case had given notice of his claim to the trustees before the close of the proceedings—that is, before the registration of the resolutions.

Then it is said that we are bound by what is said by Lords Hatherley and Blackburn upon *Ex parte Carew* in the case of *Breslauser v. Brown* in the House of Lords; and although their observations were not necessary for the purposes of the opinion which they gave—for they were removing *Ex parte Carew* out of their way, not relying upon it—yet they are entitled to the greatest weight. Lord Hatherley, however, does put the decision in that case upon the ground to which I have referred that (p. 735) "the creditor might, as against the debtor, come in at any time before the actual distribution of the fund had been completed," and waive the conditions which were provided for his benefit, and might elect to have the benefit of the composition. Lord Blackburn possibly made use of expressions which seem to go further, but there is that in his expressions which shews that he was dealing with the case of a creditor whose claim had been omitted from the list, but who came in before the resolutions had been registered. He says (p. 746), "I take it that if a man came in during the proceedings, and said, I claim to prove for

1,000*l.*, which has been left out of the list; and if his proof was admitted and then he used his power to vote against the composition, . . . waiving the condition for his benefit for the very purpose of opposing the resolution, nevertheless, if the resolution was carried by a statutory majority he would be bound by it. He would have subjected himself to the jurisdiction of the Court of Bankruptcy, which might in a summary manner prevent his suing for the debt if he was offered the composition, . . . because he had become a party to the proceedings." He there is referring, as it seems to me, to the case of a creditor coming in before the composition proceedings have ended—that is, before the resolutions passed have been made binding by registration. Under the circumstances, I cannot think the case of *Ex parte Carew* an authority for the present case; and I am of opinion that nothing said by Lord Hatherley or Lord Blackburn ought to prevent us from exercising our own judgment upon the construction of the statute.

I should not wish to get rid of anything which was said by the Judges merely on the ground that it was unnecessary for the decision. But, looking fairly at what was said by Lords Hatherley and Blackburn, I do not think that either of them intended to lay down anything inconsistent with our present decision.

LUSH, L.J.—I am of the same opinion.

Mr. Winslow asked for leave to appeal to the House of Lords, which was refused.

Solicitors—John Evans & Peacock, for appellant;
G. Rose, Innes & Son, for respondent.

[IN THE COURT OF APPEAL]

BANKRUPTCY.

JESSEL, M.R.

JAMES, L.J.

LUSH, L.J.

1880.

Nov. 11, 18.

*Ex parte PUNNETT ;
in re KITCHIN.*

Mortgage—First and Second—Attornment Clause in each Deed—Distress under Second Attornment—Valid against Trustees in Bankruptcy.

K., the lessee of a hotel, demised it by way of mortgage to P. to secure an advance. The deed contained an attornment clause by which, "for better securing payment of the interest," the mortgagor attorned tenant to the mortgagee at a rent which was equal to the amount of the yearly interest on the sum advanced. K. subsequently mortgaged the same premises to H. The deed recited the first mortgage, and contained an attornment clause in similar words to that in the first mortgage.

K. filed a liquidation petition on the 3rd of July, 1879. Trustees were appointed on the 14th of July. Afterwards the first mortgagees distrained for a quarter's rent due under the attornment clause in their mortgage on the 18th of July. In September the second mortgagees distrained under his attornment clause for a half-year's rent due in August. The hotel was subsequently put up for sale by auction by the first mortgagees under an arrangement, and the trade fixtures and also the furniture and loose chattels were sold :—

Held, that the second mortgagee had a right to distrain after the bankruptcy of K. under the attornment clause in his mortgage for one year's rent, and that his right was not at all affected by the fact that there was a prior attornment to a prior mortgagee.

The attornment being for the better securing payment of the interest does not constitute between mortgagor and mortgagee the relation of tenant and landlord only, nor compel the mortgagee to elect between his character of mortgagee and landlord. He remains mortgagee with all the incidents attaching to that position.

The attornment is merely an additional security. Therefore fixtures added by the mortgagor after the date of the mortgage

held to pass to the mortgagee in his capacity of mortgagee.

Morton v. Woods (9 B. & S. 632; 37 Law J. Rep. Q.B. 242; Law Rep. 3 Q.B. 658; affirmed 9 B. & S. 650; 38 Law J. Rep. Q.B. 81; Law Rep. 4 Q.B. 293) approved and followed.

Kitchin, the lessee of the Pelican Hotel for a long term of years, mortgaged his leasehold premises by way of demise to Punnett and Stokes to secure payment of a sum of money and interest. The deed contained no assignment of the hotel fixtures; it contained, however, the usual power of sale and the following provision :—

"And for the purpose of better securing the punctual payment of the interest of the said principal sum, the mortgagor doth hereby attorn tenant to the mortgagee of the hereditaments and premises hereby demised at the clear yearly rent of 399*l.*, to be paid quarterly on the 18th day of April, the 18th day of July, the 18th day of October, and the 18th day of January, the first quarterly payment to become due and to be made on the 18th day of April, 1877. Provided always, that the mortgagees or the survivor of them, or the executors, administrators or assigns of such survivor, their or his assigns may at any time after the said 18th of April, 1877, enter into and upon the said hereditaments and premises, or any part thereof, and determine the tenancy hereby created, without giving to the mortgagor notice to quit." The rent reserved by the clause was about equal to the yearly interest upon the mortgage debt.

On the 4th of February, 1878, Kitchin mortgaged the same premises to R. S. Hawks by way of underlease to secure a sum advanced and interest. The deed recited the former mortgage, and was expressly made subject to the former mortgage security. The deed also contained an attornment clause in the same words as the former deed, except that the rent reserved was 225*l.*, and was payable half-yearly. This rent was also equal to the year's interest on the mortgage debt at five per cent.

Ex parte Punnett (App.), Bankr.

On the 3rd of July, 1879, Kitchen presented a liquidation petition, and on the 14th of the same month trustees were appointed.

On the 25th of August, 1879, the first mortgagees distrained for one quarter's rent due under the attornment clause on the 18th of July previously.

On the 4th of September, 1879, the second mortgagees distrained on the debtor's goods in the hotel for 112*l.* 10*s.*, the amount of a half-year's rent due to him under the attornment clause on the 4th of August previously.

An arrangement was come to on the 29th of September, 1879, under which, without prejudice to the trustees' right of contesting the validity of the two distresses, the first mortgagees put up the hotel for sale as a going concern, and thereby realised 3,340*l.*; and also as the agents for the trustees in the liquidation sold the trade fixtures by valuation for 526*l.*, and the furniture and loose chattels for 734*l.* 8*s.*

The trustees in the liquidation claimed the 526*l.*; and the value of the goodwill of the house, it not being expressly comprised in the first mortgage, such value to be allowed out of the purchase-money of the hotel.

They also refused to allow any deduction out of the 734*l.* 8*s.*, the proceeds of the furniture and chattels in respect of the distresses made by the mortgagees and the expenses connected with them.

The trustees applied to the Court to have these questions settled, when the registrar decided that the trustees were entitled to the value of the goodwill, and also to the money realised by the sale of the trade fixtures, and ordered the 526*l.* to be paid to them accordingly, and declared them to be entitled to the 734*l.* 8*s.*, after deducting the amount of the distress levied by the first mortgagees and the expenses of such levy; and further declared that the second mortgagee was not entitled to distrain for any rent payable to him under his distress, and could not accordingly retain the amount he had so levied thereunder.

The first and second mortgagees appealed.

The counsel for the trustees upon the opening of the appeal gave up all claim to such of the fixtures as had been annexed to the public-house before the date of the first mortgage.

Mr. Winslow and Mr. W. B. Heath, for the appellants.—The goodwill must go with the house, as there is nothing personal to the proprietor of the house—

Ohisum v. Dewes, 5 Russ. 29;

King v. The Midland Railway Company, 17 W. R. 113;

Ginesi v. Cooper, 49 Law J. Rep. Chanc. 601; Law Rep. 14 Ch. D. 596.

On the question of the double attornment, we submit that there is nothing unlawful or fraudulent within the bankruptcy law.

A mortgagor, instead of borrowing 20,000*l.* from A and attorning for the rent equal to the rate of interest on the whole sum, borrows 10,000*l.* from A and attorns to him for rent, and 10,000*l.* from B and attorns to him.

The objection as to the impossibility of there being two landlords cannot really be sustained. The tenancy created by an attornment is really a fiction to enable the agreement between the parties to be carried out; and if the fiction is good in the first attornment it should be good in the second. A man may even by contract bind himself to become tenant of his own land—*Bacon's Abridgment*, 7th ed. vol. iv. 850.

The bankrupt himself would have been estopped from denying the tenancy; for although facts appear on the mortgage deed which shew that the mortgagor has only an equity of redemption, if the parties have agreed that the relation of landlord and tenant shall be created between them, it does not matter that the proposed landlord shall have no legal reversion—

Jolly v. Arbuthnot, 4 De Gex & J. 224; 28 Law J. Rep. Chanc. 547;

Morton v. Woods (ubi supra).

In the latter case the action was brought by the assignees in bankruptcy of the mortgagor to recover the distress levied by the second mortgagees, and

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there even as against the creditors the distress was upheld. On the question of the validity of an attornment clause, they referred to

Ex parte Williams; in re Thompson,
47 Law J. Rep. Bankr. 26; Law
Rep. 7 Ch. D. 138;

*Re The Stockton Iron Furnace Com-
pany*, 48 Law J. Rep. Chanc. 417;
Law Rep. 10 Ch. D. 335;

Ex parte Jackson; in re Bowes, Law
Rep. 14 Ch. D. 725.

Mr. A. Wills and Mr. A. Powell, for
the trustees.—In

Morton v. Woods (ubi supra)

there was only one attornment clause, and it is conceivable that a mortgagor might enter into a contract of tenancy with his mortgagee, even though not legally enforceable. But here there was by the first mortgage an actually subsisting tenancy, and there cannot be two attornments—

Coke Lit. 310a.

But we admit that if that case is correct, it will be difficult to find any other distinction; for what it substantially decided was, that even as against creditors the Court would give effect to a fiction, and if to one, why, it may be said, should it not give like effect to a second?

[LUSH, L.J.—It is a legal fiction to effectuate the actual intention of the parties.]

Then, as regards the fixtures, the tenancy created by the clause was from year to year, and the term passed to the trustee by the bankruptcy, and he having the usual rights of a tenant, the trade fixtures affixed during the term passed to him also—

Ex parte Temple, 1 Glyn & J.
216.

If the mortgagees take the advantages of a landlord's position, they must also take the disadvantages attached to it—

*Re The Stockton Iron Furnace Com-
pany (ubi supra)*.

JESSEL, M.R.—The question of goodwill has really not been argued. It is quite plain that the goodwill of a public-house passes with the public-house. In such a case the goodwill is the mere habit

of the customers resorting to the house. It is not what is called a personal goodwill. Therefore as to that there is really no more to be said.

The other two points certainly are very singular. The first is this: The first mortgagee of a leasehold public-house took a proviso for attornment as tenant from the mortgagor to secure the interest on his mortgage; the second mortgagee did the same, and it appeared on the face of the second mortgage that the first mortgage was still outstanding and undischarged. The question we have to decide is, whether under these circumstances the second mortgagee had a right to distrain after the bankruptcy of the mortgagor for rent accrued under his attornment before the bankruptcy, of course not exceeding a year's rent, which is the limit fixed by the 34th section of the Bankruptcy Act. We think he had. It appears to me that the case is really decided by *Morton v. Woods*, which is the decision of five Judges of the Exchequer Chamber, affirming an unanimous judgment of the Court of Queen's Bench. Even if I differed from the *ratio decidendi*, which I do not for a moment say that I do, I should hold that I was bound by that decision.

Then it comes to this: Is there any fair and intelligible distinction to be drawn between the two cases? Now I assent to an observation which has fallen very often from Lord Justice James, that we must not fritter away decided cases by drawing fine distinctions. There is really no substantial distinction between the two cases. If the second mortgage created the relation of landlord and tenant, which it did by the operation of a legal fiction (I am not at all finding fault with legal fictions—they are necessary for the purposes of justice: they are merely a mode of putting in legal form the contracts of the parties)—if that is so, does it make any difference that there was a prior attornment to a prior mortgagee? I do not see how it can. If by a contract, notwithstanding the fact is known that the legal estate is outstanding in a mortgagee and that the mortgagor is not really the owner of the reversion, you

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can create a tenancy between the second mortgagee and the mortgagor by what may be called estoppel or *quasi* estoppel (it does not matter what term we use), it appears to me that there is nothing either in law or in good sense to prevent the same arrangement being made with more than one mortgagee. Otherwise this would happen: if a mortgage were made to two mortgagees by the same deed, and the mortgagor were to attorn tenant to the two mortgagees, there being a proviso between themselves that the one should be first and the other second, that would be good; but if the one mortgage were made by a deed dated the day after the other it would be bad. It appears to me that that would be a mere over-refinement, and consequently, having regard to the decisions which I have mentioned, I think that the right to distrain exists, and that effect ought to have been given to it.

The only other point is this: The proviso in the first mortgage is, "For the purpose of better securing the punctual payment of the interest of the said principal sum, he, the mortgagor, doth hereby attorn tenant to the mortgagees of the hereditaments and premises hereby demised at the clear yearly rent of 399*l.*," and so on. It is argued on behalf of the respondents that certain fixtures which were affixed to the house after the date of the first mortgage by the mortgagor became after the bankruptcy the property of the trustees—in other words, that the mortgagor is to be treated as a tenant and the mortgagees as landlords and nothing more, the fixtures in question being trade fixtures paid for out of the mortgagor's own moneys; and it was said that the mortgagees were bound to elect between their character as mortgagees and their character as landlords. But really, independently of *The Stockton Iron Furnace Company's* case, which appears to me to govern this point also, on principle that cannot be the real meaning of the contract between the parties. The very words are "for better securing the punctual payment of the interest," not to destroy the position of mortgagee; and, as was pointed out in that case by Lord Justice James and Lord Justice Bramwell, the mort-

gagee becomes mortgagee in possession and liable to account as such. There is not any case of election between two characters. He remains mortgagee, with all the incidents which attach to that position. The attornment is a super-added security, and there is nothing, therefore, between which he must elect. It is merely an additional security. That is the bargain between the parties. Therefore it appears to me that the mortgagee still retains the same rights in regard to the fixtures as if no attornment clause had been inserted, and consequently that all the fixtures are comprised in the security.

JAMES, L.J.—I concur.

LUSH, L.J.—I am entirely of the same opinion. I would observe that *Morton v. Woods* governs the present case entirely, unless there is some distinction to be found on the ground that here the mortgagor had already attorned and agreed to stand in the relation of tenant to the first mortgagees. *Morton v. Woods*, I may also say, is supported by the case of *The Stockton Iron Furnace Company* in this Court, the decision in which is exactly on the same ground and to the same effect upon both points.

Now is there any distinction? Does the fact that the mortgagor had already agreed to stand in the relation of tenant to a first mortgagee disqualify him from creating the same relationship between himself and a second mortgagee? I cannot imagine any principle of law which would prevent a person, if he chooses to do so, from undertaking that relationship to two distinct persons. The object of each attornment is perfectly clear. It is to secure the interest payable on the mortgage debt, and if there is no distinction on that ground then there is no distinction whatever between the present case and *Morton v. Woods* or *The Stockton Iron Furnace Company's* case.

Now as to the fixtures, I entirely agree with what has been said. The object of the attornment was the further security of the mortgagee. Then everything that the mortgagor adds to the house to

Ex parte Punnett (App.), Bankr.

improve its value must be taken to be an accretion for the benefit of the mortgagee. He does not become tenant for all purposes, as if there were no other relation between the parties. The relation is only created as subsidiary to the mortgage, and is to operate as an additional and better security to the mortgagee. Therefore, all the fixtures which were added afterwards must be taken by him in his capacity of mortgagee and pass to him under the mortgage.

Solicitors—Hawks, Stokes & McKewan, for appellants; Hindson, Miller & Vernon, for trustees.

BACON, V.C. }
 1880. } JOHNSTONE v. COX.
 Dec. 2, 7. }

Price of Officer's Commission—Mortgages—Notices—Retirement of Officer—Priorities.

Money paid to army agents by the Army Purchase Commissioners as the value of an officer's commission is not payable to the officer until his retirement has been gazetted; and, therefore, notices given to the army agents by incumbrancers before the publication of the "Gazette" are inoperative.

An officer charged the value of his commission in favour of three different mortgagees (who had no notice of each other's securities). On the 29th of March, 1879, the Army Purchase Commissioners sent to the army agents a warrant to draw on the Paymaster-General for 800l., being the amount due to the officer "on his retirement." The army agents received the 800l., and carried it to the credit of the commissioners on account of the officer. The officer's retirement was gazetted on the 16th of May. The first mortgagee gave notice of his charge in 1875, and on the 29th of March, 1879. The second mortgagees gave notice on the 17th of May.

The third mortgagees gave notice on the 29th of March and the 17th of May:—

Held, that by virtue of their notices the second mortgagee was entitled to rank first, and the third mortgagees to rank second.

The costs of all parties were ordered to be paid out of the fund.

On the 5th of October, 1875, Captain A. M. Smith charged all moneys which he would be entitled to receive on his retirement as the value of his commission as security for repayment of 400l. and interest to Messrs. Price, Bonstead & Co., who had since become liquidating debtors. On the 14th of December, 1877, and the 5th of February, 1878, Captain A. M. Smith charged the same moneys with repayment of 444l. and interest to Thomas Kayler; and on the 14th of May, 1878, Captain A. M. Smith gave a third charge on the same moneys in favour of the plaintiff. Neither Kayler nor the plaintiff had notice of any prior charge.

In 1879 Captain A. M. Smith sent in his papers, with a view to retire from the army; and on the 29th of March, 1879, the Army Purchase Commissioners issued a warrant in the usual form to Messrs. Cox & Co. to forward a receipt, which they were thereby authorised to fill up, and draw upon the Paymaster-General for the sum of 800l., "being the amount due to Captain A. M. Smith on his retirement." Messrs. Cox & Co. drew the 800l. and sent a receipt for "the sum of 800l. on account of Captain A. M. Smith;" and, according to their usual practice in similar cases, carried this sum to the credit of the Army Purchase Commissioners, "on account of Captain A. M. Smith." It was stated in evidence that Messrs. Cox & Co. treated moneys under these circumstances as moneys of the commissioners, and that the words "on account of" (the particular officer) were added for the purpose of earmarking the fund.

On the evening of the 16th of May, 1879, the retirement of Captain A. M. Smith was duly gazetted.

Price, Bonstead & Co., the first mortgagees, gave notice of their charge to Messrs. Cox & Co. on the 8th of October,

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1875, and again on the 29th of March, 1879, at twelve o'clock; Kayler, the second mortgagee, gave notice of his charge on the 17th of May, as soon as the office of Messrs. Cox & Co. was open; and the plaintiff, the third mortgagee, gave notice on the 29th of March, 1879, at ten minutes to twelve, and again on the 17th of May, 1879, as soon as the office of Messrs. Cox & Co. was open.

This action was brought by the plaintiff to enforce his charge, and the question was as to the priorities of the three mortgages under the above circumstances.

Sir H. Jackson and *Mr. Grosvenor Woods*, for the plaintiff, the third mortgagee.—The first day for giving effectual notice was the 29th of March, when the money became due to Captain Smith "on his retirement," though payable at a later date—

Buller v. Plunkett, 1 Jo. & H. 441;
30 Law J. Rep. Chanc. 641;

Somerset v. Cox, 33 Beav. 634; 33
Law J. Rep. Chanc. 490;

Addison v. Cox, 42 Law J. Rep.
Chanc. 291; Law Rep. 8 Chanc.
76.

The third mortgagee was the first to give notice on that day, and is entitled to priority.

Mr. Horton Smith and *Mr. Romer*, for the trustee of Price, Boustead & Co., the first mortgagees.—The first mortgagees gave notice of their charge on the 8th of October, 1875, and are therefore entitled to retain their priority. But if notice at that time was ineffectual, then we support the contention of the third mortgagee that the 29th of March was the day for giving effectual notice. The notice given on that day by the first mortgagees must be treated as contemporaneous with the notice given by the third mortgagee. On either view, therefore, the first mortgagees are entitled to priority. They cited

Oalisher v. Forbes, 41 Law J. Rep.
Chanc. 56; Law Rep. 7 Chanc.
109.

Mr. Hemming and *Mr. Jason Smith*, for Kayler, the second mortgagee.—Notices given before the money became actually due to Captain Smith were in-

effectual; the money only became due to him "on his retirement"—that is, when his retirement was gazetted—

The Earl of Suffolk v. Cox, 36 Law
J. Rep. Chanc. 591.

His retirement was gazetted on the evening of the 16th of May, after business hours at Messrs. Cox & Co.'s, and the first day, therefore, for giving effectual notice was on the 17th of May. The second mortgagee gave notice on that day, and thereby obtained priority over the earlier charge of which he had no notice.

Mr. Grosvenor Woods, in reply.—As against the second mortgagee, we contend that the 29th of March was the proper day for giving notice; and as against the first mortgagees, we contend that in a question of priorities the Court will have regard to fractions of a day, and hold our notice on the 29th of March to have been earlier than that given by them—

Tomlinson v. Bullock, 48 Law J. Rep.
M.C. 95; Law Rep. 4 Q.B. D.
230.

BACON, V.C.—In some cases there can be no doubt that the Court will take notice of fractions of a day, but in the present case this question is of no importance. It is contended that the 29th of March was the important day in this case, and the plaintiff bases his claim on what is said to have been decided in *Addison v. Cox*. But that case does not, in my opinion, apply to the case before me. When the transactions between the Army Purchase Commissioners and the officer were finally completed the money was payable, and not till then. In this case the 800*l.* was paid to Cox & Co. on the 29th of March, and a receipt given by them in the usual way. The words of the warrant of the 29th of March say that this sum was due to Captain Smith "on his retirement," and a great deal of argument has been addressed to me to shew what these words mean. In my opinion Captain Smith had not retired on the 29th of March; he was still one of Her Majesty's soldiers and received his pay up to the 16th of May, when his retirement was gazetted. The practice at Messrs. Cox & Co.'s is quite consistent with this. They enter the 800*l.* in

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their books and couple the entry with the name of Captain Smith, for the purpose of earmarking the fund. It was a necessary entry for that purpose, and I attach no importance to these words, "on account of Captain Smith," either there or where they occur in the receipt. The money was held on deposit by Cox & Co. to the credit of the Army Purchase Commissioners until the retirement of the officer. Notwithstanding *Addison v. Cox*, therefore, I have no hesitation in saying that the money remained the money of the Army Purchase Commissioners in the hands of their agents until Captain Smith's retirement appeared in the *Gazette*, until which time Captain Smith could not have drawn against it. Captain Smith's retirement was not gazetted till after business hours at Messrs. Cox & Co.'s on the evening of the 16th of May; in my opinion, therefore, no notice given before the 17th of May could affect the fund in the hands of Messrs. Cox & Co. On that day simultaneous notices were given by Kayler and the plaintiff, and the elder security of these two must be preferred to the younger one. The notices given before the publication of the *Gazette* were wholly inoperative. I direct the costs of all parties to be paid in the first place out of the fund; the residue will go to the incumbrancers in the order of their priorities.

Solicitors—Dod & Longstaffe, for plaintiff; Fladgate, Smith & Fladgate; S. Scott; Hollams, Son & Coward, for other parties.

MALINS, V.C. { *In re* LORD SOUTHAMPTON'S ESTATE. ALLEN
1880. { *v.* LORD SOUTHAMPTON;
Dec. 11. { BANFATHER'S CLAIM.

Adjourned Summons—Equitable Mortgage—Transfer—Solicitor—Constructive Notice.

S. deposited certain title-deeds with J. B., who was his solicitor, together with a memorandum of deposit for securing the sum

of 3,000l. J. B., who was also the solicitor of H. B., afterwards handed the deeds and memorandum of deposit to H. B., together with a further memorandum to the effect that 2,000l., part of the 3,000l., belonged to H. B., with interest at five per cent. H. B. subsequently, on the request of J. B., returned the deeds (without the memorandum) to him on the assurance that others of equal value should be deposited with him, and J. B. afterwards deposited other deeds with H. B. which proved utterly valueless. S. had no notice of H. B.'s security. The property comprised in the original deeds was sold by the trustees of the will of S., and the 3,000l. mortgage money paid to J. B. On a claim by H. B. against the estate of S. for payment of the 2,000l. advanced by him,—Held, that he had lost all claim in consequence of his neglecting to give notice to S. of the transfer and of his having given up the deeds originally deposited with him by way of security.

Adjourned summons.

This was a claim by Mr. Banfater against the estate of Lord Southampton, who died in July, 1872, for the sum of 2,000l. under the following circumstances:—

In February, 1870, Mr. Banfater's father requested Birt, who was his family solicitor and also the solicitor of Lord Southampton, to invest a sum of 2,000l. on behalf of his son, and Birt shortly afterwards wrote and informed him that he had looked out a freehold five per cent. mortgage, which would be made out in his son's name.

On the 28th of February, Banfater, sen., sent a cheque for 2,000l. to Birt, who on the 2nd of March following wrote to the wife of Banfater, jun., saying he had received the cheque and had placed the money out in her husband's name in a freehold five per cent. mortgage, upon the Southampton estate.

In March, 1871, Birt forwarded two documents to Banfater, jun. The first of such documents was as follows: "By an agreement, dated the 6th of January, 1871, between Lord Southampton and J. Birt, in consideration of 3,000l. advanced to Lord Southampton by Jacob Birt, Lord Southampton has deposited

In re Lord Southampton's Estate.

with Jacob Birt the counterpart leases of the property specified in this schedule, of which property Lord Southampton is seised in fee, subject only to the lease appearing in the schedule, and Lord Southampton agrees when required to execute a formal mortgage of such premises for securing the principal sum and interest at five per cent. per annum." This document was signed by Lord Southampton, and the schedule contained the leases of various houses in London.

The second of such documents was a memorandum, dated the 25th of March, 1871, and was as follows: "The sum of 2,000*l.*, part of the annexed 3,000*l.* security from Lord Southampton, now belongs to the Rev. H. W. Banfather, with interest at the rate of five per cent. per annum." This document was signed by Birt.

It appeared from the evidence that Banfather, jun., afterwards asked Birt for the securities mentioned in the agreement of January, 1871, and that he received from him the leases of some houses in the Euston Road, but that some time afterwards he returned them to Birt at his request, and that Birt subsequently sent others in their place. The returned documents did not include the original memorandum of deposit to Birt.

In the year 1873 the property comprised in the leases originally deposited with Banfather by Birt were sold by the trustees of Lord Southampton's will, and the 3,000*l.* and interest paid to Birt. The original memorandum of deposit was not given up to Lord Southampton's trustees. The substituted deeds proved valueless. Throughout the transaction Banfather had no communication with Lord Southampton or the trustees of his will, and no notice was given to them or any of them of the memorandum of March, 1871, till after the commencement of the action.

Mr. Bristowe and *Mr. Whitehorne*, in support of the claim.—We say that Lord Southampton had constructive notice through Birt of the advance made by us. Notice to a solicitor is actual notice to his client—

Espin v. Pemberton, 3 De Gex & J.

547; 4 Drew. 333; 28 Law J. Rep. Chanc. 308;
Brotherton v. Hatt, 2 Vern. 574;
Spaight v. Cowne, 1 Hem. & M. 359;
Bradley v. Riches, 47 Law J. Rep. Chanc. 811; Law Rep. 9 Ch. D. 189.

They also referred to

Jones v. Gibbons, 9 Ves. 407;
Withington v. Tate, Law Rep. 4 Chanc. 288;
Hewitt v. Loosemore, 9 Hare, 449; 21 Law J. Rep. Chanc. 69.

Mr. Pearson and *Mr. Vaughan Hawkins*, for the trustees of Lord Southampton's will.—The deeds were deposited with Birt by Lord Southampton as a security for 3,000*l.* advanced by Birt. It was the duty of Banfather to have given notice to Lord Southampton—

Turton v. Benson, 1 P. Wms. 495;
Hopgood v. Ernest, 3 De Gex, J. & S 116.

If he had given notice and retained the deeds he might have had a claim on the estate, but not having done so he has no one but himself to blame. They also referred to

Williams on Personality, 10th ed. p. 457;

and

Fisher on Mortgages, 2nd ed. vol. ii. p. 589.

Mr. Bristowe, in reply.

MALINS, V.C., after stating the facts proceeded—Now the document of March, 1871, is a very formal document, and Mr. Banfather's position was materially improved by it, as up to that date he had nothing but Mr. Birt's personal liability, but now he obtains the original memorandum from Lord Southampton and all the title-deeds, and if he had been a man of business he would have kept what he had once got; but this he did not do, but at Birt's request, no doubt considering him not only an honest, but an honourable man, he handed him back the deeds which were of value, and had substituted for them others which were utterly valueless.

Now, it is argued that, because Birt was Lord Southampton's solicitor, therefore Lord Southampton must be taken

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to have had notice of this transaction. But Birt all through this transaction was committing a fraud. Is a client to have notice of all the fraudulent devices that his solicitor has recourse to? Because a solicitor cheats other people, is a client to be answerable for that cheating? I cannot accede to such an argument. The money was deposited in the hands of Birt to be invested by him, and Banfather did not know Lord Southampton's estate was the one that was to be mortgaged to him. The first notice he had of that fact was in March, 1871, and then he became aware that he had a charge on Lord Southampton's estate, but not, as Birt had led him to believe, an original mortgage to him, but a transfer in part of a mortgage for a different sum; and if he had been an astute man of business, he would at once have seen that Birt was imposing upon him, and would have made further enquiry, which would have led to the discovery of the deceit; but he relied on Birt, and believed that the substituted deeds were as valuable as the original ones.

How can I then attribute blame to Lord Southampton, who knew nothing at all about these transactions? If Mr. Banfather had employed an independent solicitor, that solicitor would have given notice to Lord Southampton—it would have been his duty to do so. Therefore, who is to blame? Clearly not Lord Southampton.

I am clearly of opinion that by giving up those deeds, which he so negligently did, Mr. Banfather has lost his claim upon the property of Lord Southampton. The lien which he had was constituted by the deposit of the title-deeds, and that he lost by giving those deeds up.

When the trustees sold the property, Birt produced all the title-deeds, which, no doubt, he had obtained possession of by fraud. But how were the trustees to know that? There was nothing to lead them to that conclusion; therefore they are not to blame. Have they been guilty of any negligence? Lord Southampton mortgages his property to Birt, who transfers that mortgage, but gives no notice to the mortgagor, Lord Southampton; then Lord Southampton's trus-

tees sell the property, and pay the money to Birt. I am bound to say that, as prudent men, they would have acted much better if they had not done so. Every obligor or mortgagor is, in my opinion, guilty of a certain degree of negligence when he pays off a bond debt, or a mortgage, if he does not require the instrument creating the debt to be delivered up to him. But is he bound to do so? The negligence of the man who takes an assignment of a *chose in action* like this, without giving notice to the mortgagor, is much greater—his duty is to give such notice. Suppose a man borrows 10,000*l.* on his own estate, and verbally agrees with the mortgagee that whenever he can pay off 2,000*l.* the mortgagee will take that on account; and then, having received no notice that the mortgagee has assigned the mortgage, he writes and sends him a cheque for 2,000*l.*: is that a good payment or not? Why should it not be a good payment? I quite agree with what was cited from *Jones v. Gibbons*, that it is not necessary to give notice of the assignment of a mortgage; and that, although it is not necessary to give notice, any payment after assignment without notice to the mortgagor is a good payment as against the transferee.

With regard to the case of *Withington v. Tate*, in which there was a mortgage and a transfer, and after the transfer there was a payment to the solicitor of the mortgagee—there the Master of the Rolls decided, and his decision was affirmed by Lord Hatherley, that the payment to the solicitor of the mortgagee without his authority was no payment at all, and therefore that the transferee had a perfectly good title. But what would have been the case if, instead of payment having been made to the solicitor, it had been made to the mortgagee himself? My opinion is, that if the payment had been made to the mortgagee it would have been a good payment, and the transferee not having given notice would have had no right whatever. The decision in *Withington v. Tate* turned upon the fact of the payment having been made to the wrong person.

Under all the circumstances of this

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case I am of opinion that Mr. Banfather has lost all claim against the estate of Lord Southampton.

Solicitors—Stonehouse & Legge, for Banfather;
Farrer, Gurry & Co., for trustees.

BACON, V.C. }
1880.
Dec. 8.

Ex parte YOUNG AND
GRINDELL.

Forest of Dean—Forfeiture of Gale—Re-entry—Application for Gale—Priority—Petition of Right—Forest of Dean Act, 1838 (1 & 2 Vict. c. 43), s. 29.

Where a gale is forfeited for non-user, under the provisions of the Forest of Dean Acts, the forfeiture is complete on service of the notice of forfeiture without actual re-entry on the part of the Crown.

Petition of right.

Two gales in the Forest of Dean vested in certain trustees having remained unworked for five years, became liable to forfeiture under the provisions of the Acts and rules relating to the Forest of Dean (1). Negotiations for renewal

(1) 1 & 2 Vict. c. 43 (Forest of Dean Act, 1838), s. 29, provides that the commissioners may make general rules specifying the mode in which gales shall be worked; "and that in case any person or persons entitled to or in the possession of any gale, pit, level, work or quarry within the said hundred, now granted, or hereafter to be granted, awarded or leased, shall wilfully proceed in opening or working any such gale, pit, level, works or quarry, contrary to the said rules and regulations, and the directions to be contained in any award of the said commissioners hereby appointed, after seven days' notice in writing from the gaveller or deputy gaveller, to stop and discontinue such opening and working, left at or upon the said gale, pit, level, work or quarry, or at the last known or usual place of abode of such person or persons as aforesaid, then the said gales, pits, levels, works or quarries shall be liable to be forfeited as and for a breach of condition, and the same shall always after the said award be considered as held on condition of performing and abiding by the said rules and regulations in all respects; and the person or persons in possession of any such gales, pits, levels, works or quarries may be evicted therefrom by Her Majesty, her

of the gales took place between Messrs. Prior, Bigg, Church & Adams, the solicitors of the trustees, and the gaveller, but ultimately, on the 17th of September, 1877, the gaveller served the solicitors with a notice that the gales were forfeited for want of user, and the solicitors wrote in reply accepting the notice on behalf of the trustees. On the 18th of September the gaveller sent to Mr. Brown, the deputy gaveller, and Mr.

heirs or successors, as might be done on a forfeiture of a lease for breach of condition; and all such gales, pits, levels, works or quarries so forfeited shall be subject to be again galed or leased as other the mines, minerals or quarries in the said forest and hundred; and in addition to such right or power of eviction, the compliance with such rules, orders and regulations may be enforced by and on behalf of Her Majesty, her heirs and successors, or by any other person or persons, by injunction of her Majesty's Court of Exchequer, or otherwise in such manner as the said Court shall on application think fit."

By section 60, it is enacted that, "The gaveller or deputy gaveller for the time being shall grant gales to free miners in the order of their applications in writing, to be made from and after the passing of this Act; and the entry of such applications in the books of the gaveller or deputy gaveller shall be evidence of the priority of such applications respectively; and the said gaveller or deputy gaveller is hereby directed to make entries of all such applications as aforesaid, and in the order in which the same are made; and the application for such gales shall be made by the filling up a printed form of application to be provided by the said gaveller or deputy gaveller."

By the rules and regulations made by the commissioners it is provided that, "All persons now, or at any time hereafter, holding any unopened gale or gales of coal or iron ore shall *bona fide* commence opening the same within the space of five years from the date of this award, and as regards all other gales, or new grants of surrendered or forfeited gales, within five years of the date of the grant thereof respectively."

22 & 23 Vict. c. 21 (Queen's Remembrancer Act, 1859), s. 25: "When a right of re-entry upon lands or other hereditaments shall have accrued to Her Majesty or her successors, such right may be exercised or enforced without any inquiry being taken or office being found, or any actual re-entry being made on the premises."

24 & 25 Vict. c. 40 (Forest of Dean Act, 1861), s. 3: "Provided always that nothing in this Act contained shall enlarge or diminish, or in any way affect, any right of re-entry or eviction, or liability to forfeiture; but every gale, pit, level, work and quarry shall be subject in all respects to the same liability to forfeiture and eviction, and no other, as if this Act had not been passed."

Ex parte Young.

Francis, the receiver of rents, in the forest, a copy of the notice of forfeiture, authorising them to take possession of the gales. This notice, however, was not acted on till the 28th of September, when the deputy gaveller took formal possession, by publicly entering on the land and declaring the gales forfeited.

The suppliants applied for grants of the forfeited gales on the 21st and 24th of September, but the deputy gaveller declined to enter these applications in his books, on the ground that the forfeiture was not then complete, and entered in priority other applications made after the 28th of September.

The suppliants prayed that it might be declared that the forfeiture was complete before the 21st and 24th of September, and that their applications might be entered accordingly.

Mr. Kay and *Mr. Renshaw*, for the petitioners.—The forfeiture was complete when the notice was given by the gaveller to the solicitor. That would be the case as between landlord and tenant—

Roberts v. Davy, 4 B. & Ad. 664;
1 Nev. & M. 443; 2 Law J. Rep.
K.B. 141;

Jones v. Carter, 15 Mee. & W. 718;
Woodfall on Landlord and Tenant
(11th ed.) 290;

and the same rule applies to the Crown—
Chitty's Prerogative of the Crown,
p. 245.

There is nothing inconsistent with this view in the Forest of Dean Act, 1838 (1 & 2 Vict. c. 43), s. 29, where forfeiture and eviction are distinguished; and the Queen's Remembrancer Act, 1859 (22 & 23 Vict. c. 21), s. 25, is in our favour.

Mr. W. W. Karslake (with him *The Attorney-General (Sir H. James)* and *Sir H. Jackson*), for the Crown.—The Forest of Dean Act, 1861 (24 & 25 Vict. c. 40), s. 3, leaves the question of forfeiture to be determined under the provisions of the Act of 1838 (1 & 2 Vict. c. 43), s. 29. It has always been the practice to make a corporeal entry on the land and declare the gale forfeited; and as the proceedings are addressed to a humble class of persons, it seems more suitable that

the forfeiture should be completed by some visible public act, such as the ceremony of re-entry; and such, we submit, is the right construction of section 29. The deputy gaveller, therefore, was not bound to take notice of applications made prior to the 28th of September.

Mr. Kay, in reply.

BACON, V.C.—I cannot say that I entertain any doubt about the legal right which ensues upon the transaction stated in the admissions. The suggestion of *Mr. Karslake* is, that there was no effectual forfeiture until the 28th of September. By a notice, dated the 17th of September—on what particular day that came to the hands of *G. E. Francis* and *T. F. Brown* does not appear—but on the 17th of September there was a declaration by the only person competent and authorised to make it that the forfeiture had taken place; and that was an authority to the persons to whom that notice was directed to make an entry upon or take possession of the gales. The affidavit of *Mr. Brown* states: "I say that information that service of the said notices of forfeiture had been accepted by the said Messrs. Prior, Bigg, Church and Adams, as aforesaid, was sent from the office of Woods to *Mr. Francis*, the receiver of the Crown rents in the said forest, and myself, by letter, dated the 18th of September, 1877, the original of which letter I have sought for but have been unable to find." [That is among the admissions, and therefore that does not signify.] "Mr. Francis was at that time absent from home on his vacation, and that letter was forwarded to me some days after its date, but I am unable to fix on what day in particular. I acted on the said letter by taking possession on the 28th of September, 1877, which was the earliest day on which re-entry on the said gales could be made after I received the said letter from the office of Woods, dated the 18th of September, 1877." There is no explanation why it could not have been made earlier except the suggestion that *Mr. Francis*, one of the two persons to whom the authority was directed, was absent for his vacation.

Ex parte Young.

Surely I must treat that act done by the gavelleur upon that notice as plainly evincing his intention to avail himself of the forfeiture, and that he availed himself of the forfeiture to do whatever was necessary, if anything was necessary. There is nothing in the statement nor in the Act of Parliament requiring more. The general law which has been referred to, without any intimation of the intention of the Crown, is enough, I think. If that is the law—and I have no reason to doubt it—then it is very plainly decided. I think it is clear that on the 17th of September, at least—it is not necessary to say whether before or not—a forfeiture had been validly and effectually declared and authority was given to the bailiff to take possession. In my opinion that was abundantly enough. It must be held that the forfeiture took effect from the 17th of September, and the date of the 28th of September is indifferent for all the purposes of this application. Mr. Karlake has, with the greatest possible propriety, brought to my attention the fact that on the 28th of September, or some other day—the days are mentioned in the affidavit which I last referred to; the 28th of September is the first of them; there are others at later periods—an application was made by other free miners for the grant of that which had become forfeited. It is not disputed that the application made by the two present suppliants was made on an earlier date, and therefore I think they are entitled to the relief which they ask by this petition; and I cannot take any notice of any subsequent applications.

Order the applications on the 21st and 24th of September to be entered in that order, the forfeiture being declared to be on the 17th. The Crown to pay the costs.

Solicitors—Jones & Starling, agents for W. Roberts, jun., Coleford, for petitioners; T. W. Gorst, Solicitor to the Treasury, for the Crown.

[IN THE COURT OF APPEAL]

JAMES, L.J.	} <i>In re</i> THE NORMANTON IRON AND STEEL COM- PANY (LIMITED).
BRETT, L.J.	
COTTON, L.J.	
1881.	
Jan. 24.	

Practice—Title to Fund in Court—Leave to Appeal after time expired—Winding-up.

In the winding-up of a company, JESSEL, M.R., following a reported decision of his own, ordered a certain fund, claimed by a creditor as against the liquidator, to be paid to the liquidator. The creditor allowed the time for appealing to expire. Afterwards the decision which had been followed was overruled by the Court of Appeal. The creditor then applied for leave to appeal against the order of the MASTER OF THE ROLLS:—Held, that as the fund in question was still within the control of the Court, leave to appeal should be given.

Original motion for leave to appeal.

Messrs. Thompson & Co., judgment creditors of the above company, issued execution on their judgment under which the sheriff seized some property of the company, and sold the same by public auction on the 22nd, 23rd and 24th days of March, 1880.

On the 7th of April a creditor's petition for winding-up the company was presented, on which the usual winding-up order was made on the 17th of April.

The liquidator claimed the proceeds of the third day's sale—about 800*l.*—as having taken place within fourteen days of the presentation of the petition, and on the 6th of August the Master of the Rolls, following his decision in

In re The Printing and Numerical Registering Company, 47 Law J. Rep. Chanc. 580; Law Rep. 8 Ch. D. 535,

decided in favour of the liquidator, but intimated that as Fry, J., in

In re Richards & Co., 48 Law J. Rep. Chanc. 555; Law Rep. 11 Ch. D. 676,

had come to an opposite conclusion, the question was one which ought to be settled by the Court of Appeal. It was, therefore, ordered that the sheriff should pay the 800*l.* into Court to abide the

In re Normanton Iron and Steel Co., App.

result of an appeal by Messrs. Thompson & Co.; but if no appeal was brought within twenty-one days the costs of the liquidator, the sheriff and Messrs. Thompson & Co. were ordered to be paid out of the fund, and the residue to be paid to the liquidator. Messrs. Thompson & Co. did not appeal within the twenty-one days.

On the 13th of December the Court of Appeal, in

In re The Withernsea Brick Works (Limited), ante, p. 185, reversed the decision of the Master of the Rolls in

In re The Printing and Numerical Registering Company (ubi supra). Thereupon Messrs. Thompson & Co. now moved for leave to appeal notwithstanding the time had expired.

Mr. Rozburgh and Mr. C. J. Tahourdin, for the appellants.—The fund is still in the hands of the liquidator, and therefore within the control of the Court. The case on its merits is indistinguishable from

In re The Withernsea Brick Works (Limited) (ubi supra).

No doubt in

Craig v. Phillips, 47 Law J. Rep. Chanc. 239; Law Rep. 7 Ch. D. 249,

leave was refused, but in that case James, L.J., particularly mentions an appeal under the Winding-up Act as being on a different footing.

Mr. Ince and Mr. D. Jones, for the liquidator.—Orders in many cases have followed the decision in

In re The Printing and Numerical Registering Company (ubi supra), and all business done under such orders cannot now be undone. The order in this case was made at a time when the conflicting decisions on the point were perfectly well known, and the applicants were in fact invited to appeal by the Master of the Rolls. There is nothing harsh, therefore, in giving up the benefit of the statutory limit. In

Krehl v. Burrell, 48 Law J. Rep. Chanc. 252; Law Rep. 10 Ch. D. 420,

an entirely new point was taken by the

Court of Appeal, and yet leave to appeal was refused. Further, the liquidator has paid costs under the order; therefore, if leave to appeal be now given, he must be protected and be allowed the costs he has paid under the order, and the costs of this application.

JAMES, L.J., said — I think we may give leave to appeal in this case. If the money had been paid away under the order it would be impossible to bring it back, for the person to whom it had been paid would then be as much entitled to it as he would be to property held under a bad title but protected by the Statute of Limitations. But it appears to me there is a broad distinction when the money is still under the control of the Court. The liquidator, however, must be protected if he has paid anything under this order.

BRETT, L.J., said — To lay down a general rule in such a case as this would be dangerous. When a fund has actually been distributed under an order I think an appeal ought not to be allowed. In this case the fund is still in the control of the Court, and under these circumstances I do not think that money which legally belongs to one party should be given to another by the order of the Court.

COTTON, L.J., concurred.

Leave to appeal being given, the liquidator submitted to an immediate order discharging the order of the Court below, being allowed his costs of the application and all costs paid under the order of the Court below.

Solicitors—Tahourdin & Hargreaves, for applicants; Singleton & Tattershall, agents for Harrison & Beaumont, Wakefield, for liquidator.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
COTTON, L.J.
LUSH, L.J.
1880.
Dec. 15.

THE WYE VALLEY RAILWAY
COMPANY v. HAWES.

Practice—Third Party Notice—Discretion—Order XVI. rules 17, 18, 20, 21.

The provisions contained in Order XVI. in favour of defendant are to be made use of in such a way as not to cause delay or embarrassment to the plaintiff; therefore where the granting of leave to a defendant to serve a third party notice under rule 18 of the Order would unfairly hamper the plaintiff, the Court in the exercise of its discretion ought to refuse to grant such leave.

The decision of HALL, V.C., affirmed.

This was an appeal from a decision of Vice-Chancellor Hall, refusing an application by the defendants for leave to serve a notice on other parties under Order XVI. rule 18. This case is fully reported *ante*, p. 75.

The defendants appealed.

Mr. Romer, for the appellants, repeated the arguments used in the Court below.

Mr. Whitehorne, for the respondents, was not heard.

JESSEL, M.R. — We will not trouble you, *Mr. Whitehorne*. The application under the 18th rule of the 16th Order is, no doubt, an application to the judicial discretion of the Court, because it does not give the right to the defendant as a right, but only by leave of the Court or a Judge. Now, undoubtedly that rule covers a case where the main question, as this appears to be—the contention between the plaintiff and defendant—is also one of the questions between the defendant and the person whom he desires to serve with notice. But, although it includes such a case, in my opinion, it is not every case in which the question to be decided between the plaintiff and defendant would also be a question to be decided between the defendant and somebody else which entitles

the defendant as a matter of course to leave to serve. There are several cases in which the Judge, as it appears to me, may well, in the exercise of his judicial discretion, think it not right to give such a liberty.

Now it must not be forgotten that service of this kind puts a person, who does not appear, to a certain amount of cost and inconvenience. It is quite true that a person may choose to appear. Whether by so doing he will or will not get his costs is a question on which I do not intend at present to offer any opinion, but if he does not appear I certainly see no reason upon which he can get them. Therefore it appears to me that if the Judge thought the claim to contribution, indemnity or other remedy or relief *prima facie* bad, he might, in the exercise of his discretion, decline to put the person served to that inconvenience. I only give that as an illustration, not saying that it applies to this case, which I intend to decide on different grounds. All these rules in favour of a defendant are subject to this observation, that they are not intended to embarrass the plaintiff in his action. They were intended to help the defendant as regards third parties, but were not intended to delay the plaintiff or to subject him to further costs as a rule. If it appeared, as it does appear to me, that the giving the leave would unfairly hamper the plaintiff, then I think the leave should not be given.

Now the case, put shortly, with which we have to deal is this. A railway company sues its directors on the ground that they have paid a sum of money to contractors out of the funds of the company improperly; because the sum of money was paid to induce the contractors to pay over to the shareholders dividends upon their shares before the line was completed, contrary to the express provision of the Act of Parliament. If that contention is made out, the directors, being guilty of a breach of trust, may be made liable jointly and severally to replace the moneys improperly paid. The suggestion or claim made on their behalf is that, if that should turn out to be so, they will be entitled to recover from the shareholders of the com-

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pany, who, we are told, are 450 in number, all the moneys which these shareholders have received from the contractors as dividends with knowledge of the facts. Whether that is so or not I give no opinion, beyond this, that I am by no means convinced that it follows as a necessary conclusion from the success of the plaintiffs in the pending action. But even if it were so you are going to serve some 450 people, everyone of whom has a right, as I read it, to dispute the plaintiffs' claim. The 20th rule provides that if he tries to dispute the plaintiff's claim as against the defendant he must enter an appearance in the action. According to that theory you might have—I do not say you would—but you might have 450 more defendants, and then, when they come in under the 21st rule, they would take out 450 summonses—or they might do so—to have the direction of the Judge as to the mode in which the action was to be tried; and then the Judge might give everybody who asked it liberty to defend the action. If that was carried out to its full extent, which I agree is not probable, and I might say not possible, you would have 450 defendants, with 450 counsel, or it might be 900 counsel, entitled to appear at the trial with a tribe of witnesses brought by each one. Of course I know this is putting the thing in a very absurd light, but let us substitute for 450 one-tenth of the number, which is not impossible, and you at once see the embarrassment and annoyance caused to the plaintiff, and the difficulty which would be thrown in the way of his successfully prosecuting the action. It does appear to me, looking to the nature of the case made, and looking to the circumstances to which I have adverted, that the discretion of the Court below was well exercised, and that this appeal should not be allowed.

COTTON, L.J.—I am of the same opinion. I think the case is one within the rule which has been relied upon; but still, even if it is within the rule, the Judge is to exercise a discretion when the application is made to him; and one of the rules which, in my opinion, ought to be had

regard to in exercising his discretion is this, that this proceeding is not to be allowed where it will hinder or embarrass the plaintiff in the prosecution of the action. It is introduced for the benefit of the defendant as regards third parties, but at the same time it appears to me that the plaintiff is not to be prejudiced by bringing in third parties under this rule, and I think the application was rightly refused. It is true that the Court or Judge will have a discretion when parties come in and ask leave to appear and defend, and, of course, it may be presumed that the Court would exercise the discretion in such a way as, so far as possible, when parties have appeared, not to prejudice or delay the plaintiff; but here, having regard to the vast number of persons who may come in and shew reasons, if they are to be bound for saying they can bring forward what seems to be important evidence to them, I think we ought not, having no power now to control or regulate what is to be done if all these parties appear, to make the order which is asked for, namely, for liberty to serve this large number of persons as against whom the defendants here say they have a remedy over.

LUSH, L.J.—I am entirely of the same opinion. I think it is sufficient to base it upon the grounds on which the Vice-Chancellor decided, and which my learned colleagues have also taken; although there are to my mind very serious considerations indeed beyond that which happily it does not become necessary for us to express any opinion upon at the present moment. The Court is to be satisfied that there is a question in common between the plaintiff and defendant, and the defendant and the persons sought to be brought in, which ought to be determined in that action. Now, I confess I do not see that there is a question in common which ought, considering all the circumstances, to be determined between these parties. The benefit which the defendants would get from having this single question in common determined, as Mr. Romer has pointed out, would be infinitesimal.

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mally small compared with the embarrassment which the bringing in of this large number of persons would cause to the plaintiffs in the action; and it never was intended that the action of the Court should be exercised to bring in persons whose presence there with the rights which belong to them as such would embarrass the plaintiff in the management of his claim against the defendant. Now, if these persons are brought in, it is impossible to deny to them the right, if they please to be represented at the trial and to call their own witnesses. How can this be possibly done without putting the plaintiffs to an enormous inconvenience and embarrassment, and virtually rendering all the trial abortive? I think I have said quite enough to base my decision upon that ground, without referring to any other consideration that may arise—that is to say, that this decision of the Vice-Chancellor should be affirmed.

Solicitors—Wilson, Bristows & Carpmal, for appellants; Newman, Stretton & Hilliard, for respondents.

BACON, V.C. }
1881. } CHATTERTON v. WATNEY AND
JAN. 14, 15. } COMPANY AND OTHERS.

Garnishee Order—Order against Mortgagor—Mortgage to Three Successive Mortgagees—Assignment of Third Mortgage—Sale by First Mortgagee—Right to Surplus Proceeds—“Debt due from Garnishee to Judgment Debtor”—Common Law Procedure Act, 1854, ss. 61 and 62—Rules of Court, 1875, Order XLV. rule 2.

A mortgaged leaseholds to B, C and D successively. X, a judgment creditor of D, obtained a garnishee order against A, attaching all debts due from A to D, to answer his judgment. Subsequently D assigned his mortgage to E. B, the first mortgagee, sold the property under his power

of sale, and paid off himself and C; and there remained in his hands a surplus insufficient to satisfy the third mortgage. After the sale, and while the proceeds were in B's hands, Y, a judgment creditor of D, obtained a garnishee order against B, attaching all debts due from B to D.

Upon a question of priorities as between E, X and Y,—

Held, that X, by his garnishee order against A, obtained no priority over either E or Y with respect to the surplus proceeds of sale in B's hands, inasmuch as the liability of A as mortgagor to D as third mortgagee, did not constitute a debt due from the garnishee to the judgment debtor within the meaning of section 61 of the Common Law Procedure Act, 1854, and Order XLV. rule 2 of the Rules of Court, 1875. Held also, that Y would rank next to E as to any surplus remaining after satisfying the third mortgage.

On the 13th of December, 1877, H. F. Margetts, the then owner of a leasehold public-house called “The Greyhound,” at Croydon, executed a first mortgage thereof to Watney & Co., to secure 3,500*l.*, interest and any further sums which might become due to them; a second mortgage thereof to Vickers & Co. to secure 2,000*l.*, interest and other moneys for goods sold not exceeding 2,600*l.*; and a third mortgage thereof to J. P. Budden to secure 6,000*l.* and interest. On the 28th of July, 1879, Robert Rogers recovered judgment against Budden for 1,081*l.* 0*s.* 8*d.* and costs; and on the 1st of August, 1879, further obtained a garnishee order nisi, attaching all debts due from Margetts to Budden, which was made absolute on the 7th of August, and notice of it given to Margetts. On the 2nd of September, 1879, Walker & Co. recovered judgment against Budden for 2,180*l.* 17*s.* 7*d.* and costs, and on the 16th of October, 1879, they obtained a garnishee order nisi, attaching all debts due from Margetts to Budden, and served it the same day on Margetts. This order was made absolute on the 22nd of December, 1879. On the 13th of November, 1879, Budden assigned his mortgage to H. W. Chatterton, and notice of the assignment was given to

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Watney & Co. On the 10th of December, 1879, Margetts filed a petition for liquidation, and a trustee was appointed. On the 11th of February, 1880, Watney & Co. agreed to sell the public-house under the power of sale in their mortgage. On the 11th of March, 1880, the sale was completed; and, after satisfying their own and Vickers' mortgage, there remained in their hands 1,106*l.* 11*s.* 4*d.* Notice of Rogers's garnishee order of the 7th of August, 1879, was given to Messrs. Watney's solicitors on the 12th of February, 1880. On the 3rd of March, 1880, Ind, Coope & Co., judgment creditors of Budden, obtained a garnishee order against Margetts, attaching all debts due from Margetts to Budden, and gave notice of it to Watney & Co. On the 22nd of March, 1880, Ind, Coope & Co. obtained a garnishee order against Watney & Co., attaching all debts due from Watney & Co. to Budden, to answer their judgment against Budden. On the 23rd of April, Rogers also obtained a garnishee order *nisi* against Watney & Co., attaching all debts due from Watney & Co. to Budden, to answer his judgment; and served the same upon Watney & Co. Chatterton commenced an action against Watney & Co., Budden, Ind, Coope & Co., Walker & Co., Rogers and the trustee in Margetts' liquidation, to enforce the third mortgage. Upon an application by Rogers to make absolute his garnishee order *nisi* of the 23rd of April, an order was made on the 10th of May, 1880, that Watney & Co. should, without prejudice to the rights of all parties, bring into Court to the credit of the action (*Chatterton v. Watney & Co. and Others*) the amount remaining in their hands, namely, 1,119*l.* 7*s.* This sum was invested, and was now represented by 1,124*l.* 16*s.* 6*d.* consols. Upon a summons taken out by the plaintiff, H. W. Chatterton, an order was made in chambers on the 24th of July, 1880, directing an enquiry as to the charges and priorities of the parties upon the fund in Court. The summons was adjourned into Court, and the question of the priorities of the various parties was now submitted for the opinion of the Court.

Sir H. M. Jackson and Mr. Terrell, for the plaintiff.—The garnishee orders obtained against Margetts could have no effect upon the property after it had been converted into a fund in the hands of Watney & Co., for that fund was never a debt owing or accruing from the garnishee (Margetts) to the judgment debtor (Budden), within section 1 of the Common Law Procedure Act, 1854. The law on the subject contained in that Act is in no way altered by the Judicature Act.

Those garnishee orders are therefore of no effect against the plaintiff.

Mr. Badnall, for Messrs. Ind, Coope & Co.—The money in Watney & Co.'s hands could not be attached before the 11th of March, when the sale was completed. We obtained the first garnishee order after that date, and should therefore rank next to the plaintiff.

He referred to

Webster v. Webster, 31 Beav. 393;
31 Law J. Rep. Chanc. 655;

Stevens v. Phelps, 44 Law J. Rep.
Chanc. 689; Law Rep. 10 Chanc.
417.

Mr. Horton Smith and Mr. Vernon Smith, for Rogers.—The effect of our garnishee order against Margetts was to transfer to us the debt owing by Margetts to Budden, and with it the security for it, namely, Budden's mortgage. Budden's assignment to the plaintiff was therefore invalid against us.

They referred to

Ex parte Joselyne, 47 Law J. Rep.
Bankr. 91; Law Rep. 8 Ch. D.
327;

Ex parte Nelson; in re Hoare, 49
Law J. Rep. Bankr. 44; Law Rep.
14 Ch. D. 41;

Levy v. Lovell, 49 Law J. Rep.
Chanc. 305; Law Rep. 14 Ch. D.
234;

Pickering v. The Ilfracombe Railway Company, 37 Law J. Rep. C.P.
118; Law Rep. 3 C.P. 235;

Robinson v. Nesbitt, 37 Law J. Rep.
C.P. 124; Law Rep. 3 C.P. 264;

Emanuel v. Bridger, 43 Law J. Rep.
Q.B. 96; Law Rep. 9 Q.B. 286.

Mr. Vaughan Hawkins, for Taylor, Walker & Co., followed the same line of

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argument, but claimed priority over Rogers, as having given prior notice to Margetts the garnishee.

Mr. Cosens-Hardy, for Watney & Co.

BACON, V.C.—It is agreed on all hands that this is the first time that such a question as is here raised has been presented to the Court for decision; and I cannot say that I am very much astonished at it. The Legislature thought fit in the Common Law Procedure Act to lay down a principle regulating what are called garnishee orders. That principle is adopted in the Judicature Act, and the thing is perfectly intelligible and clear. Where a man has recovered judgment against his debtor, if he finds that that debtor does not pay him, and has the means of procuring payment, either in whole or in part, from persons who are indebted to him (the debtor), the Common Law Procedure Act enacts in substance, that the judgment creditor shall have all such rights against the garnishee as the judgment debtor would himself have had but for the suit which was then pending. It is a very reasonable provision; but whether reasonable or not I have not now to enquire. In the commercial world nobody will doubt that it is perfectly reasonable that a man who is able to pay his debts if he will take the trouble to collect them, ought not to be permitted to defeat his creditors by forbearing to do so. The statute is plain and distinct in its policy, and not questionable in its terms. If such a state of things as I have referred to exists, and the judgment debtor has the means of paying the debt by getting in debts which are due to him, he is no longer to have the power to get them in himself, but they shall be the property of the judgment creditor to the extent to which he has recovered judgment. That is the substance and effect of the law, and none of the cases which have been referred to bring that principle in question, or carry it a particle beyond that.

But then it is most expressly determined by the terms of section 61 of the Common Law Procedure Act that the debt must be a debt owing by the garnishee—

a debt which the judgment debtor could have compelled the payment of if he had desired; and such a debt, and such a debt alone, is capable of the operation of what is called garnishing.

Now what are the facts I have to deal with here? There were three successive mortgages executed by Margetts on the same day, purporting to secure by the assignment of the property in question the payment of the sums mentioned in the several securities. The mortgages also contain the usual powers of sale, and direct the application of the proceeds of the sale in the manner which has been read from the instruments, under which the surplus is payable, if there should be any surplus after satisfaction of these debts, to Margetts, his executors, administrators and assigns. By the third mortgage (Budden's) Margetts has effectually disposed of the residue of the proceeds, unless there shall be a surplus. By the terms of the mortgage-deed to Budden the relation, no doubt, of creditor and debtor exists between himself and Margetts, but the debt contemplated by the Common Law Procedure Act must be a debt the payment of which can be effectually enforced. I do not mean that a legal right to enforce it is essential, but the debt must be one which can be effectually enforced as regards the thing which is to be bound. Order XLV. rule 3 has also been referred to, which expresses that the property shall be bound in the hands of the garnishee. Now, under what state of circumstances can it be said, in the events which have happened, that there ever was a single particle of money, or anything else, that ever was in the hands or could be contemplated as being in the hands of Margetts? If that is not so, the garnishee orders against him effect nothing; they establish no right except the right which the judgment debtor might assert against Margetts.

The judgment debtor has asserted no right as against Margetts; but the sale having taken place, there being enough to satisfy the first and second mortgages, and not enough to satisfy the third (Budden's), the question is, What is to be done with that surplus?—and it is said that

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the garnishee orders against Margetts carry the right to that sum. No case that has been referred to favours that in the slightest degree. The case which looks nearest to it is the case of *Emanuel v. Bridger*, but that case, when it is examined, is a totally different case: a judgment was recovered against Bridger, who was ascertained to have owing to him a debt from Mrs. Roberts; and after judgment was recovered, and after the garnishee order was made, and the debt from Mrs. Roberts to the judgment debtor dealt with in a certain way, that need not be followed very closely, he makes a mortgage and gets an advance of 50*l.*; and the ultimate decision is, that, for all beyond the debt to which the judgment creditor has established his right by the garnishee order, the mortgage was a good one, but that the debt realised by the judgment debtor after the garnishee order belonged to the judgment creditor. That bears no kind of resemblance to the case before me. There was nothing done by Budden, and all that was done was done by the first mortgagee: Budden was merely passive in all these transactions. He remains entitled to the sum which should turn out to be the surplus after satisfying the two first debts; and that surplus he was perfectly competent to deal with notwithstanding the judgments against him. I have nothing to do with considering what rights the judgments might give the judgment creditors against any interest Budden had in the land or in the proceeds of the land: all I have to consider is, whether, admitting that there was a debt, according to the terms of the mortgage deed, there ever was anything in the hands of Margetts which could be applicable to the payment of that debt. I find the contrary to be the case. Budden was entitled to the surplus, whatever it might be, to the extent of his debt, and Margetts was entitled to nothing whatever unless the property should produce enough to satisfy all the mortgages, and leave a surplus.

Then what property was ever in the hands of Margetts? That Margetts owed Budden a debt is true. The garnishee order says, You, the judgment creditor,

shall get that from Margetts if you can: if it is in his hands you shall be entitled to it;—but it does not say these three mortgages shall be undone. I cannot come to a conclusion which would make the state of the law as to mortgages so uncertain, as that a man may take a mortgage one day, and find it defeated the next, because he owed money to somebody, and a garnishee order is obtained against his mortgagor. There never was such an instance, and no principle can be referred to which will justify it. I dispose of the matter, therefore, by saying that, in my opinion, the garnishee orders against Margetts have no application nor operation upon the surplus proceeds which remain after satisfying the two first mortgages, and that they belong to Budden. Although a judgment has been recovered against Budden, Budden is not precluded by the effect of that judgment from assigning to anybody he thought fit such interest as he had in the surplus. He has assigned it to Mr. Chatterton; and in my opinion Mr. Chatterton has a claim preferable to that of the garnishee creditors, and is entitled to be paid out of the sum in Court as much as will satisfy his debt, if there is enough; and, if not, he has a right to the whole of it. That renders it unnecessary for me to go into the question which has been raised between Mr. Horton Smith and Mr. Vaughan Hawkins. If it were necessary, I think the priority of the notice ought to govern their rights; but I have nothing to do with that. If there is any surplus after satisfying the plaintiff, Messrs. Ind, Coope & Co., by reason of their garnishee order against Watney, are, in my opinion, entitled to it.

Solicitors—H. W. Chatterton, for the plaintiff; Peacock & Goddard, agents for W. H. Rowland, Croydon, for defendant Rogers; Gellatly, Son & Warton, for defendants Taylor, Walker & Co.; Pownall & Co., for defendants Watney & Co.; Henry Tyrrell, for Ind, Coope & Co.

FRY, J.
1880.
Dec. 7, 9. }

PORTER v. WEST.

Solicitors Act, 1860, s. 28—Lien—Costs—Practice—Petition—Order LI. rule 1 (a).

A petition to enforce a solicitor's lien for costs is a further proceeding after trial within the meaning of Order LI. rule 1 (a).

Judgment was given against a plaintiff who claimed money lent by defendant A to B:—Held, that A's solicitor's lien on the fund was prior to B's right to costs.

This action was brought to obtain payment of money represented by investment shares in the Perpetual Investment Building Society, standing in the name of Mary A. H. West, on the ground that she was a trustee for the plaintiff's wife, and held them in fraud of his rights. Mary A. H. West, the plaintiff's wife, and the society were made defendants. The plaintiff made default in appearance at the trial, and judgment was given for the defendants.

This was a petition by the solicitor of the defendants West and Porter, for a solicitor's lien for costs on the shares, the subject of the action, as being property preserved.

Dec. 7.—*Mr. Beddall* applied to have the petition heard by Fry, J., as being "a further proceeding after trial," which the Judge had jurisdiction under Order LI. rule 1 (a) to direct should be heard by himself.

Fry, J., thought the petition was "a further proceeding" within the meaning of the rule, and directed it to be heard before himself.

Dec. 9.—*Mr. Beddall*, for the petitioner, asked for a charging order on the whole fund.

Mr. F. Waters, for the society, contended that the costs of the society ought to be provided for before the petitioner's lien, first, on the ground that they were in the position of trustees; or, secondly, on the ground that the property that had been preserved was only what the plaintiff, if successful, would have got, and that was the fund, less the society's costs of action.

FRY, J., held that the society were simply in the position of debtors and not of trustees, and said—The other contention of the society is, that, though the Attorneys and Solicitors Act, 1860, gives a solicitor a title to any property recovered or preserved, inasmuch as if the plaintiff had won his action he would have recovered from the building society the amount owed by them to the defendant, but less the costs of the society, and that the fund preserved is only the fund that remains after deducting those costs. But in this case the whole fund is what the solicitor has preserved, because no order to pay any costs of any co-defendant was made, and the order asked by the petitioner must be granted.

Solicitors—F. C. Tudor, the petitioner in person;
Watson, Sons & Room, for respondent.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.

JESSEL, M.R.

JAMES, L.J.

LUSH, L.J.

1880.

Nov. 18.

*In re PHILLIPS; ex parte
THE NATIONAL MERICAN-
TILE BANK.*

*Bills of Sale Act, 1854 (17 & 18 Vict.
c. 36), ss. 1 and 7—"Growing Crops"—
Severance.*

Although growing crops are not personal chattels, but pass by a deed as an interest in land, and the deed does not, as far as regards them, require registration; yet when they are severed from the land they become personal chattels and pass to the trustee in bankruptcy of the grantor, unless the grantee has prior to the bankruptcy taken possession of them.

Appeal from a decision of Mr. Registrar Hazlitt, acting as Chief Judge in Bankruptcy.

Phillips, a farmer, on the 23rd of December, 1878, executed a bill of sale to the bank, whereby, in consideration of 575*l.*, he assigned and transferred to the mortgagees all and singular the furniture,

In re Phillips; ex parte National Mercantile Bank (App.), Bankr.

fixtures, live and dead farm stock, growing crops, utensils and implements of husbandry, and future growing crops, and other goods and chattels and effects of and belonging to the mortgagor then in and about the farm yards, outbuildings, land and premises, together with all his tenant right and interest yet to come and unexpired in and to the said lands and premises.

The deed contained a covenant by the mortgagor that he would not charge, encumber or remove, or permit or suffer the goods, chattels and effects, or any of them, to be removed from the house or premises, for any purpose, without the previous consent, in writing, of the mortgagees.

The deed was not registered.

Phillips filed a petition for liquidation on the 21st of October, 1879.

Phillips, in the interval between the date of the bill of sale and the filing of the petition, severed all the crops which were growing at the date of the bill of sale, or which had since been planted, and stacked them on his premises.

The bank took possession under the bill on the 22nd of November, 1879.

The Registrar held that the growing crops assigned by the bill, having been severed and stacked, passed to the trustee in liquidation, as the bill had not been registered.

The bank appealed.

Mr. Winslow and Mr. Robson, for the appellants, referred to

Brantom v. Griffiths, 45 Law J. Rep. C.P. 588; Law Rep. 1 C.P. D. 349; 46 Law J. Rep. C.P. 408; Law Rep. 2 C.P. D. 212,

as shewing that "growing crops" were not personal chattels within the Bills of Sale Act, 1854, and that deeds assigning them did not require registration; and also referred to the judgment of Brett, L.J., in that case, in which he held that the Act only applied to things which, at the time the bill of sale is given, are chattels and capable of delivery to the assignee; and that, consequently, the subsequent severance and stacking of the crops had not affected the validity of the transaction. They also referred to

Ex parte Payne; in re Cross, Law Rep. 11 Ch. D. 539.

Mr. Hemming and Mr. E. O. Willis, for the trustee, were not called upon.

JESSEL, M.R.—I am of opinion that the decision of the Registrar is right. Growing crops are an interest in land; and they passed by the deed; and, so far as they are concerned, the deed did not require registration. According to the ordinary law, the rents and profits of land in mortgage belong to the mortgagor, so long as he is allowed to remain in possession; and therefore, in this case, the grantor was entitled to sever the crops, which, when severed, became chattels under the deed, and, therefore, subject to the provisions of the Bills of Sale Act. But it is said that there is a bargain that the mortgagor shall not take them off the premises without the consent of the mortgagees. But that being a bargain relating to chattels is void as against the trustee in liquidation, by reason of the non-registration of the deed.

JAMES, L.J., and LUSH, L.J., concurred.

Solicitors—J. T. Irving, for appellants; May, Sykes & Batten, for trustee.

BACON, V.C. }
1881.
Feb. 12. }

SHAW v. BROWN.

Upon this summons being called, Vice-Chancellor Bacon stated, that in all similar cases—that is, applications after judgment in causes transferred from his Lordship to Mr. Justice Fry for hearing—it was his desire that that learned Judge should be requested to hear them, as arising out of matters with which the latter was already acquainted.

The Vice-Chancellor accordingly declined to hear the summons.

[IN THE COURT OF APPEAL.]

JAMES, L.J.
BRETT, L.J.
COTTON, L.J. } FRODSHAM v. FRODSHAM.
1880.
Aug. 2.

Practice—Right to Transfer Stock—Vesting Order in Chambers—Jurisdiction—Trustee Act, 1850, s. 43—15 & 16 Vict. c. 80, s. 26—18 & 19 Vict. c. 134, s. 16—Consolidated Order XXXV. rule 1.

In an administration action commenced by writ, an order was made in chambers directing the plaintiff and defendant to transfer a sum of stock into Court. Afterwards, as the defendant could not be found, an order was made in chambers vesting the right to transfer the stock in the plaintiff, and directing him to transfer it into Court. The Bank of England having objected to act on this order, on the ground of its having been made in chambers, JESSEL, M.R., on the motion of the plaintiff, held that he had jurisdiction to make the order in chambers, and directed the bank to act upon it:—Held, on appeal, that, having regard to 18 & 19 Vict. c. 134, s. 16, the Consolidated Order XXXV. rule 1, and the course of practice, it was doubtful whether there was jurisdiction to make such a vesting order in chambers, and therefore that the order directing the bank to act upon it ought to be discharged.

This was an appeal from the decision of Jessel, M.R.

The action was for the administration of the estate of W. C. Frodsham, and was commenced by writ.

On the 12th of November, 1879, an order was made in chambers that the plaintiff and the defendant should transfer into Court, to the credit of the action, a sum of consols standing in their names as trustees of the will of the said W. C. Frodsham.

On the 2nd of February, 1880, an order was made in chambers whereby, after stating *inter alia* that the defendant could not be found, it was ordered that the right to transfer the said stock should vest in the plaintiff, but only for the purpose of making the transfer into Court thereafter directed; and it was

ordered that, notwithstanding the order of the 12th of November, 1879, the plaintiff alone should, on or before the 15th of April, 1880, transfer the stock to the credit of the cause.

The Bank of England being dissatisfied with this order, by reason of its having been made in chambers, it was arranged that, for the purpose of having its regularity formally decided by the Court, the plaintiff should move for an order directing the bank to act in accordance with it.

On the 14th of May, 1880, the motion was heard before Jessel, M.R., who delivered judgment as follows:—

The matter stands in this way: At the time of the passing of the Trustee Act of 1850 there was no such thing as an application by summons in chambers, because the jurisdiction in chambers did not begin until 1852. The 43rd section of that Act is as follows: "And be it enacted that, whensoever in any cause or matter, either by the evidence adduced therein or by the admissions of the parties, or by a report of one of the Masters of the Court of Chancery, the facts necessary for an order under this Act shall appear to such Court to be sufficiently proved, it shall be lawful for the said Court, either upon the hearing of the said cause" (which at that time could only be heard in Court) "or of any petition or motion in the said cause or matter, to make such order under this Act." Consequently, the only way in which an order could at that time be made at all was in one of the three ways mentioned in the section. Therefore, it was not the case of an Act of Parliament mentioning some modes of procedure out of many. The section mentioned every then existing mode of procedure in the Court of Chancery, for the only way in which a Judge could act was on the hearing of the cause, or on motion or petition. Therefore, that Act did not mean to say that a Judge should not do it except by a particular mode of procedure selected out of several; but it did mean to say that he should do it by every possible mode of procedure known to the Court. It was, if I may say so, an enlarging section, and not a restricting section.

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Afterwards it was enacted by the Trustee Extension Act (15 & 16 Vict. c. 55), ss. 6 and 7, that whenever an order was made under the Act the right should vest, and the Bank of England should be indemnified in acting under the order, which enactment, no doubt, was passed not for the purpose of allowing irregular orders to be made, but for the purpose of preventing expense to the parties, if any order were made by accident irregularly.

Then, in 1852, a very remarkable change took place in the procedure of the Court of Chancery, and two things were done. The Masters were abolished, and, besides that, the Master of the Rolls and the then Vice-Chancellors were allowed to hear matters sitting in chambers, which was an entirely new jurisdiction. By the 26th section of the Masters in Chancery Abolition Act, 1852, they were authorised not only to take in chambers such matters as therein specified, but such other matters as each Judge might from time to time see fit, or as might from time to time be directed by any orders of the Lord Chancellor. So that it was for the Judge himself to decide what matters he should hear in chambers. Then the Chancery Procedure Act of 1852, which was passed at the same time, was part of the same scheme, and introduced by section 45 a new mode of instituting administration suits by what is now called an originating summons; and where the suit was instituted by summons, the first hearing and the hearing on further consideration all took place in chambers and on summons.

Then, if we turn back to the 43rd section of the Trustee Act of 1850, this result follows, that as the hearing of the cause may be on summons, an order vesting the right to transfer stock could be made in chambers at the hearing of it. Now it would be strange if an order vesting the right to call for a transfer of the stock could be made on summons at the hearing in chambers, it could not be done by summons at any other stage of that cause. It would be a very remarkable interpretation of this Act of 1850 standing alone; because it is obvious that it meant not to diminish the power of the Courts, but,

as I said before, to enlarge it; and therefore, when there was a new mode of procedure by summons, and a power in the Judge to decide what business shall be so disposed of, it seems to me quite clear, that if this Act stood alone an order might be made not only at the hearing of the cause, if the cause was heard on summons, but at any other stage of the cause, if the Judge thought fit. I must say I should have no doubt about the matter were it not for the Act 18 & 19 Vict. c. 134. s. 16, which enacts: "And whereas by divers Acts of Parliament, the Court of Chancery is empowered to make orders in respect of the disposition of trust funds and other matters under its jurisdiction, upon petition presented or motion made in a summary way without bill, but such orders cannot be made in respect of the same matters upon application in chambers." Now that recital is erroneous. There is no doubt that there were some cases in which the Judge could make such orders upon application in chambers, but what the draftsman must have meant was, that the words "without bill" should govern the whole clause, and by those words he must have meant to say "not in a cause." He had forgotten that you can have an originating summons. He is referring to applications not made in a cause, to matters commenced by motion or petition, and then he states his opinion (forgetting the 26th section of the Masters Abolition Act, to which I have already referred) that those applications must originate by motion or petition, and cannot be made on application at chambers. The section then proceeds: "Be it therefore enacted, that the business to be disposed of by the Master of the Rolls and the Vice-Chancellors respectively, while sitting at chambers, shall comprise such of the matters in respect of which the Court of Chancery is so, as aforesaid, empowered to make orders in a summary way, as the Lord Chancellor, with the advice and assistance of the Master of the Rolls and Vice-Chancellors, or any two of them, may, by any general order, direct."

Now, I agree, there is some difficulty in saying that this does not repeal the power of the Judge; but it was obviously

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intended to extend his power. The draftsman who drew it did not know the practice and did not know the statutes which gave the Judges the power already; and supposing they were going to give them power, he frames an enactment which purports to give them a less power than what they had already. Surely that cannot be a repeal of the power. It appears to me that when the thing is fully considered the draftsman by the words "without bill" meant to exclude applications made in a cause, because he evidently thought that causes still began by bill—which they did not in all cases. I think the draftsman had in view not the Trustee Acts so much as the Lands Clauses Act and other Acts (of which there were a great number), by which what I call the matter originates by petition or motion. In the present case we have a cause which before the Judicature Acts would certainly have been commenced by an originating summons. It never could have been meant by this enactment to interfere with any order which the Judge could otherwise have made at the hearing of the cause, but it must have been meant to extend the power to make the application in some other way. In my opinion, it does not repeal the power, and I think that in all cases in which an order can be made at the hearing of the cause, it can still be made at the hearing of the cause in chambers if the cause is originated by summons only. That is quite clear, and I think it is equally clear that the true construction of this Act of Parliament is not to take away powers which already existed, but that it was intended to extend the power to cases not already provided for by giving a further power to the Lord Chancellor and the Master of the Rolls and the Vice-Chancellors, or any two of them, to direct such application to be made in chambers.

Now, if that is the true view of the section, the result will be this, that whenever a cause begins in chambers by an originating summons, there the application may be made as a matter of course by summons, and in every other case there must be a special direction by the Judge that that particular business shall be done on summons.

Therefore it appears to me that the order in this case is properly made in chambers, and that the Bank of England should act upon it.

The Bank of England appealed.

Mr. Kekewich, for the appellants.—The question turns upon section 43 of the Trustee Act, 1850, which authorises the making of these vesting orders of stock at the hearing of a cause or on petition or motion. An application by summons does not come within the section. The Master of the Rolls laid great stress on the 45th section of 18 & 19 Vict. c. 134, which enacts that the business to be disposed of in chambers shall comprise such matters as shall be directed by general order. The only general order made is Consolidated Order XXXV. rule 1, which authorises vesting orders to be made in chambers only where the Court has made an order for sale or conveyance of lands. Up to the present time no orders in chambers vesting the right to transfer stock have been acted on. Such orders have been made, but objection has always been taken by the Bank, and an order in Court has been obtained. The objection is that there is no jurisdiction to make such orders in chambers.

Mr. Hadley, for the respondent.—The order was made under section 25 of the Trustee Act, 1850, which says it shall be lawful for the Court to make the order. The jurisdiction, therefore, is in the Court, and the procedure by which that jurisdiction is exercised cannot affect the validity of the order. There is nothing on the face of the order to shew that it was made on summons in chambers. Further, under 15 & 16 Vict. ss. 6 and 7, the Bank is bound to act under the order, and is indemnified in doing so.

Mr. Kekewich, in reply.

JAMES, L.J.—Without saying what the strict construction of the Act of Parliament is, it appears to me that, taking all the Acts of Parliament together, and considering the recital in section 16 of the Act of 1855, and the effect of the general order of the 12th of November, 1856, that was made under that Act (Consolidated Order XXXV. rule 1),

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and the course of practice which has prevailed ever since, it is at all events doubtful whether the jurisdiction given by the Trustee Act, 1850, was intended by the Legislature to be exercised in chambers, except in cases provided for by general order. Having regard to this doubt, I think we ought to say that such applications ought to be made by petition or motion in open Court, unless and until some general order is made (which no doubt will be made if it is considered desirable) prescribing the conditions under which, and the safeguards with which, such orders shall be made, if they are made in chambers at all.

BRETT, L.J.—I entirely agree with what my Lord has said. I should be unwilling at present to go further.

COTTON, L.J.—I concur in the decision which has been pronounced, but I do not entertain as much doubt as has been intimated by the Lord Justice James. It is highly important that the special jurisdiction conferred by the Trustee Act should be exercised very cautiously, and that nothing should be done as to which there is a doubt whether it is or is not within the powers given by the Act of Parliament. The Master of the Rolls considered himself to be acting under section 43. But the case is not within the words of section 43, for the order was made neither upon the hearing of the cause nor of any petition or motion. We then find that the subsequent Act, 18 & 19 Vict. c. 134. s. 16, proceeds on the footing that such orders as this cannot be made in chambers; and a general order made in November, 1856, provides that applications under the Trustee Acts may be made in chambers where a decree or order has been made directing the conveyance or transfer of real estate, but it goes no further. In my opinion that ought not to be extended by allowing orders to be made in chambers vesting the right to transfer stock in the public funds which can so much more easily be dealt with improperly than land. In the present case a previous order had been made directing a transfer, so that if the property had been land the case would

have come within Consolidated Order XXXV. rule 1; but, following the principle laid down by the Master of the Rolls, it would seem that a vesting order of stock under the Trustee Acts, 1850 and 1852, might be made in chambers without any such previous order where there was a cause, though, so far as I collect from his judgment, he did not consider that any vesting order could be made in chambers otherwise than in a cause. I think that the vesting order ought not to have been in chambers, and that the order under appeal cannot be sustained.

The order of the 2nd of February, 1880, was accordingly discharged so far as it expressed an opinion that there was jurisdiction to make the order in chambers, and so far as it directed the bank to act in accordance with it.

Solicitors—Norris, Allens & Carter, agents for J. L. Johnson, Liverpool, for respondent; Freshfields & Williams, for the Bank of England.

[IN THE COURT OF APPEAL.]

JAMES, L.J.

BRETT, L.J.

COTTON, L.J.

1880.

July 10, 12,

17, 23.

POOLEY v. WHETHAM.

Contempt of Court—Writ of Attachment—Criminal Offence—Arrest Abroad under Warrant—The Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 19—Detainer under Writ—Abuse of Procedure.

Disobedience of an order of the High Court of Justice in a civil action, though a contempt of Court, is not an "offence" within the meaning of the 19th section of the Extradition Act, 1870, which applies only to political and criminal offences. Where, therefore, a party to a civil action in England was arrested in Paris under a warrant issued under the Extradition Act, and while in prison in England under the warrant was served with a writ of attach-

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ment for disobedience to an order in the action,—Held, that the attachment was valid, and that he was not entitled to his discharge until he had purged his contempt, although he had been acquitted of the criminal charge on which he had been arrested.

If a warrant is obtained under the Extradition Act, not for the bona fide purpose of trying a person for a crime, but with the indirect object of bringing him within the jurisdiction so as to make him amenable to an attachment in a civil action, it will be an abuse of the process of the Court, and the attachment will be set aside.

This was an appeal from the decision of Vice-Chancellor Bacon.

The action was brought by A. G. Pooley against the Metropolitan Bank, its chairman and secretary, for relief in respect of certain transactions relating to the Jersey Railway.

On the 3rd of September, 1879, the defendants obtained an order that A. G. Pooley should give up possession of the railway to F. Cooper, who had been appointed by the Court receiver and manager of the railway. This order was served on A. G. Pooley personally, and, as he did not obey it, a writ of attachment was issued against him.

On the 22nd of October, 1879, A. G. Pooley was adjudicated bankrupt on the petition of one Toppin, whose debt was soon after purchased by A. Cooper, the brother and partner of F. Cooper.

On the 13th of May, 1880, the trustee in bankruptcy obtained an order in the bankruptcy for leave to prosecute A. G. Pooley for offences against the bankruptcy laws; and on the 22nd of May a warrant was issued under the Extradition Act, 1870, for the arrest of A. G. Pooley, who was then in France. Under the warrant A. G. Pooley was on the 1st of June arrested in Paris, brought over to England, and lodged in Newgate Prison.

On the 7th of June the defendants in this action obtained an order directing that the writ of attachment should be lodged with the governor of Newgate Prison, and that Pooley, when released from the criminal charges, should be handed over to the governor of Holloway Prison till he had purged his contempt.

On the 28th of June Pooley was tried and acquitted of the offences against the bankruptcy laws, and was then transferred to Holloway Prison.

On the 9th of July Pooley applied to be discharged from prison on the ground that by virtue of section 19 of the Extradition Act, 1870, he was privileged from arrest under the writ of attachment until he had been restored to the country from which he had been taken, and that the criminal prosecution was got up in collusion with the defendants in the action, and was simply a device to get him into England in order to serve the writ of attachment on him.

The Vice-Chancellor dismissed the application with costs.

Pooley appealed.

Sir H. Giffard, Mr. Horton Smith and Mr. Northmore Lawrence, for the appellant.—Pooley having been acquitted of the alleged offences against the bankruptcy laws his arrest under the warrant was illegal. Therefore his continued detention in prison under the writ of attachment is illegal, and he is entitled to be at once discharged—

Ex parte Ross, 1 Rose, 260;

Chapman v. Freston, 6 Harl. & N. 466; 30 Law J. Rep. Exch. 89;

Hooper v. Lane, 6 H.L. Cas. 443; 27 Law J. Rep. Q.B. 75;

Bateman v. Freston, 3 E. & E. 578; 30 Law J. Rep. Q.B. 133;

Ex parte Freston, 3 De Gex, F. & J. 612; 30 Law J. Rep. Chanc. 460.

Further, the offence for which Pooley was attached was committed prior to his arrest under the warrant, and is totally unconnected with the crime for which he is arrested; and the 19th section of the Extradition Act, 1870, provides that any person surrendered by a foreign state under the Act shall not be triable or tried for any offence committed prior to the surrender, other than such of the crimes mentioned in the Act as may be proved by the facts on which the surrender was grounded, until he has been restored or has had an opportunity of returning to such foreign state. Pooley, therefore, was privileged from arrest in respect of the attachment until he had returned to

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France. Lastly, we submit the evidence shews that the arrest on the criminal charge was devised by the defendants in collusion with the trustee in bankruptcy for the purpose of getting Pooley within the jurisdiction in order to attach him in the action. Such a proceeding is an abuse of the process of the Court which will not be permitted.

Mr. Hemming and Mr. Pollard, for the defendants, were heard on the last point.

Mr. A. Young, for the bank.

Sir H. Giffard, in reply.

JAMES, L.J.—The more important question in this case, the public question, apart from the importance to the individual concerned, is the construction of the Extradition Act, 1870. Originally, no doubt, the Act had reference to political offences to prevent a man being brought into a country on what we should call an ordinary common law offence, and then to be tried for some political offence for which he would not have been extradited. However, the protecting section clearly extends beyond political offences, and its meaning is, that a man is not to be tried for any offence committed prior to the surrender other than some crime which may be proved by the facts on which the surrender is grounded. In my opinion, neither the words nor what is called the spirit of the Act of Parliament—that is to say, the true intent and meaning of the Act of Parliament—have any reference to what is really in this case a mere civil process. Although it assumes the form of punishment for contempt of Court, it is a mere civil process to enforce obedience to an order of a civil Court to do something on behalf of or for the benefit of a private person, which has no reference whatever to any offence committed against the state or against the sovereign of the state, which are the offences mentioned in the Act. It appears to me that it is impossible to extend the words to an attachment for a contempt, which is really only a process of coercion to compel the performance of the order of the Court in what, as I have said, is a civil matter.

It did appear to us when the case was first opened that there were circumstances

leading at all events to a suspicion that the extradition had been obtained by the defendants for the purpose of bringing Mr. Pooley to this country, in order that they might then have him within the jurisdiction of the Court, so that they might attach him for his contempt. Of course, if that were so—if anything of that kind amounting to an abuse of the process of the Court were resorted to, independently of any Extradition Act or any other Act in the world—we should not have had the slightest hesitation in discharging Mr. Pooley from the attachment which had been so obtained, as we should from an attachment obtained through any other fraud. But now that that matter has been investigated, it appears to me that there is no evidence from which we can say that the appellant has made out to our satisfaction that the defendants were the persons who put in motion these proceedings under the Extradition Act, in order to bring this gentleman here. Before we can arrive at that conclusion, in my opinion, we must actually pronounce four persons guilty of wilful and corrupt perjury, committed by all four of them for the purpose of concealing and denying a most wicked conspiracy. We are not trying an action for malicious prosecution against anybody, nor is it for us to say, what I cannot help thinking is the object of the greater part of the examination and cross-examination, whether any materials have been obtained to maintain such an action, if such an action should ever be brought. We have nothing whatever to do with that point, or what will be the result if anything of that kind is done. But certainly it has not been proved to my satisfaction that there was any conspiracy or design or device on the part of the defendants to bring the appellant to this country on the criminal charge, with a view of arresting him on the attachment; on the contrary, it has been satisfactorily disproved, so far as I am concerned.

BRETT, L.J.—In this case Mr. Pooley was brought into this country under a warrant granted in virtue of the provisions of the Extradition Act, and he was brought here and imprisoned under such

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a warrant upon a charge of an offence against the bankruptcy laws, which is one of the offences named in the Extradition Act. He was imprisoned here under that warrant until he was taken before the magistrates, and when taken before the magistrates he was discharged from that charge. But before he had been so discharged a detainer had been lodged at the prison in which he was confined, on the ground that before he came here he had been guilty of a contempt of Court, and an attachment was out against him, and it was claimed that he should be detained on that attachment for a contempt of Court. Upon that statement of facts it has been argued that the imprisonment under the warrant was illegal, and that therefore no detainer at all could have any effect. It was said that he was illegally imprisoned, because he was finally acquitted of the charge. Now that certainly is an argument which, to my mind, cannot be sustained, for he was legally imprisoned, because he was imprisoned under a warrant of a magistrate who had jurisdiction to grant that warrant. That contention therefore fails.

It was then suggested that he could not be detained on the ground of this contempt, because that was an offence within the 19th section of the Extradition Act, and was committed before he was surrendered to this country. It was also suggested, and I only notice it because the statement is very erroneous, and for fear that some other error should creep forward, that the Act only applied to political offences, and that the meaning of it was that he should not be tried here for a former political offence, but that he might be tried for a former offence which was not political. Now that seems to me a plain error, for the Act of Parliament plainly applies to all offences committed in this country before the time of surrender. But then comes the next question, which is, whether a contempt is, even though it be committed before surrender, an "offence" such as is mentioned in the 19th section. Now the offence there mentioned is one which is thus described: "Where a person might be triable or tried for any offence." How is it possible to say that he was ever

triable or tried for a contempt? It is not a matter which is a triable offence. It is a civil process under which he is detained, which he can get rid of at any time by purging his contempt; and it is not, in my opinion, a triable offence or an offence upon which a man can be tried at all. The real truth is, that the word "offence" in the 19th section means a criminal act—whether a felony or misdemeanour is immaterial, but an offence which would be triable in a criminal Court. Therefore it does not apply to civil processes, so that the objections which were founded on that reading of the statute all fail.

Then it was said that the bringing him here under the warrant which was granted under the Extradition Act was an abuse of the process of the Court; that is to say, that he was not brought here *bona fide* for the purpose of being charged with an offence against the bankruptcy laws at all, but that the process was used indirectly and improperly in order to bring him here for the purpose of taking him under the attachment. If the indirect motive had been made out, whether there were grounds for the warrant or not, I should have thought that was an abuse of the process of the Court. Whether the person who was using the process might have had colourable evidence or not, if it could be made out that in his mind he was using the process indirectly and dishonestly, not with the intention of prosecuting, but with the intention of dropping the prosecution and bringing him here only for the purpose of being enabled to enforce the attachment, I should have thought the Court would not allow its process to be abused, and that therefore it would have set aside the attachment at once. Then comes the question whether that is proved. Now it seems to me that it is not. We are Judges of fact, and we have all three to make up our minds, and it would be useless to go over the facts again. My Lord has stated the reasons on which I am of opinion, as well as he is, that the contention is not made out. I think it may be said that the prosecution was a feeble one, and that it was feebly maintained—and, so far as I can see, I do not wonder that it was feebly main-

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tained—but that it was not *bona fide* instituted I can see no sufficient ground for holding. Therefore there was no abuse of the process of the Court; and, if there was no abuse of the process of the Court, this attachment must remain.

COTTON, L.J.—I am also of opinion that the appeal fails. It was put on three grounds, on two of which we did not hear the respondents. The first ground was that the arrest of the plaintiff was illegal, and that therefore he could not be detained under the attachment. Now that was based simply upon this, that the charge was not sustained, and that when the matter came before the magistrates they said as far as that charge went he must be discharged; but that does not shew that the arrest was illegal in the sense of being void, or was to be treated in a Court of law as void. I do not go into the question whether or not there were reasonable grounds for the arrest. Even if there were no reasonable grounds for the arrest, yet the arrest was under a warrant issued by a magistrate who had authority to issue it, and it cannot be considered as null and legally void in the sense in which processes have been treated as illegal in the cases which have been referred to.

The second point was this: It was said that the detainer under the attachment was in violation of the express provision in the 19th section of the Extradition Act. [His Lordship read the section.] Now it is difficult to see here what can be said to be the trial of Mr. Pooley when he was taken under the attachment; but I do not decide it on that ground. It is sufficient to say that, in my opinion, what is here forbidden is his being tried—whatever that may mean—for an offence against the criminal law. In the former and in the latter part of that section mention is made of crimes in respect of which a person can be taken under the Act; and although the word “crime” is not used where we find the prohibition, yet the offence there referred to, coupling it with what goes before and what goes after, must, in my opinion, mean an offence against the criminal law; that is to say, a crime for which the offender can be tried,

in the ordinary sense of the word, under the criminal law. But here there was nothing criminal. Incorrectly we say a man is guilty of gross contempt—that is to say, he has disobeyed an order of the Court in a civil proceeding—but that is not a crime or offence against the criminal law. It is one the Court is bound to deal with by committing the man to prison; but that is simply for the purpose of enabling a litigant, who has got an order which has been disobeyed, to obtain his civil rights, and it is a mere process to enforce civil rights, and not any proceeding for punishing a crime as suggested. Therefore, in my opinion, the second objection fails.

The third objection, which has occupied a considerable time, I will now deal with. It was this, that the whole proceeding was collusive; that is to say, that the proceedings under the Extradition Act were taken, not for the purpose of getting Mr. Pooley here in order that he might be tried for an offence against the criminal law, but for the purpose of getting him here in order to enforce the attachment. Now it is not to the point to shew that some one else other than the persons who sought to enforce and did enforce the attachment had some indirect object in prosecuting Mr. Pooley. Even if that were made out it would avail nothing, unless it could be shewn that the persons who enforced the attachment were parties to that indirect object, so as that it might be established to the satisfaction of the Court that on their part there was such fraudulent conduct, such abuse of the process of the Court, as to justify the Court in saying that those who had so unduly used the process of the Court by fraudulent and collusive conduct shall not retain the benefit of it. Fraud on the part of the defendants must be established. I give no opinion at all as to whether there was reasonable or sufficient ground for taking these criminal proceedings. I do not in the least intimate an opinion that there was not, but assume for the purpose of argument that it is doubtful whether there was sufficient reason for taking these criminal proceedings—assume, if you will, that it was ill-judged to take those proceedings—still that is nothing.

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It may be one step, and so it was used by Sir H. Giffard in saying that there could be no legitimate object in conducting those proceedings; but what the Court must be satisfied of in order to discharge the order upon this ground is, that there was fraud on the part of the defendants who were seeking to enforce the attachment. Then we have here those who were really acting for the defendants one and all coming forward, and in no way shaken, saying that they in no way advised or were parties to the criminal proceedings. There is nothing, therefore, in my opinion, that raises a suspicion of any such fraudulent conduct on the part of the defendants or those acting for the defendants—nothing which justifies the Court in saying that there had been an abuse of the process of the Court; and upon that ground the attachment ought to be discharged.

Solicitors—Harper, Broad & Battcock; Newman, Stretton & Hilliard.

and to invest the same and pay the dividends of the sum of 2,000l., part thereof, to T. for life; and of the sum of 1,000l. to O. for life; and of the sum of 2,000l., residue thereof, to E. for life; and after the respective deaths of his wife, T., O. and E., he directed the sums of 12,000l. and 5,000l. to fall into and be divided with the residue of his estate; and after giving certain other legacies, he declared that till the sums of 12,000l., 1,000l. and 2,000l. should be set aside for the benefit of his wife and O. and E. they should from the time of his decease be paid interest at four per cent. on such sums, and by a codicil gave divers other legacies:—Held, the estate proving insufficient to pay all the legacies in full, that the widow of the testator was entitled in priority to the payment in full of the legacy of 500l., and that the two sums of 12,000l. and 5,000l. were to be raised and appropriated in priority to all the remaining legacies.

Adjourned summons.

Richard Hardy, by his will dated the 14th of May, 1874, gave and bequeathed to his wife, Mary Ann Hardy, all his household goods and furniture, plate, linen, china, books, wearing apparel, horses, carriages, cattle and other effects in or about his dwelling-house, for her own use and benefit, together with the legacy or sum of 500l., which he directed to be paid to her immediately after his decease; and he gave, devised and bequeathed all his real estate, whatsoever and wheresoever, and all the residue of his personal estate and effects, to the defendants Elizabeth Philbrick and Edwin Barwick, and the plaintiff, their heirs, executors, administrators and assigns, according to the natures thereof respectively, upon trust for sale and conversion as therein mentioned; and to stand possessed of the proceeds arising therefrom upon trust in the first place to raise and appropriate out of his estate and effects the sum of 12,000l., and to invest the same at interest in manner therein mentioned, and to pay the dividends, interest and annual income of the said sum of 12,000l. to his wife during her life; and in the next place to raise and appropriate out of his said estate and effects the sum

MALINS, V.C. } *In re HARDY; WELLS v.*
1881. } *BARWICK.*
Jan. 15, 22. }

Adjourned Summons—Will—Legacy to Widow—“To be paid to her immediately after my decease”—Priority over other Legacies—Payment in Full—Direction “in the first place to raise and appropriate 12,000l.”—“In the next place to raise and appropriate 5,000l.”—Priority of those Legacies over all other Legacies.

B. H., by will dated in 1874, gave to his wife, M. A. H., all his household goods, &c., for her own use and benefit, together with the legacy or sum of 500l., which he directed to be paid to her immediately after his decease; and he gave all his real estate and all the residue of his personal estate to trustees upon trust for sale and investment, and thereout “in the first place to raise and appropriate the sum of 12,000l.,” and to invest the same and pay the dividends to his wife for life; and “in the next place to raise and appropriate the sum of 5,000l.”

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of 5,000*l.*, and to invest the same and to pay the dividends, interest and annual produce of the sum of 2,000*l.*, part thereof, to his brother, Thomas Hardy, during his life; and to pay the dividends, interest and annual produce of the sum of 1,000*l.*, other part thereof, to his sister Catherine Hardy, during her life; and to pay the dividends, interest and annual produce of the 2,000*l.* (residue of the said sum of 5,000*l.*), to the defendant Elizabeth Philbrick during her life; and from and after the respective deaths of his wife and his brother Thomas Hardy, and his sisters Catherine Hardy and Elizabeth Philbrick, he directed that the said sums of 12,000*l.* and 5,000*l.* should respectively fall into and be divided with the residue of his estate as thereafter mentioned; and he gave and bequeathed to his brother, the defendant James Hardy, the legacy of 6,000*l.*; and to his brother, the defendant John Hardy, the legacy of 2,000*l.*; and to his sister, the defendant Ann Armitage, the legacy of 2,000*l.* All the residue and remainder of his estate and effects he gave and bequeathed in manner following—that is to say: one-half part thereof to the defendant James Hardy, one-fourth part thereof to the defendant John Hardy, and the remaining one-fourth part thereof in trust for the benefit of his sister Ann Armitage and her children as therein mentioned. And he declared that until the several sums of 12,000*l.*, 1,000*l.* and 2,000*l.* should be set aside and invested as thereinbefore directed for the benefit of his wife, and his sisters Catherine Hardy and Elizabeth Philbrick, they should from the time of his decease be paid interest at the rate of four per cent. per annum on such sums respectively; and he appointed the defendants Elizabeth Philbrick and Edwin Barwick, and the plaintiff, executrix and executors of his will. The testator also by a codicil gave divers other legacies.

The testator died on the 23rd of January, 1875, and this action was commenced in February, 1877, for the administration of his estate.

The executors had paid the legacy of 500*l.* to the wife in full. In the course of the administration it turned out that the estate of the testator was barely

more than sufficient to pay one-half the amount of the legacies.

The two principal questions to be decided on the present summons were,—First, whether the legacy of 500*l.* given by the testator to his widow, Mary Ann Hardy, had priority over the legacies and bequests given by the testator by his will and codicil; and second, whether the two sums of 12,000*l.* and 5,000*l.*, directed by the said testator's will to be raised out of the proceeds of the sale of his real estate and out of his residuary personal estate, and invested, and the income of such investment paid to his widow Mary Ann Hardy, his brother Thomas Hardy, to his sister Catherine Hardy, and to his sister Elizabeth Philbrick, were to be raised and invested in priority to payment of any and which of the legacies and bequests given by the will and codicil of the said testator.

Upon the first question—

Mr. Pearson and *Mr. Phipson Beale* appeared in support of the contention that the legacy of 500*l.* to the widow abated in proportion with the other legacies, and referred to

Blower v. Morret, 2 Ves. sen. 420;

Thwaites v. Foreman, 1 Coll. C.C.

409; 15 Law J. Rep. Chanc. 397;

Beeston v. Booth, 4 Madd. 161.

[*MALINS, V.C.*, referred to

Roper v. Roper, Law Rep. 3 Ch. D. 714;

and

Heath v. Dendy, 1 Russ. 543; 5 Law J. Rep. (O.S.) Chanc. 59.]

Mr. Glasse, *Mr. Northmore Lawrence* and *Mr. Cozens-Hardy*, for parties in the same interest.

Mr. Bristowe and *Mr. Russell Roberts*, for the widow, cited

Lewin v. Lewin, 2 Ves. sen. 415.

Mr. Pearson, in reply.

MALINS, V.C.—The question I have now to decide is, whether in this particular will a legacy of 500*l.* having been given to the widow of the testator, and then the bulk of his property having been given to trustees for the benefit of the collateral relatives, the wife is bound to take ratably, it turning out that the estate, from

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an unforeseen accident in the family, is insufficient to pay the legacies in full, that insufficiency having arisen from a circumstance which probably the testator did not anticipate, namely, the insolvency of a brother.

Now, therefore, the testator, not desiring that his wife should wait until it was ascertained whether there was or was not enough to pay all the legacies in full, gives to her specific things. He gives and bequeathes to her all his household goods and furniture, plate, linen, china, books, wearing apparel, horses, carriages, cattle and other effects in and about his dwelling-house, for her own use and benefit, together with the legacy or sum of 500*l.* which he directs to be paid to her immediately after his decease. The executors, under the impression that the estate is a solvent one, and that there is money enough to pay the 500*l.*, pay that sum in full. The lady having received the money, it is now, the assets being insufficient, contended that she must refund part of it. What did the testator intend? As between himself and his widow, whom he makes tenant-for-life of the general residue of his estate, can there be a shadow of doubt that when he directs it to be paid immediately after his decease his meaning was that, as she succeeded to the possession of his household goods, furniture and everything else, she was also immediately to have 500*l.* as the means of carrying on her household? That instead of being paid immediately she is to wait until it is ascertained that there is enough to pay the collateral relatives in full is, in my opinion, repugnant to every intention the testator had. His intention was to give priority to his wife in this way, that she was to be paid immediately whether the other legatees could be paid in full or not. Therefore I am of opinion that it was the intention of the testator to give her priority—that is, that she should be paid immediately, and that having been once paid she should never be called upon to refund any part of the money she received.

It is said that I am not at liberty to say that that was the intention, because 130 years ago Lord Hardwicke decided in a particular case, which has been fre-

quently followed no doubt, that there was no priority. I think this case is distinguishable from that. Here it is mixed up with specific bequests, with all the things in and about the testator's house—his household furniture, his carriages, horses, &c. His whole establishment is given to the wife; and not leaving her merely to depend upon the life estate, and knowing that she would want a little money to go on with, a moderate sum of 500*l.* is to be paid to her immediately.

In *Blower v. Morret*, which is the only case which has been decided on the subject, land is given to trustees to be sold for payment of debts. The testator then gives to his wife a general legacy of 500*l.*, to be paid to her immediately after his decease out of the first moneys belonging to him which should be got in after his decease; and it was his will that his wife should be entitled to the general legacies given to her in full satisfaction of all dower or thirds. That again was a circumstance which entitled her to priority. That is settled by all the authorities.

Although there is the eminent authority of Lord Hardwicke, I can only say that, if I had lived 130 years ago, I should have come to a distinctly opposite conclusion in *Blower v. Morret*. I dissent from that decision and never will follow it unless I am obliged to do so by the Court of Appeal. I think that when a man gives his wife a sum of money to be paid immediately after his decease, his object is that she shall have the means of going on, and that she shall not be bound to wait until it is ascertained what is the state of the assets, and whether everybody else can be paid in full. The object is manifestly that the testator's widow shall immediately after his decease have a sum of money to go on with. Therefore *Blower v. Morret* is distinguishable in many respects; but if it is not distinguishable, then I say I dissent from it and decline to follow it.

Therefore I decide that in this case the testator's widow is clearly entitled to priority.

Upon the second question—

Mr. Pearson and *Mr. Beale*, who appeared in support of the contention that

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the legacies of 12,000*l.* and 5,000*l.* did not take priority over the other legacies, were stopped by the Court.

Mr. Bristowe and *Mr. Russell Roberts*, for the widow and sisters of the testator, referred to

Lewin v. Lewin (*ubi supra*);

Brown v. Brown, 1 Keen, 275;

Pepper v. Bloomfield, 3 Dr. & War. 499;

Haynes v. Haynes, 3 De Gex, M. & G. 590;

Brown v. Allen, 1 Vern. 31;

Beeston v. Booth (*ubi supra*);

Thwaites v. Foreman (*ubi supra*);

Gyett v. Williams, 2 Jo. & H. 429.

Mr. Pearson, in reply, cited

Johnson v. Child, 4 Hare, 87;

Miller v. Huddleston, 17 Sim. 71; 3

Mac. & G. 513; 21 Law J. Rep. Chanc. 1.

MALINS, V.C.—Very likely, whichever way I may decide this case, it will not be final; and therefore I think it is much better for the parties that I should give judgment at once, in order that they may go elsewhere, if they desire. It is, I think, a case of extreme nicety and doubt, and therefore, in giving the opinion which I am about to do, I am not to be understood as entertaining it very strongly for the reasons I have stated.

This is a question of the construction of the will of the testator, and the general principles upon which the case must be decided are not in question. A general principle is, that every testator in making gifts by his will—not specific gifts, but general gifts, or legacies, or money provisions—must be considered as entertaining the notion that his assets are sufficient to pay all in full, unless he shews a contrary intention. This is also clear on the authorities that have been mentioned of *Beeston v. Booth* and *Thwaites v. Foreman*—one being a decision of Sir John Leech and the other of Vice-Chancellor Knight-Bruce—that a legacy first to A, secondly to B, and thirdly a legacy to C, or a direction that one legacy shall be paid at one period and another legacy paid at another period, does not create any priority between the legatees. Therefore, the question in every case is, Has the tes-

tator by his will shewn an intention to give priority to a particular legacy? If he says expressly that it is to have priority, there is an end to the whole question; but if the testator has not given any express direction on the subject, the intention must be collected from the whole frame of the will, and that which is to be presumed is the object of the testator. Although the Court is bound by decisions on other wills, it has often been said that a decision upon one will can hardly be a guide for another will in which the words are different, and from which a different intention may be collected. At all events, there is no doubt whatever that in order to give priority to a particular legacy or provision, it must be collected from the will what was the intention of the testator. Therefore, however right I may think it to be that, if possible, these two legacies of 12,000*l.* and 5,000*l.*, or, rather, the legacy of 12,000*l.* in particular (for that is the one to which the argument has been addressed), should have priority, I am not at liberty to give it that priority, unless upon the whole will I can collect that such was this testator's intention even if it turned out contrary to his expectations that his assets were insufficient. The testator was at the time of making his will possessed of considerable wealth, and would have been so at the time of his death if it had not been for a loss he sustained through one of his partners. No doubt, therefore, when he made his will he expected that he would have enough to pay everything, and a residue besides, which he has given to his brothers and sisters in certain proportions. It turning out that the assets are insufficient, the question is, whether upon the whole will I can collect that it would have been the intention of the testator, as expressed in the will, to give a legacy of which the wife is only tenant-for-life priority, or whether, in the events which have happened, the testator being a wealthy man, intended, besides his specific gifts to her of his household furniture, carriages, horses and so forth, to leave her with the interest of 12,000*l.* only—in any event, that is, that she should be cut down, if his assets failed,

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to no provision whatever. His assets might not have been sufficient to pay everybody five shillings in the pound; and in that case, was it his intention that she should only have a dividend or the interest of the legacy in common with all the other legatees, the collateral relatives and the charity legacies? because, if the argument against priority prevails, even the charity legacies must come in *pari passu* with the widow, as well as all the collateral relatives.

In order, therefore, to arrive at a conclusion, it requires very careful attention to the terms of the will. The testator begins by giving all his household furniture, chattels, carriages and horses and so forth to his wife, and also a gift of 500*l.*, which is to be paid to her "immediately after my decease." It has been contended that she was not entitled to the priority even as to the 500*l.* That point was carefully argued. I carefully considered it; and I gave my reasons last Saturday for holding as I did, that she was, at all events, entitled to priority as to the legacy of 500*l.*, although Lord Hardwicke, 180 years ago, in a case very like it, had come to an opposite conclusion. I have, therefore, already decided as to one legacy that she is entitled to priority.

The testator then proceeds to give all his real estate and the residue of his personal estate to trustees. The "residue" of his personal estate means all his personal estate except the chattels given to the wife, and also the 500*l.* upon trust to convert the same, giving them minute directions as to the mode in which the real estate shall be sold either by private contract or public auction as they thought fit; and having converted all, and put it into one mass, he then proceeds to direct how they are to deal with it. He says they are "to stand possessed of the proceeds arising from the sale, calling in and conversion of my real and residuary personal estate, and the money of which I may die possessed;" therefore they are to stand possessed of the whole proceeds "upon trust in the first place to raise and appropriate out of my said estate and effects the sum of 12,000*l.*, and to invest the same at interest upon government or real

or leasehold securities or railway debentures or debenture stock, or upon mortgage of the rates of any borough or district, but all such securities to be in England, with power from time to time to alter, vary and transpose such securities for others of the like nature as to them, my said trustees, shall seem expedient; and upon trust to pay the dividends, interest and annual income of the said sum of 12,000*l.* to my said wife during her life." Therefore the only beneficial interest given in this sum of 12,000*l.* is a life interest to the wife. The capital up to this time is in no way disposed of. She is only tenant-for-life of the 12,000*l.* The testator then goes on—[His Lordship then read the clause empowering the trustees to raise 5,000*l.* for the benefit of the testator's brother and sister, and continued:] Therefore, with regard to the legacies of 12,000*l.* and 5,000*l.*, no other bequest is made than a life interest to the wife in one legacy, and to the two sisters and brother in the other, and there it stops. Then he proceeds to dispose of the capital. [His Lordship here read the clause and continued:] Then there is a declaration that after their deaths those sums shall form part of the residuary estate. Does it not shew that it was not to go into the general mass of his estate, but that it was to be separated and invested in a particular manner, not to be paid absolutely, but only for the purpose of paying the interest to these persons for their lives? It is only natural that he should say that these sums should be taken out of the mass in order that his wife might be provided for, for she required it; and in order that his brother Thomas and his two sisters should have the interest, if he considered they wanted it. There is a broad distinction between the life interest in these legacies and the other legacies of 6,000*l.* and 2,000*l.* It is to fall into the residue. It seems to me to follow from that that it is to be taken out of the residue—it is to be separated; and in order that his wife, the person whom of all others in existence he was bound to take care of, might have the interest of 12,000*l.*, it is to be taken out of the mass for that purpose; and after it has been

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once taken out of the mass for that purpose, when the purpose is answered—namely, when the wife dies—it is to fall back into the residue and answer general demands. [His Lordship here read the bequest of the legacies, and that of the residue, and continued:] With regard to general legacies the law is that every general legacy bears interest only from one year from the death of the testator. Are those legacies of 12,000*l.* and 5,000*l.* to be treated as general legacies in all respects? because, if they are, then there is to be no interest on them till the expiration of one year after the death of the testator. Has he shown any intention to give them an advantage which does not belong to any other legacies? He says here, “And I further declare that until the said several sums of 12,000*l.*, 1,000*l.* and 2,000*l.* shall be set aside and invested as hereinbefore directed for the benefit of my said wife, and my said sisters Catherine Hardy and Elizabeth Philbrick, they shall from the time of my decease be paid interest at the rate of four pounds per centum per annum.” Now I think that is an indication that he intended those legacies or sums of money to be in a different position from the others. There is an intention to give these legacies priority over the other general legacies. There is sufficient, in my opinion, in the general frame of the will to reasonably satisfy my mind—I will not say beyond all possibility of doubt, but reasonably—that, although he had not thought it necessary to provide for it in express words, because he supposed his assets would be enough to pay everybody in full, yet if he had known the state of his assets as they turned out to be, he would have provided for it, and would have done that which was his manifest duty, namely, provided that his wife should in the first instance be taken care of, and that collateral relatives should only come in after her.

I quite agree with the argument that the words “in the first place” and “in the second place,” and so forth, would not have the effect of giving priority. That would be in accordance with *Beeston v. Booth*. The money is to be taken out and invested in particular securities. It is not directed to be invested

in land. The case of *Pepper v. Bloomfield* decides that where money is directed to be taken out and invested in land it shews an intention to give priority. I can see no distinction between investing in land and investing in any other securities, and therefore the circumstance that it is to be taken out and invested in a particular manner is, in my opinion, an indication of an intention to give priority. I must say I think—and although it has been very much commented upon, it has never been dissented from—that the rules laid down by Lord Hardwicke in the case of *Lewin v. Lewin* are entirely applicable to this case. The question there was, whether the widow was entitled to priority. “Lewin, having a wife and two children, by will gives an annuity of 120*l.* to his wife during her natural life, payable half-yearly, subject to limitations over if he had a son, and afterwards directs his executors to purchase, if they could, the said annuity of 120*l.* in government securities of ninety-nine years or some other longer term; if they could not do that his executors were to purchase land of 200*l.* a year value, to be settled so as that the said annuity should be to his wife free from taxes with remainders over. He directs that if he should leave any child living at his death, his executors should, out of the profits of the residue of his estate, pay to his wife 30*l.* per annum for maintenance of such child. He gives legacies to some collateral relatives and friends, and all the residue of his estate, both real and personal, to be put out to and for the best advantage for every child and children at his death equally to be divided.” [His Lordship read at length from the judgment of Lord Hardwicke, and proceeded:] I must say that I follow that reasoning entirely. I did not follow the reasoning of Lord Hardwicke in a case decided only three days afterwards, where he did not give priority to the wife of a legacy to be paid immediately after the death of the testator, but I think that this reasoning is very sound, and it carries conviction to my mind. I think it is applicable to this case because, although the words are “Upon trust, in the first place, to raise and appropriate,” and

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although the words "First a legacy to A and then to B" are not here, yet, looking at the whole frame of the will, this seems to me to shew that the very first object he had in view—the thing above all others that was to be done—was to make provision for his wife; and therefore they are "in the first place to raise and appropriate out of my said estate and effects the sum of 12,000*l.*, and to invest the same," and pay the dividends to her for her life. *Lewin v. Lewin*, therefore, is entirely in favour of the construction which I put upon this will.

Brown v. Brown is also in favour of the same construction, although I am bound to say that the circumstances there are more favourable to priority than they are in this case. [His Lordship read the words of the bequest from the will in that case, and proceeded:] That really is very much like this case; it is rather more favourable, I think, than this case. Lord Langdale said, "In this case the testator gives 1,000*l.* to trustees upon trust to invest the same, and pay the interest to his wife for her life; and after her decease he declares his will to be that the 1,000*l.* should become a part of his personal estate, and applicable to the trusts or payment of the legacies given by this will; and the legacy of 5,000*l.* given in trust for Mr. Meadows and his wife is in almost the same words, the only difference being that, in the corresponding passage, he declares that the 1,000*l.* shall become applicable to the payment of the several legacies given by his will." It is the same here. He says, "After the respective deaths of my said wife, my said brother Thomas Hardy, and my said sisters Catherine and Elizabeth Philbrick, then I direct that the said sums of 12,000*l.* and 5,000*l.* shall respectively fall into and be divided with the residue of my estate as hereinafter mentioned." So that he seems to me to draw a distinction between this fund and the general residue of his estate, taken out, as I have already said, for the purpose of paying the annuities, and when they are over falling back into the residue. Lord Langdale proceeds: "If the testator had contemplated that all his legacies would be at once satisfied, it would have

been unnecessary to direct that the two legacies in question should be applicable, after the decease of the legatees, to the payment of the legacies given by his will. He cannot be reasonably presumed to have contemplated, as has been suggested at the bar, the death of the three legatees to whom these two legacies are given within a twelvemonth after his decease, and there is nothing in the language of the will which affords ground for the argument that he intended to provide for such a possibility. There is no way, therefore, in which effect can be given to the words used by the testator but by giving a priority to these two legacies."

The case of *Gyett v. Williams* has been relied on upon both sides. There the bequest was of the testator's personal estate upon trust to lay out 2,000*l.* upon the purchase of an estate. Here it is upon the purchase of securities. The question there was, whether the 2,000*l.* had priority; and Sir William Page Wood (at page 440) states it thus: "Then upon the question of priority the case is distinguished from *Thwaites v. Foreman*. There the directions were, in the first place, to pay a debt, then to set apart an annuity fund, and, in the next place, after making such investment as aforesaid, to pay legacies. . . . The words were read not as pointing out the order of execution of the trusts; but the order of enumeration only. On the language of this will, even if it were not covered by authority, I think there is no doubt as to the legitimate construction. When a man directs 2,000*l.* to be laid out in purchasing an estate, and then after disposing of that estate directs that the residue of his personal estate is to be invested and portioned out in a particular way, what is it that he gives by this last disposition? Clearly nothing, except the residue so to be invested after payment of the 2,000*l.* The substance of the gift is such that the language cannot be regarded as pointing to the mere order of enumeration, but must be read as giving priority."

I must say that I think this case in principle is exceedingly like that case. I do not think there is any other case that has any particular bearing upon the subject. All of them depend upon the par-

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ticular language of the will. I cannot collect any general rule from them. Every one of the cases depends upon what was the intention of the testator; and on those grounds I come to the conclusion that it was the intention of this testator that these sums of 12,000*l.* and 5,000*l.* should have priority. I have heard no argument about the priority between the 12,000*l.* and the 5,000*l.*, because I understand there is enough to pay both.

Upon those grounds I come to the conclusion that there is such a marked distinction between the legacies in which life interests were given only and those in which the *corpus* was absolutely given, that the effect of the will is to give priority to the 12,000*l.* and the 5,000*l.*, the fund to be set apart for which is to fall back into the residue when the life interest expires; and I must, therefore, declare that those legacies of 12,000*l.* and 5,000*l.* have priority over the general legacies given by the will.

Solicitors—Frith Needham, agent for Abraham Cann, Nottingham, for applicant; Torr & Co., agents for Wells & Hind, Nottingham, for plaintiff and some of the defendants; Field, Roscoe & Co., agents for Wells & Hind, Nottingham, for the remaining defendants.

JESSEL, M.R. }
1880. } GOWAN v. GOWAN.
Dec. 6. }

Executory Settlement — Children — Powers of Appointment.

In making a settlement of property directed to be settled on the wife and children of the testatrix's son, the Court has jurisdiction to give to the husband a life interest and also power to appoint the fund amongst the issue of the marriage, jointly with the wife during the coverture, and alone if he survive her.

Oliver v. Oliver (48 Law J. Rep. Chanc. 630; Law Rep. 10 Ch. D. 765) dissented from on this point.

The testatrix in this case by her will gave 5,000*l.* to be held by her trustees and executors until her son married;

"the said sum then to be settled on his wife and children." The son having married, a question arose as to the proper form of the settlement to be made of the 5,000*l.*

Mr. Langworthy, for the son (the plaintiff), submitted that the settlement should contain a power for the husband and wife jointly during the coverture by deed, and for the survivor by deed or will, to appoint the fund amongst the children, with remainder, in default of any such appointment, to the children equally. But he called attention to a case of

Smithers v. Green (cited in *Seton on Decrees*, 675),

where powers of appointment were omitted from the settlement, although the form was stated to have been approved of by the Master of the Rolls, as the proper settlement in the absence of any special circumstance, and to

Oliver v. Oliver (*ubi supra*), in which case Fry, J., although he directed the insertion of a power to the wife to appoint amongst the children, said that the authorities did not go to the extent of giving a joint power of appointment to the husband and wife.

Mr. Cecil Russell and *Mr. Langley* appeared for the other parties.

THE MASTER OF THE ROLLS.—There must have been some special reason for the form of the settlement in *Smithers v. Green*. In ordinary cases the husband and wife, or the survivor, ought to have powers of appointing the fund amongst the children. I have no doubt that the Court has full power as to the form of the settlement. In *Spirrett v. Willows* (1) Lord Justice Wood in giving judgment said, "As regards the limitations and powers in favour of the children, we think that what the Court has to look to is, that this portion of the fund should be settled in a usual and proper form for the benefit of the wife and children." And I am satisfied that, as a rule, it is very desirable that both the parents should have a power of appointing the fund amongst the children, and that I

Gowan v. Gowan.

have power to insert a clause to that effect in the settlement. What Mr. Justice Fry is reported to have said in *Oliver v. Oliver* appears to me to be contrary to the opinion expressed in the case of *Cogan v. Duffield* (2) by Lord Justice Baggallay, who said, "The mode of settling a wife's fortune which is approved by the Court is to give her the first life interest for her separate use, then a life interest to the husband, then (subject to powers given to the husband and wife of appointing the fund among the issue of the marriage) it is given equally to such of the children as, being sons, attain twenty-one, or, being daughters, attain that age or marry, or else to the children equally, with gifts over in favour of the others, if any of them, being sons, die under twenty-one, or, being daughters, die under that age and unmarried." I therefore direct that the settlement in this case shall contain a limitation of the fund to the wife for life for her separate use, with remainder to the husband for life, with remainder as the husband and wife shall by deed jointly appoint, with remainder as the survivor shall by deed or will appoint (but if the wife is the survivor, she is to have power to appoint amongst her children by a future marriage), and an ultimate remainder to all the children of the wife attaining twenty-one, or, in the case of daughters, marrying under that age.

Solicitors—Hores & Pattison, for all parties.

MALINS, V.C. }
1881.
Jan. 13.

MERRILL v. MORTON.

Will—Construction of—"My nephews and nieces"—Consanguinity—Wife's Nephews and Nieces.

A testator devised certain real estate to A. G. (sister of his late wife) for life, and upon her decease to her children and to S. H., E. A. and "my niece M. W."; and he devised other real estate upon trust for sale and investment, and to pay the income equally among "all my nephews and nieces," and bequeathed the money to the survivor of "my said nephews and nieces," and devised the residue of his real estate to the survivor "of my said nephews and nieces," and bequeathed his residuary personal estate "equally among all my nephews and nieces." M. W. was a child of a sister of the testator's wife.

At the testator's death there were nineteen nephews and nieces living, children of testator's brothers and sister, and seven nephews and nieces, children of sisters of the testator's wife:—

Held, that none of the wife's nephews and nieces (including M. W., although called "my niece"), but only the testator's nephews and nieces by consanguinity, were entitled to a share under the gifts to "my nephews and nieces."

Grant v. Grant (39 Law J. Rep. C.P. 140; *ibid.* Exch. 272; Law Rep. 5 C.P. 380; *ibid.* Exch. 727) *disapproved of.*

Nathaniel Foster, by his will made in January, 1870, devised certain closes of land to trustees upon trust to pay the rents thereof to Ann Grantham (sister of his late wife) for life; and after her decease he gave and devised the same "unto the children of the said Ann Grantham, and Susannah, the wife of William Holbrook, and Eliza, the wife of Samuel Abraham, and my niece, Mary Williamson, their heirs and assigns as tenants in common and not as joint tenants." He also devised other real estate upon trust for sale and investment, and to pay the income equally among "all my nephews and nieces for and during the term of their natural

(2) 45 Law J. Rep. Chanc. 307; Law Rep. 2 Ch. D. 44.

Merrill v. Morton.

lives, and the life of the survivor of them," and bequeathed the money so invested to the survivor of "my said nephews and nieces;" and he devised other real estate "unto all my said nephews and nieces;" and he devised the residue of his real estate to the survivor of "my said nephews and nieces," and bequeathed all the residue of his personal estate "equally amongst all my nephews and nieces, share and share alike."

At the death of the testator there were nineteen nephews and nieces living who were sons and daughters of his own brothers and sisters, and seven nephews and nieces of his deceased wife, of whom Susannah Holbrook, Eliza Abraham and Mary Williamson were three.

The suit had been instituted in 1871 for the administration of the estate of the testator, and now came on upon further consideration, and the question was whether the nephews and nieces of the testator's deceased wife took under the will equally with the testator's own nephews and nieces.

Mr. W. O. Fooks, jun., for some of the testator's own nephews and nieces having the conduct of the proceedings.—The nephews and nieces related to the testator by blood are entitled to the exclusion of those connected with him by affinity only—

Wells v. Wells, 48 Law J. Rep. Chanc. 681; Law Rep. 18 Eq. 504;

Smith v. Lidiurd, 3 Kay & J. 252;

In re Blower's Trusts, 42 Law J. Rep. Chanc. 24; Law Rep. 11 Eq. 97; on appeal, 6 Chanc. 351.

Where the words used, as here, are distinct and have a primary signification, extrinsic evidence is not admissible to shew that any other meaning is to be attached to them than the primary one—

Ellis v. Houstoun, Law Rep. 10 Ch. D. 136.

He also referred to

Megson v. Hindle, Law Rep. 15 Ch. D. 198.

Mr. G. Murray (amicus curiæ), referred to *Webber v. Corbett*, 43 Law J. Rep. Chanc. 164; Law Rep. 16 Eq. 515.

Mr. Jolliffe, for other nephews and nieces of the testator.

Mr. R. F. Norton, for the nephews and nieces of the wife, including Mary Williamson.—The testator must have intended to include his wife's nephews and nieces, for he has himself put a meaning on the words by calling Mary Williamson, who was his wife's niece, "my niece."

Grant v. Grant (ubi supra)

and

Sherratt v. Mountford, 42 Law J. Rep. Chanc. 688; Law Rep. 8 Chanc. 928,

are entirely in our favour. He also referred to

James v. Smith, 14 Sim. 214;

Hussey v. Berkeley, 2 Eden, 194;

Weeds v. Bristow, 35 Law J. Rep. Chanc. 839; Law Rep. 2 Eq. 333.

I submit that in any event Mary Williamson is entitled to share with the testator's own nephews and nieces, as he has himself called her his niece.

MALINS, V.C., after stating the facts, proceeded as follows: Here the contention is that the words "all my nephews and nieces" will include all the testator's wife's nephews and nieces as well as his own, and in support of that contention the case of *Grant v. Grant* is relied upon. I think that in that case there ought not to have been any enquiry as to which person was intended by the expression "my nephew Joseph Grant," and in my opinion that decision was wrong, and I find that the present Master of the Rolls in the case of *Wells v. Wells* agrees with me on that point; and having to decide which of the two decisions—the one in *Grant v. Grant* and the other in *In re Blower's Trusts*, which was a decision of the Court of Appeal in Chancery—he was to follow, he is of opinion that he must follow the latter case. *In re Blower's Trusts* and *Wells v. Wells* shew that the ordinary meaning of the words "nephews and nieces" is a man's own nephews and nieces by consanguinity; and I think it would be most pernicious to let in a wife's nephews and nieces simply because a testator may have been in the habit of calling them his nephews and nieces. Therefore, on that part of the case, I must

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decide that the testator's own nephews and nieces are alone entitled to share.

There is much more to be said in favour of the contention that the wife's niece Mary Williamson should be included among the testator's own nephews and nieces, for in the first clause he describes her as "my niece, Mary Williamson," and in the following clauses he gives his property to "my nephews and nieces." Now if I were unfettered by authority I should decide that she was included among the testator's own nephews and nieces, but I find that a contrary doctrine has been laid down in some of the cases cited. In *Sherratt v. Mountford* the gift was to "my nephews and nieces living, and the issue (if any) of my nephews and nieces dead before me;" and there the nephews and nieces of the testator's wife were held to be entitled, but on the ground that the testator never had any nephew or niece of his own, nor any brother or sister living at the date of his will. But in *Smith v. Lidiard*, where a testatrix having given legacies to two of her husband's nieces by name afterwards bequeathed her residue to her respective nephews and nieces, it was held that the two legatees whom she had named were not included in the residuary gift. On that authority I must decide that Mary Williamson is not entitled to share with the testator's own nephews and nieces. Upon the whole case, therefore, I come to the conclusion that only those who were nephews and nieces of the testator by consanguinity are entitled.

Solicitors—Hughes & Sons, agents for Walker, Sons & Rainey, Spilsby, for plaintiffs; Courtenay & Croome, agents for Joseph Bassitt, Wainfleet, for defendants.

BACON, V.C. }
1881. }
Jan. 11. }

MANN v. PERRY.

Practice—*Notice of Motion for Attachment*—*Service on Solicitor*—*Personal Service*—*Rules of Court, 1875, Order XLIV. rule 2.*

Under ordinary circumstances a notice of motion for a writ of attachment to issue against a party should be served personally, and not merely on the solicitor on the record of the party.

This was a motion for a writ of attachment to issue against the defendant, an executor, for non-compliance with an order directing him to pay certain funds into Court. The order directing the defendant to pay the funds into Court had been personally served; but notice of the present motion had been served on the solicitor on the record of the defendant only, and no attempt had been made to serve the defendant personally.

Mr. Morshead, for the motion, submitted that the practice was settled by the cases of

Browning v. Sabin, 46 Law J. Rep. Chanc. 728; Law Rep. 5 Ch. D. 511;

and

In re A Solicitor, 49 Law J. Rep. Chanc. 295; Law Rep. 14 Ch. D. 152;

and that service on the solicitor on the record of the party was sufficient service of a notice of motion for attachment under Order XLIV. rule 2.

BACON, V.C., declined to make the order for an attachment to issue without personal service of the notice of motion, or without some evidence to shew that there was a reason for not making personal service; and directed the motion to stand over.

Solicitor—B. F. Watson, for plaintiff.

MALINS, V.C. }
1881. }
Jan. 13, 19. }

BLAND v. DAWES.

Special Case — Will — Legacy — “Sole use and disposal” — Husband — Wife — Separate Estate.

A legacy given to a married woman “for her sole use and disposal” vests in her as separate estate.

Prichard v. Ames (Turn. & R. 222) followed.

SPECIAL CASE.

Julia Priscilla Baker, by her will dated the 9th of August, 1866, bequeathed as follows: “I give and bequeath to my dear niece, Frances Sybell Bland, for her sole use and disposal, 5,000*l*.”

The legatee was at the date of the will the wife of Archdeacon Bland. It appeared that upon the death of the testatrix her estate was insufficient to pay the legacies given by her will in full, and this particular legacy of 5,000*l*. became represented by a sum of 4,127*l*. New Three per Cents., and it was arranged between Mrs. Bland and her husband that this sum should be transferred into the name of the archdeacon, who had then some of the like stock standing in his name, and that his bankers should receive the dividends on the whole of the stock, and from time to time place the dividends attributable to the sum of 4,127*l*. to the credit of the separate account of Mrs. Bland. From that time till the death of Archdeacon Bland, in 1880, Mrs. Bland drew cheques on her separate account.

The question stated in this Special Case was, whether Mrs. Bland was entitled to have the sum of 4,127*l*. New Three per Cent. Annuities transferred to her, or whether it formed part of her husband's estate.

Mr. Speed, for Mrs. Bland, the plaintiff, relied on

Prichard v. Ames (ubi supra).

Mr. Whitehorne, for the defendant, the executor of the husband.—There must be on the face of the gift a clear intention to exclude the marital right—

Tyler v. Lake, 2 Russ. & M. 183.

The words “sole use” alone are not sufficient to exclude the husband—

Gilbert v. Lewis, 1 De Gex, J. & S. 38; 32 Law J. Rep. Chanc. 347.

He also cited

Ex parte Ray, 1 Madd. 199;

Massey v. Parker, 2 Myl. & K. 174; 4 Law J. Rep. Chanc. 47;

Arthur v. Arthur, 11 Ir. Eq. Rep. 311;

Re Peacock's Pension Fund, 48 Law J. Rep. Chanc. 265; Law Rep. 10

Ch. D. 490;

Massey v. Bowen, Law Rep. 4 E. & L. App. 288.

MALINS, V.C.—I adhere to what I said in *Re Peacock's Pension Fund*, that in order to exclude the husband “there must be in a will or any other instrument an intention shewn that the wife shall take and that the husband shall not,” and “that although two or three words will not be sufficient, you must look at the whole framing of the instrument to see what the object is, and to see what the intention is as collected from the instrument.”

Looking, then, at the frame of this gift, I am clearly of opinion that it was the intention of the testatrix to give this legacy to the wife to the exclusion of the husband.

If the words had been simply “for her sole use,” I should, upon the authority of *Gilbert v. Lewis*, have been compelled to hold that they were not sufficient to exclude the husband. But here the words are, “for her sole use and disposal.” The legacy is to be for the “sole use” of the legatee, and she is to have the sole power of disposing of it.

If these words do not mean that the legacy is to be for her separate use, what else do they mean? In *Prichard v. Ames* the words were, “for her own use and at her own disposal;” and Baron Graham in his judgment says, “I cannot entertain a doubt upon this point: the necessary effect of these words is to give this legacy to the separate use of the plaintiff. The testatrix, in using the words ‘at her own disposal,’ has stated the effect she wished to be produced; her intention was to give the plaintiff that power of disposition

In re Hardy.

an unforeseen accident in the family, is insufficient to pay the legacies in full, that insufficiency having arisen from a circumstance which probably the testator did not anticipate, namely, the insolvency of a brother.

Now, therefore, the testator, not desiring that his wife should wait until it was ascertained whether there was or was not enough to pay all the legacies in full, gives to her specific things. He gives and bequeathes to her all his household goods and furniture, plate, linen, china, books, wearing apparel, horses, carriages, cattle and other effects in and about his dwelling-house, for her own use and benefit, together with the legacy or sum of 500*l.* which he directs to be paid to her immediately after his decease. The executors, under the impression that the estate is a solvent one, and that there is money enough to pay the 500*l.*, pay that sum in full. The lady having received the money, it is now, the assets being insufficient, contended that she must refund part of it. What did the testator intend? As between himself and his widow, whom he makes tenant-for-life of the general residue of his estate, can there be a shadow of doubt that when he directs it to be paid immediately after his decease his meaning was that, as she succeeded to the possession of his household goods, furniture and everything else, she was also immediately to have 500*l.* as the means of carrying on her household? That instead of being paid immediately she is to wait until it is ascertained that there is enough to pay the collateral relatives in full is, in my opinion, repugnant to every intention the testator had. His intention was to give priority to his wife in this way, that she was to be paid immediately whether the other legatees could be paid in full or not. Therefore I am of opinion that it was the intention of the testator to give her priority—that is, that she should be paid immediately, and that having been once paid she should never be called upon to refund any part of the money she received.

It is said that I am not at liberty to say that that was the intention, because 180 years ago Lord Hardwicke decided in a particular case, which has been fre-

quently followed no doubt, that there was no priority. I think this case is distinguishable from that. Here it is mixed up with specific bequests, with all the things in and about the testator's house—his household furniture, his carriages, horses, &c. His whole establishment is given to the wife; and not leaving her merely to depend upon the life estate, and knowing that she would want a little money to go on with, a moderate sum of 500*l.* is to be paid to her immediately.

In *Blower v. Morret*, which is the only case which has been decided on the subject, land is given to trustees to be sold for payment of debts. The testator then gives to his wife a general legacy of 500*l.*, to be paid to her immediately after his decease out of the first moneys belonging to him which should be got in after his decease; and it was his will that his wife should be entitled to the general legacies given to her in full satisfaction of all dower or thirds. That again was a circumstance which entitled her to priority. That is settled by all the authorities.

Although there is the eminent authority of Lord Hardwicke, I can only say that, if I had lived 180 years ago, I should have come to a distinctly opposite conclusion in *Blower v. Morret*. I dissent from that decision and never will follow it unless I am obliged to do so by the Court of Appeal. I think that when a man gives his wife a sum of money to be paid immediately after his decease, his object is that she shall have the means of going on, and that she shall not be bound to wait until it is ascertained what is the state of the assets, and whether everybody else can be paid in full. The object is manifestly that the testator's widow shall immediately after his decease have a sum of money to go on with. Therefore *Blower v. Morret* is distinguishable in many respects; but if it is not distinguishable, then I say I dissent from it and decline to follow it.

Therefore I decide that in this case the testator's widow is clearly entitled to priority.

Upon the second question—

Mr. Pearson and *Mr. Beale*, who appeared in support of the contention that

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insure against fire and death by accident. It was proved by the affidavits of the plaintiffs that, as the result of the similarity of the two names and the proximity of their places of business, letters intended for the plaintiffs had been wrongly delivered to the defendants, and *vice versa*, and that confusion had been occasioned amongst the plaintiffs' customers.

In the plaintiffs' affidavits it was further stated that their company was known as the "Guardian Assurance Company," and that it was spoken of throughout the City of London by that name or simply as the "Guardian."

In the affidavit of the defendants' secretary it was alleged that the defendants had nearly 2,000 agents in the United Kingdom, and that their company was also known as the "Guardian Company," and that it would almost entirely ruin their business to omit the word "Guardian" from their title. In the secretary's affidavit it was also stated that their new name was assumed without any intention or desire to interfere with the plaintiffs' business. It also appeared from the evidence that a company called the "National Guardian Assurance Company" had carried on for some time the business principally of lending money in Oxford Street, and also that there was another company called the "Guardian Plate-Glass Insurance Company," which carried on the business of insuring loss against accidents to plate glass.

Mr. Chitty and *Mr. Whitehorne*, for the plaintiff company.—This motion is founded upon the general doctrine of equity that the defendants cannot appropriate the plaintiffs' business or represent that they are carrying on their business. The result of the defendants having assumed their present name will be to appropriate the plaintiffs' business.

The law was clearly laid down in your Lordship's decision of

The Merchant Banking Company of London (Limited) v. The Merchants Joint-Stock Bank, 47 Law J. Rep. Chanc. 828; Law Rep. 9 Ch. D. 560.

The general law is also stated in *Croft v. Day*, 7 Beav. 84;

and

The Colonial Life Assurance Company v. The Home and Colonial Insurance Company, 33 Beav. 548; 33 Law J. Rep. Chanc. 741.

Mr. Ince and *Mr. Francis B. Palmer*, for the defendants.—We are not carrying on the same business as the plaintiffs, and have never done so; and the plaintiffs are not entitled to the exclusive use of the name "Guardian." This is shown by the fact that two other companies now carry on business with that word as an integral part of their name. Moreover, in the present case, the defendants formerly carried on business without objection under the name of the "Guardian Horse and Vehicle Insurance Association." We therefore submit there is no objection to the defendants calling themselves the "Guardian and General Insurance Company."

The case of

Croft v. Day (ubi supra)

is not a decision against us, as that case only applies when the business of the new firm is identical with that previously established.

The inconvenience of the delivery of the letters is no ground for an injunction—

Day v. Brownrigg, 48 Law J. Rep. Chanc. 173; Law Rep. 10 Ch. D. 294.

The plaintiff company have, moreover, no right to an injunction until it has been shown that we are carrying on the plaintiffs' business, which we say we are not. In any event, the plaintiffs should only have an injunction to restrain the defendants carrying on the business of insurance against fire.

If, however, your Lordship considers the plaintiffs are entitled to an injunction, we will give an undertaking to change the defendants' name to the "Guardian Horse, Vehicle and General Insurance Company." This, in fact, the defendants offered to do when served with the notice of motion, and we submit they ought not in any event to pay the costs of the motion.

[At the conclusion of the arguments it was arranged that the motion should be treated as the trial of the action.]

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THE MASTER OF THE ROLLS.—I must say that this case comes as close as any case I know within the boundary of the law.

The plaintiffs' title is the "Guardian Fire and Life Assurance Company." They were established in the year 1821, for the purposes of fire and life assurance, and they have offices in Lombard Street, where they have carried on business for a great many years. The defendants' title is the "Guardian and General Insurance Company (Limited)," a very similar title to that of the plaintiffs. They carry on business at No. 31 Lombard Street, and were established in the month of March, 1880. The business of the plaintiffs is, as their name implies, the ordinary business of fire and life insurance. That of the defendants is peculiar: they seem to have bought the business of a former company at No. 31 Lombard Street, which was called the "Guardian Horse and Vehicle Insurance Association." The object of that company, which was established in 1877, and had a life of little more than three years, was to insure horses and carriages against injury, but not, as it is important to mention, against fire. Well, it also appears that there have been for some time established—I do not know how long—two companies, one called the "National Guardian Assurance Company," carrying on business in Oxford Street, and whose chief business appears to be that of a loan society, though probably it has some insurance business; and the other is the "Guardian Plate-Glass Insurance Company." I mention this because it has been supposed that the similarity of these names has some bearing on the present action. Now, I have no hesitation in saying that not one of the three names mentioned—that is, the "National Guardian," the "Guardian Horse and Vehicle," or the "Guardian Plate-Glass"—can fairly be confused with the "Guardian Fire and Life Assurance Company;" and I have no hesitation also in saying that the "Guardian and General Insurance Company," carrying on business at No. 11 Lombard Street, could very readily be confused with the "Guardian Fire and Life Assurance Company," carrying on business at No. 31 in the

same street. From the evidence, it appears that what one would have thought probably would occur, has occurred, and, moreover, to some considerable extent. The public are careless, and it is no use supposing that if they paid a very moderate attention to names they would see they were not the same, but only similar, but they have in fact been deceived. Letters addressed to the secretary of the Guardian Fire Office are addressed to 31 Lombard Street (I have such a letter in my hand) instead of to No. 11 Lombard Street. Another letter is to the Guardian Fire Office, 31 Lombard Street, and people who want to write to the "Guardian Fire and Life Assurance Office," instead of writing to the "Guardian Assurance Company," write to the "Guardian Insurance Company"; in fact the old company is known as the "Guardian Assurance" or the "Guardian Company." That being so, and seeing that a confusion has in fact arisen, I think my opinion is so far confirmed as to say that the two names are so similar that they would naturally cause confusion.

Now I say this in *The Merchant Banking Company of London v. The Merchants Joint-Stock Bank*: "The sole remaining point I have to consider is this: Is the name so similar that I must impute to the defendants an intention to appropriate the plaintiffs' business?" That is the real question in these cases, and I must see here what the circumstances are. The old company, whose business the defendants bought, was the "Guardian Horse and Vehicle;" the new company is the "Guardian and General." Why did they change their name? The reason, I am told, why they changed it was because the name of the old company did not quite describe the business of the new company. The new company, in addition to the business carried on by the old company, is also formed for carrying on what I will call an accident business to persons: it is no longer confined to four-footed animals, but is extended to injuries by accident to human beings. That is a very great extension; and in addition to that the new company is extended to fire business in general. Now those are two very large extensions, and we are told

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the reason why the old name was also changed. It is said in the secretary's affidavit that the word "Guardian" is essential to the working of the defendant company's business; and he says at the same time that the name of the new company was fixed upon without any intention or desire of interfering with the business of the plaintiff company; but he does not say he was not aware of the nature of the business carried on by the plaintiff company, because he was aware of it. It was carried on in the same street, and the company was a perfectly well-known company; and though the secretary says it was not with any intention or desire of interfering with the plaintiffs' business that the defendants changed the name, he does not say it was not intended to attract the business of the plaintiff company by using so well known a name.

In my opinion, the question that I asked in *The Merchant Banking Company of London v. The Merchants Joint-Stock Bank* must be answered adversely to the defendants. Knowing all about the plaintiffs' business, as I think they must be taken to have known, I consider they have taken a name so very similar to that of the plaintiffs with a view to appropriate some of the plaintiffs' business. It must be remembered that at the very time the defendants changed their name they changed their business also; and as regards the first part—namely, "Fire"—of the plaintiffs' name, the defendants are formed with the object of carrying on in the most general terms fire business, and I must assume that the company intends to carry on the business which it is formed to carry on; and one of the objects of the memorandum of association is general insurance against fire.

When you have, as here, a company formed for carrying on fire business, which is a large part of the plaintiffs' business, and you find that company taking over the business of a company which had a clearly distinguishable name, and you find the new company throwing out those words which clearly distinguished it, and adopting a name very similar to that of the plaintiffs, I think I am entitled to say that it is not done quite

innocently or quite without a view of appropriating some of the plaintiffs' business.

Then there is another thing. Is there a possibility of appropriating? Of that I have no doubt whatever. The letters addressed to the plaintiffs go to the defendants, and *vice versa*, and the confusion has arisen which, as I mentioned in the former case of *The Merchant Banking Company*, had not arisen there at all. I do not approve of a new company being started with the defendants' name in Lombard Street, without a sufficient explanation. It does not appear to me that there is any reason put forward for dropping the name "Horse and Vehicle." However, I need not now consider that any further, because the defendants are willing to undertake to resume those names as quickly as possible, and, according to what has now been arranged, to call themselves the "Guardian Horse, Vehicle and General Insurance Company." I am of opinion if they do that no injury will be occasioned to the plaintiffs.

Although actual fraud may not have been really in the contemplation of the defendants, yet I feel bound to impute to them what amounts to legal fraud in assuming the name complained of under the circumstances that I have mentioned; and although they did make an offer to do substantially that which they have now agreed to do, yet that offer was not made until after the service of the notice of motion. That being so, inasmuch as a successful party in a litigation is entitled to his costs, the plaintiffs must have their costs.

Solicitors—Parkin, Pagden & Woodhouse, for plaintiffs; Denton, Hall & Fox, for defendants.

JESSEL, M.R. }
 1881. } HENDRIKS v. MONTAGU.
 Feb. 4. }

Company — Registration under Companies Act, 1862—Similarity of Name—Right of Unregistered Company to restrain Registration—Intention to take Business—Fraud—Injunction.

A company not registered under the Companies Act, 1862, has, by virtue of the 21st section of that Act, no right or equity to restrain a second company from registering under the Act with a name similar to or even identical with the existing company.

Where Company B had only temporary offices, and had not yet commenced business or registered under the Companies Act, 1862,—

Held, that an injunction could not be granted at the instance of Company A—an existing company—to restrain Company B from carrying on their business so as to deceive, although Company B proposed to start with a name similar to that of Company A; on the ground that it was merely matter of opinion, and not of sufficient certainty for the purposes of an injunction, how Company B would carry on their business, and they might conduct it in such a manner as to shew they did not intend to appropriate any part of Company A's business.

Leave to amend a writ will not in general be granted to raise an entirely new case of fraud.

Motion.

The plaintiffs, the Universal Life Assurance Society, were incorporated in the year 1836 by an Act (6 Will. 4. c. 54), and the society were thereby authorised to sue and be sued in the name of their actuary for the time being. Since their incorporation the plaintiff company had carried on a large business, the greater part being derived from premiums payable by persons residing in the colonies. The head office of the plaintiffs was at King William Street, in the City of London.

On the 25th of January, 1881, the defendants, the directors, issued a prospectus of a new company called the "Universe Life Assurance Association (Limited),"

with a capital of 2,000,000*l.* in 200,000 shares of 10*l.* each, for the purpose *inter alia* of carrying on in Great Britain and its dependencies, and in France and other parts of the world, the business of life insurance. The defendant company had taken temporary offices in Size Lane, in the City of London, but had not yet commenced business.

On the 27th of January the plaintiff company, suing by their actuary, commenced this action, and by their writ claimed an injunction to restrain the defendants from applying to the Registrar of Joint-Stock Companies in England for registration, under the Companies Acts, of any company to be incorporated under the name of the "Universe Life Assurance Association (Limited)," or any other name likely to mislead and deceive the public into the belief that the company to be incorporated as aforesaid was the same as the plaintiff society, and from issuing or publishing any advertisements, circulars or prospectuses, representing that a company was to be incorporated, pursuant to the Companies Acts, under the name of the "Universe Life Assurance Association (Limited)," or any such other name as aforesaid, and from carrying on business under the name of the "Universe Life Assurance Association (Limited)," or any such other name as aforesaid.

The plaintiff company now moved for an injunction in the terms of their writ, and their actuary made an affidavit in support of the motion, in which he stated that, from his experience as an actuary for more than thirty-five years, he had no doubt that if the defendants were allowed to incorporate under their proposed name, their company would obtain premiums intended for the plaintiffs, and thus greatly damage the plaintiffs' business. The secretary of another life assurance company stated that he had no doubt that if the defendant company carried on business under their proposed name, the public would in many cases be deceived, and would pay premiums to the defendants intended for the plaintiffs.

Mr. Chitty and Mr. H. Walters Horne, for the plaintiff company.—Under the 20th

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section of the Companies Act, 1862, which provides that "no company shall be registered under a name identical with that by which a subsisting company is already registered, or so nearly resembling the same as to be calculated to deceive," we claim to restrain the defendants from registering their company under their proposed title. The names, if not identical, are so nearly alike as to be calculated to deceive.

[THE MASTER OF THE ROLLS.—But if your society is not registered, how does the section apply?]

We admit that our society is not registered under the Companies Act, but still we submit we are entitled to apply as we are within the mischief intended to be guarded against, which was to prevent one company being registered with a name similar to that of an existing company. But if the section does not in terms meet our case, still we are entitled to an injunction to restrain the defendants from carrying on business under their proposed name, as the result will be that they are certain to appropriate our business. According to your Lordship's ruling in

The Merchant Banking Company of London (Limited) v. The Merchants Joint-Stock Bank, 47 Law J. Rep. Chanc. 828; Law Rep. 9 Ch. D. 560,

if there is an intention to appropriate, or probability of the defendants appropriating our business, you will grant an injunction. In the case of

The Guardian Fire and Life Assurance Company v. The Guardian and General Insurance Company (Limited), ante, p. 253,

your Lordship went fully into the law, and held the defendants' name was calculated to deceive, and that they must change it.

[THE MASTER OF THE ROLLS.—But there the defendants were actually carrying on business.]

The last words of our writ ask, in effect, for an injunction to restrain the defendants from carrying on their business so as to deceive.

[THE MASTER OF THE ROLLS.—I do not think they do. The whole writ is based on the 20th section; and how can you get an injunction to restrain the defendants from

appropriating your business until they have started? You do not know how they will carry on their business.]

If your Lordship thinks we are not entitled to any injunction at present, we would ask for leave to amend our writ and notice of motion, and that the motion may stand over until the defendants have actually started.

Mr. Roxburgh and Mr. Bond Coxe, for the defendants, were not called upon.

THE MASTER OF THE ROLLS.—This is a motion founded on the 20th section of the Companies Act, 1862, and that section only applies to taking the name of a subsisting company already registered. Why it should have been confined to that, I am quite unable to say, but it is confined to that; and the objection is taken that the plaintiff company is not a registered company, and that therefore the section does not apply at all. That objection once made appears to me to be entirely fatal to this application.

The writ which I have got before me is this: "For an injunction to restrain the defendants from applying to the Registrar of Joint-Stock Companies in England for registration under the Companies Act of a company to be incorporated under the name of the Universe Life Assurance Association, or any other name likely to mislead or deceive the public into the belief that the company, being incorporated as aforesaid, is the same as the Universal Life Assurance Society." It is exactly under the Act of Parliament. Of course there is no such equity. You may register in any name, whether the name is likely to deceive or not, because you may carry on business in such a way that you will not deceive. There is—apart from the Act—nothing to prevent a company registering in the same name. They may carry on a totally different business. Suppose the company's name was the Universal alone—the Universal Company—if it were not for the Act of Parliament you might have a second Universal Company; but the first company might be a life insurance company and the second a fire insurance company. You could not restrain the registration. The mere identity of

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names will not do. Suppose the first company dealt in manure and the second in hardware, you could not restrain the second from registering. I am thinking of the same identical name. That is not a ground for an injunction. As I have already explained, the ground for an injunction is the fraudulent attempt to appropriate other persons' or other companies' business.

Well, then, the next part of the writ is this: "From issuing or publishing any advertisements, circulars or prospectuses representing that a company is to be incorporated pursuant to the Companies Act under the name of the Universe Life Association (Limited), or any such other name as aforesaid." What equity there is for that I am utterly at a loss to understand, either in the Act or anywhere else, to prevent the registration. Why a man shall not advertise that a company is going to be incorporated under that name I cannot understand. "And from carrying on or commencing any business under the name of the Universe Life Assurance Association (Limited), or any such other name as aforesaid." It is to restrain them from carrying on business under a particular name. That you cannot do. You can restrain them from doing it either where it is done with the intent to appropriate the plaintiff's business or where it, in fact, does appropriate unfairly the plaintiff's business, although the actual intent—that is, the moral intent to commit fraud, or rather the immoral intent—is not proved. You must have that. It is the unfair appropriation of a portion of the plaintiff's business which is prevented by injunction. A man may incorporate a company and not carry on business at all, or may carry on a totally different business. Therefore it seems to me that the whole injunction asked by this writ is simply pursuant to the section of the Act of Parliament. But even if it were otherwise it would not do. If the affidavits had stated that which I must say, in fairness to the deponents, the affidavits do not state at all—that it was not possible to carry on business under the defendants' name without appropriating unfairly a portion of the plaintiff's business—even then the

plaintiffs could not have got an injunction, because the answer would be, "That is your opinion, but there is an opinion on the other side that the business can be carried on without any such result." And I put a case to illustrate it. Suppose this new company, carrying on the business they intend to carry on, establish themselves in Birmingham or Liverpool, which they may do. They may have their temporary office within a few yards of you, but they may have their registered office somewhere else. What would you say then? It is quite plain that they can carry on business in a way which will not represent their business as being the business of the plaintiffs, and that, even if they had the same name and not a similar name, they could do it supposing they put at the top of their prospectus, or at the top of their door, "No connection with any insurance company called the 'Universal' established at such a place, or with any other company of a similar name." I do not say they will carry on business in that way, but they might; and as to injunctions which are called injunctions *quia timet*, it is essential to shew that what the defendant is about to do must have that effect—not may, but must. We are more familiar with them in the cases of interference with light where the proposed plans shew that the building will be such that it must obscure the light. There was a very curious discussion on that subject before Lord Cottenham in *Haines v. Taylor* (1), where it was sought to prevent the erection of gasworks, on the ground that when erected they would be a nuisance. The plaintiffs were in this position, that if they had stood by unduly without notice, they might have been barred under the doctrine of acquiescence, by reason of having allowed such a large expenditure; but the answer was, "We are going to erect a building to be used as a gasworks; we say we have an invention to prevent a nuisance; you think we have not, but it may turn out that something may be invented before we begin making gas that may prevent a nuisance. Is it the absolutely necessary consequence of

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our erecting gasworks that we shall cause a nuisance?" Why should it be predicted as an absolutely necessary consequence that the use of a similar name is a fact which *per se* will be calculated to deceive, and that the defendants will carry on business in such a way as to unfairly interfere with the plaintiffs' business? I mention this because I think that it is only a fair warning to the defendants that if they do they will be liable to an action, and to have an injunction granted against them.

Now, the only other point which I wish to advert to is the excuse which Mr. Chitty had for going on with his case after the argument I have just dealt with was disposed of. He asked me for leave to amend his notice of motion, and to let the motion stand over. Now I cannot accede to that. There is no Judge more liberal, if I may use the expression, in allowing amendments, in order to try the real issue, than I am, at any stage of the case; but I make one exception, that is as to charges of fraud. I do not, as a rule, allow amendments to raise a charge of fraud at a time when the case has been launched independently of fraud. I generally stop there. Now to allow such an amendment as this would be to contravene that rule. Of course, like all my rules, it is not an absolute rule. I may make an exception to it if I like, but generally it is my rule. Here are plaintiffs who come under an Act of Parliament and say to the defendants, "You shall not use a name so similar as to be calculated to deceive." They now ask me, having failed, because their company is not registered, to change the whole complexion of the suit and to turn it into an action for fraud, and charge the defendants with the intention of adopting their name and carrying on the business with the view of defrauding the plaintiff company by unfairly, illegally and immorally appropriating a portion of the business of the plaintiff company. Now I cannot allow any such case to be made by amendment. If made at all, it must be by separate action and by separate notice of motion, and therefore I declined to accede to Mr. Chitty's re-

quest, and the only order I make now is, that there be no order except that the costs of the motion be costs in the action.

Solicitors—Pollock & Co., for plaintiffs; W. F. Nokes, for defendants.

FRY, J. }
1880. } LAIRD v. BRIGGS.
Dec. 13, 14. }

Prescription Act (2 & 3 Will. 4. c. 71) s. 8—Reversion—Practice—Amendment at Trial—Order XXVII. rule 1.

A tenant-at-will under a remainder-man whose estate has fallen in, is a "person entitled to any reversion" within the meaning of the Prescription Act, s. 8.

In an action for trespass, where the defendant claimed a prescriptive right, the Court refused an amendment by which the title of the plaintiff would be denied.

This action was brought to restrain the tenant of Clifton Baths, Margate, from committing acts of trespass on the foreshore at Margate. The plaintiff was tenant-at-will under the Marquis of Conyngham, who, it was alleged by the statement of claim, was entitled as lord of the manor to the foreshore.

The defence set up was prescriptive right by user for a period of over forty years under section 8 of the Prescription Act (2 & 3 Will. 4. c. 71) to do the acts complained of, and the statement of defence denied that the plaintiff and those through whom he claimed had any title "save subject to the rights of the defendant and his predecessors."

The property had been in settlement, and the last tenant-for-life had died within three years, and the plaintiff pleaded that under section 8 of the Prescription Act the effect of bringing this action was to exclude a sufficient period from the computation of the forty years to prevent the prescriptive right set up by the defendant from arising.

Laird v. Briggs.

Mr. Cookson and Mr. W. S. Follett, for the plaintiff, contended that the resistance of the defendant's right by the plaintiff in bringing this action was to be looked at either as a resistance by the marquis, the person entitled to the whole reversion, or that the plaintiff himself, having an interest in the reversion, however small, was to be considered as a person having "any reversion," and either way could succeed in this action.

Mr. North and Mr. Brett, for the defendant, had asked at the opening of the trial to be allowed to amend the statement of defence by striking out the words "save subject to the rights of the defendant and his predecessors." The application was allowed to stand over. They now argued that such amendment would only be making the denial of the plaintiff's title in the pleading unqualified, instead of qualified, and that the Court had full power under Order XXVII. rule 1 to make the amendment asked, and ought to do so to put the real question between the parties at issue.

[FREY, J., referred to

Newby v. Sharp, 47 Law J. Rep. Chanc. 617; Law Rep. 8 Ch. D. 39; *Tildesley v. Harper*, 47 Law J. Rep. Chanc. 263; Law Rep. 7 Ch. D. 403; on appeal, *Ibid.* 10 Ch. D. 393.]

They said also that the plaintiff, who was a mere tenant-at-will of a person who had come into possession, could not in any sense be held to be "entitled to any reversion."

FREY, J., said—In the statement of defence it is admitted that the plaintiff is in possession of the foreshore, subject to the rights of the defendant; that is only a qualified denial of the plaintiff's right, and I am now asked to allow the defendant to insert in the statement of defence an unqualified denial. The effect of that would be very serious in the conduct of the case. The plaintiff is entitled to rely on possession giving him a *prima facie* title, and if I allow the amendment, that cannot be done; and it appears to me there is no broader distinction among actions than between one brought by a person to acquire possession and one

brought by a person in possession of land. Having regard to the case of *Newby v. Sharp*, where Lord Justice James expressed the difficulty of allowing a change to be made in the nature of an action by amendment at the trial, I think I ought not to allow this amendment to be made.

Further, I make this observation: I am bound to allow such amendment as will bring the real question between the parties to an issue. But here nobody, down to the time of trial, thought of denying the title of the Marquis of Conyngham to the foreshore. I feel bound on these grounds to decline to allow the amendment to be made.

Upon the case as it stands it appears to me that the plaintiff has proved his right. According to admission he is in possession, and it appears to me that he is in possession in some way under the present Marquis of Conyngham, and derives from him at all events an estate at will. It appears that the defendant has since 1829 exercised certain rights which may amount to evidence of an easement over the foreshore, but it further appears that the marquis's estates have been settled, and since 1829 it has been occupied by tenants-for-life for a period which, when deducted from the period of the defendant's enjoyment, will bring the latter down to less than forty years.

A question on that arises under the 8th section of the Prescription Act, which provides "that when any land or water upon, over or from which any such way or convenient"—which word "convenient" is, I understand, not unreasonably supposed to be a misprint for "easement"—"water-course or use of water shall have been or shall be enjoyed or derived, or has been or shall be held under or by virtue of any term of life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned during the continuance of such term shall be excluded in the computation of the said period of forty years in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant

Laird v. Briggs.

on the determination thereof." Now this action is brought within three years of the death of the late marquis, the tenant-for-life, and it is admitted (the contrary could not well be contended) that it is a resistance. The only question, therefore, is, whether it is by a person entitled to any reversion expectant on the death of the late marquis. What is the meaning of the person entitled to any reversion? Does it mean the person entitled to the whole reversion, or does it include every person entitled to any part of the reversion? In my judgment it includes any one who derives his estate out of the reversion, whether he be a tenant-for-years or only a tenant-at-will.

That being my view, the plaintiff is entitled, and I give judgment accordingly.

Solicitors—Remnant, Penley & Grubbe, for plaintiff; Harrisons, for defendant.

JESSEL, M.R. }
1881.
Feb. 15. }

In re WORTH.

Practice—Solicitor and Client Costs—Plaint on Equity Side of County Court—Taxation by Chancery Division—Solicitors Act, 1843, s. 37—County Court Act, 1856, ss. 35 and 36—County Court Act, 1875, s. 8—County Court Rules, 1875, Order XXXVI. rule 1.

The Chancery Division has jurisdiction to tax, under the 37th section of the Solicitors Act, 1843, the solicitor and client costs of any proceeding on the equity side of a County Court where the amount involved exceeds a sum of 20l., the jurisdiction conferred by that Act not being taken away by the subsequent County Courts Acts or the County Court Rules.

One Worth had acted as solicitor for J. F. Kershaw in an administration action on the equity side of the County Court of Saddleworth, in Yorkshire, the value of the estate exceeding 20l.

On the 24th of May, 1880, Worth de-

livered to Kershaw his bill of costs and disbursements, and Kershaw subsequently presented a petition of course at the Rolls asking for the taxation of the costs in the Chancery Division.

Mr. Farwell, for Kershaw.—I ask that the common order to tax may issue. A difficulty has arisen in the order of course office as to whether such an order can issue, or whether the exclusive jurisdiction to tax the costs is not given to the Registrar of the County Court. I submit that such is not the case. By section 27 of the Solicitors Act, 1843, the High Court of Chancery had jurisdiction to tax the costs of any bill, when the business "contained in such bill or any part thereof shall have been transacted in the High Court of Chancery or in any other Court of equity."

The jurisdiction of the Court of Chancery is now, by the Judicature Act, vested in the High Court, and by reason of the equity jurisdiction conferred on the County Courts, they are "Courts of equity" within the above words.

The jurisdiction conferred by the Solicitors Act is, as I submit, not taken away by the subsequent County Court Acts. Section 35 of the County Courts Act, 1856, is the only section dealing with solicitor and client costs, and by that section such costs, on the application of the solicitor or client, are to be taxed by the Registrar subject to review by the Judge; and there is a provision at the end of the section that no solicitor shall have a right to recover any costs unless they have been allowed either on such taxation "or on the taxation of a Master of a Supreme Court of Common Law or of the Court of Chancery." I say, therefore, that section 35 does not take away the jurisdiction to tax given to the Court of Chancery by the Solicitors Act, but, on the contrary, that section rather confirms the jurisdiction. The next section—section 36—may be said to give the exclusive jurisdiction to tax the costs of claims under 20l. to the Registrars of the County Court, because no costs can be allowed except those mentioned in section 91 of the County Courts Act, 1846, unless upon a taxation the Registrar of the County

In re Worth.

Court is satisfied that the client has in writing agreed to pay further costs and charges, when he may allow such further costs. Then, by the County Courts Act, 1875, s. 8, the Judges therein mentioned have power to frame a scale of costs with respect to all proceedings then or thereafter to be taken in any County Court, and such scale, when approved of by the Lord Chancellor, is to be binding. Under that section and the previous power to make rules of practice given to the Judge by section 32 of the County Courts Act, 1856, the County Court Rules of 1875 have been framed and are now the only rules in force regulating the practice of the County Courts. By Order XXXVI. rule 1 of those rules "all costs shall be taxed by the Registrar of the Court, subject to the review of such taxation by the Judge." That rule, however, only, as I submit, deals with party and party costs, and the jurisdiction of the High Court as to solicitor and client costs remains.

THE MASTER OF THE ROLLS.—Under the Attorneys and Solicitors Act, 1843, all costs in any Court may be taxed by any Judge of the High Court, the jurisdiction conferred by section 37 of that Act not being restricted, and the jurisdiction given by that section being now transferred by the Judicature Acts to the Judges of the High Court. The only question, then, is, whether that jurisdiction has been taken away so far as regards costs in a County Court; but it can only be taken away by plain words. Section 36 of the County Courts Act of 1856 fixes the costs in all actions in the County Court where the claim amounts to less than 20*l.*, and only allows such costs to be taxed by the County Court Registrar in certain specified cases. That section, it seems to me, excludes the jurisdiction of the High Court where the claim is for less than 20*l.* Now, as to solicitor and client costs, the Registrar does not tax them as a matter of course, but they are dealt with by section 35, and they are only to be taxed on the application of either party, and can only be recovered after they have been allowed on such taxation or on a taxation by one of the Masters of the superior Courts. That

being so, section 35 does not seem to me to take away the jurisdiction of the High Court to tax solicitor and client costs when the claim is for more than 20*l.* All other costs in the County Courts are now regulated by the scale of costs framed under the County Courts Act, 1875, s. 8, and by the County Court Rules, 1875. The Acts of 1856 and 1875 give the County Court Judges power to frame rules for the regulation of the practice of their own Courts, and to frame a scale of costs under those powers; and by Order XXXVI. rule 1 of the County Court Rules of 1875, the Judges have directed that all costs are to be taxed by the Registrar of the Court. The only powers, however, given to the County Court Judges are to regulate the proceedings and practice in their own Courts, and therefore under that power they cannot, as it seems to me, repeal the previous jurisdiction to tax the costs conferred on the superior Courts. In my opinion, therefore, the High Court has now jurisdiction to direct the taxation of these costs, and an order of course for that purpose must issue.

Solicitors—Pritchard, Englefield & Co., for applicant.

MALINS, V.C. }
1881.
Jan. 21.

SHIPWAY v. BALL.

Married Woman—Infant—Separate Examination.

When a married woman is under twenty-one, her consent to waive her equity to a settlement will not be taken.

Petition.

Pursuant to an order made on the 19th of July, 1880, a sum of 562*l.* consols was standing in Court to a separate account entitled "The contingent share of Elizabeth Phipps."

On the 25th of November, 1880, Elizabeth Phipps, then an infant, of the age

Shipway v. Ball.

of seventeen years, intermarried with Heming Shipway.

This was a petition by Elizabeth Shipway and Heming Shipway, praying that the consols fund in Court (to which she was absolutely entitled under her grandfather's will upon attaining the age of twenty-one years, or marrying, which should first happen) might be transferred to Heming Shipway.

Mr. Freeman, for the petition, now asked that this fund might be transferred to the husband upon Mrs. Shipway being separately examined in Court, and consenting thereto.

[*MALINS, V.C.*—Can I take the consent of a married woman, who is still under age?]

Mr. Glasse, amicus curiæ, referred to *Stubbs v. Sargon*, 2 Beav. 496;

and

Mr. Bristowe, amicus curiæ, to *Gynn v. Gilbard*, 1 Dr. & S. 356.

MALINS, V.C.—It is clear, upon the authorities referred to, that I cannot take the consent of this lady. That entirely accords with my own view, that a person cannot exercise a disposing power, whether *coverte* or *discoverte*, until the age of twenty-one years. As to her executing a power of appointment, contained in a marriage settlement, I am bound by the recent decision of the Court of Appeal in *Andrews v. Andrews* (1).

I cannot, therefore, give the capital; but I will make an order for payment of the dividends to Mrs. Shipway upon her separate receipt until further order.

Solicitors—*Newman, Stretton & Co.*, agents for *A. R. Hudson*, Pershore, for petitioners.

JESSEL, M.R. }
1881.
Feb. 5, 14. }

HARRISON v. LEUTNER.

Practice—Costs—Taxation—Abandoned Motion—Discontinuance of Action—Unfinished Affidavits or Pleadings.

Upon taxation of the costs of a motion where a notice of withdrawal is given, the Taxing Masters will allow the costs of all work in preparing, briefing or otherwise relating to affidavits or pleadings, reasonably and properly and not prematurely done, down to the time of the giving of the notice which stops the work; but the Taxing Masters will have regard to the circumstances of each case, and will decide whether the work was reasonable and proper, and whether the time for doing the same had arrived.

The same principles will be applied in taxing costs on a discontinuance of an action, and the practice in that respect has not been altered since the Judicature Acts.

The plaintiff served the defendants with notice of motion for an injunction and afterwards served them with notice of withdrawal of the motion, whereupon an order was made directing the plaintiff to pay the defendant's taxed costs of the motion.

In taxing the costs the Taxing Master allowed the costs of affidavits in their state of preparation when the notice of withdrawal was served, but not the costs of anything done after such service. The Taxing Master also disallowed the costs of brief copies for counsel of affidavits which had not been filed at the time of the service of notice of withdrawal, although brief copies were previously delivered.

The plaintiff, on a summons to review the taxation, objected to the allowance of any costs of affidavits not actually completed and filed when the notice of withdrawal was served.

Upon the summons (which was adjourned into Court) coming on for hearing it was stated there was no distinct authority as to what was the usual practice of the Taxing Masters, but by analogy to the practice which had been usually adopted on the discontinuance of an action or the dismissal of a bill, it was contended

(1) 49 Law J. Rep. Chanc. 756; Law Rep. 15 Ch. D. 228.

Harrison v. Loutner.

that the costs in question ought not to be allowed.

THE MASTER OF THE ROLLS then directed that the summons should stand over in order that he might have a certificate from the Taxing Master upon the following questions of their practice: First, whether on taxing the costs of an abandoned motion it is usual to allow the costs of preparing and briefing or otherwise relating to affidavits which have not been actually sworn, or, being sworn, have not been filed. Secondly, whether in taxing on a discontinuance of an action, any change of practice has been made from the former practice before the Judicature Act on the dismissal of a bill, and in particular with respect to pleading and evidence, &c., in course of preparation.

In reply to these questions seven out of the eight Taxing Masters certified as follows: "That we have always acted upon the principle that the costs of all work in preparing, briefing or otherwise relating to affidavits or pleadings, reasonably and properly and not prematurely done, down to the time of any notice which stops the work, is allowable, and that the Taxing Master, having regard to the circumstances of each case, must decide whether the work was reasonable and proper, and the time for doing it had arrived. We apply the same principles in taxing costs in discontinuance of action or dismissal of bill, and we have not made any change of practice in this respect since the Judicature Act."

Mr. Grosvenor Woods appeared for the plaintiff, and *Mr. Methold* for the defendant.

Upon the summons being again mentioned, his Lordship, having read the Taxing Masters' certificate, stated that he entirely agreed with the principles upon which they had acted, and he accordingly dismissed the summons with costs.

Solicitors—*R. Hewlett*, for plaintiff; *Blachford, Riches & Co.*, for defendant.

HALL, V.C.
1881.
Feb. 1, 2.

In re ROBERTS.
REINGTON v. ROBERTS.

Will—Construction—Gift in Trust after Life Interest for "Descendants" who shall "bear" a particular name—Uncertainty—Remoteness.

A testatrix bequeathed stock to trustees in trust for her brother R.-G. for life, and after his decease in trust for his son, J. R.-G., for life, and after the decease of both of them upon trust for any immediate or direct descendants of her said brother or nephew who should bear the name of R.-G. for life, and from and after his or her decease, or in case of failure of any such immediate or direct descendants of her said brother or nephew, who should bear that name, upon trust for certain charities, with a condition of forfeiture on abandoning the name of R.-G.:—Held, that the gift to descendants was not confined to those whose family name or birth name was R.-G., but included descendants who assumed that name. Held also, that the gift to descendants was void for remoteness, and that the gift, as well to the charities as to the descendant who had assumed the name of R.-G., failed.

Quære, whether the gift to descendants would not (even if not void for remoteness) have been void for uncertainty.

Semhle, there is a difference between a gift to descendants who "bear" a certain name and a gift to descendants "of" a certain name.

The testatrix, Jane L. S. Roberts, by her will, dated the 21st of August, 1851, after bequeathing certain legacies, gave and bequeathed a sum of 7,800*l.* new Three per cent. Annuities to trustees, upon trust to pay to or permit and suffer her brother, Admiral John C. G. Roberts-Gawen, to receive the dividends thereof during his life, and from and after his decease, upon trust to pay to or permit and suffer her nephew, Augustus J. Roberts-Gawen (son of the said John C. G. Roberts-Gawen), to receive the dividends thereof during his life, "and from and after the decease of both of them her said brother and nephew, then upon trust to pay the dividends

In re Roberts.

and annual proceeds thereof for life unto any immediate or direct descendants of her said brother or nephew who should bear the name of Roberts-Gawen only, and from and after his or her decease, or in case of failure of any such immediate or direct descendants of her said brother or nephew, who should bear the names of Roberts-Gawen only," then upon trust to pay and divide the same amongst certain specified charities (including the Society for Promoting Christian Knowledge), and the testatrix declared that "if either of them, her said brother and nephew and their descendants, as aforesaid, should, after they became entitled to, or should be in the actual receipt of, the dividends and actual proceeds of the said trust money, abandon the name of Roberts-Gawen, and take or assume any other name, the trusts in favour of her said brother and nephew and their descendants, as aforesaid, should immediately cease and determine, and be void to all intents and purposes," and the testatrix bequeathed all her residuary estate to her said brother absolutely.

The testatrix died on the 23rd of April, 1853.

Admiral Roberts-Gawen died on the 21st of November, 1874, having by his will, dated the 5th of April, 1869, bequeathed all his residuary estate upon trust, as to one moiety, in favour of his son, the said Augustus J. Roberts-Gawen and his wife or issue, and as to the other moiety, in favour of his daughter, Elizabeth Charlotte Borough, absolutely, and, after referring to the above-stated bequest in his sister's will, he directed that his grandson, Charles Gawen Borough (one of the sons of E. C. Borough), should "immediately after his decease, or so soon as circumstances would permit, take and assume in addition to his own name that of Roberts-Gawen, so that in case of failure of issue of his said son, Augustus J. Roberts-Gawen, his said grandson should benefit by the bequest contained in his said sister's will."

In the month of May, 1875, Charles Gawen Borough (who was born on the 10th of April, 1859), by Her Majesty's royal licence assumed the surname of Roberts-Gawen only, in lieu of that of

Borough. Augustus J. Roberts-Gawen died a bachelor, on the 4th of May, 1880, and, at his death, Charles Gawen Roberts-Gawen was the only descendant of Admiral Roberts-Gawen bearing that surname.

This was a Special Case, stated by consent, for the opinion of the Court, pursuant to Order XXXIV. of the Rules of the Supreme Court; the plaintiffs being the trustees of the settlement made on the marriage of Charles Gawen Roberts-Gawen (which comprised his interest (if any) under the will of the testatrix), and the defendants being Charles Gawen Roberts-Gawen, the executor of the will of Admiral Roberts-Gawen, and the treasurers of the Christian Knowledge Society (as representing the charities interested).

The questions for the opinion of the Court were—

1. Whether the above-stated bequest for life to any immediate or direct descendants of the testatrix's brother or nephew who should bear the name of Roberts-Gawen was void for remoteness or uncertainty or otherwise, and whether the defendant, Charles Gawen Roberts-Gawen, was entitled under such bequest.

2. Whether, if such bequest was void, the trust for the charities was void or valid.

3. Whether the said 7,800*l.* Annuities passed (subject to the life interests of the testatrix's brother and nephew) as part of her residuary estate; and, if so, whether it formed part of the residuary estate of John C. G. Roberts-Gawen or belonged to the defendant, Charles Gawen Roberts-Gawen by virtue of the direction in the will of John C. G. Roberts-Gawen that he should assume the name of Roberts-Gawen.

Mr. Graham Hastings and *Mr. Speed*, for the plaintiffs.—We submit that this gift took effect in favour of the first defendant, Charles G. Roberts-Gawen. The gift is in effect a gift for life to any descendant who, at the decease of the last surviving tenant-for-life, should bear the name of Roberts-Gawen, and the first defendant complies with this description, and is therefore entitled. If, however,

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this is not the correct view, then we contend that the gift to descendants is void for remoteness, and that the gift over to the charities therefore fails. They referred to

Tollemache v. Coventry, 2 Cl. & F. 611; 8 Bligh, N.S. 547;

Jarman on Wills, vol. i. p. 258;

and

Lewis on Perpetuities, p. 478.

Mr. W. Pearson and Mr. Marcy, for the defendant, Charles G. Roberts-Gawen.

Mr. Renshaw, for the executors of the will of Admiral Roberts-Gawen.

Mr. Eddis and Mr. Cadman Jones, for the Society for Promoting Christian Knowledge.—In

Tollemache v. Coventry (ubi supra), and that class of cases, there were clear words which shewed that a succession of takers were intended, and that was the *ratio decidendi* upon which that case proceeded—see

Stuart v. Cockerell, 38 Law J. Rep.

Chanc. 473; Law Rep. 7 Eq. 363;

on appeal, 39 Law J. Rep. Chanc.

729; Law Rep. 5 Chanc. 718;

and

Evans v. Walker, Law Rep. 3 Ch. D. 211.

The gift here is a perfectly valid gift to a descendant of a particular name who should be in existence on the determination of the prior estates, but it is clearly established that under such a gift no person can take who does not bear the name at his birth; he cannot qualify himself by assuming the name. This is clear on authority—see

Barlow v. Bateman, 3 P. Wms. 65;

2 Bro. P.C. 272;

Pyot v. Pyot, 1 Ves. 335;

Leigh v. Leigh, 15 Ves. 92;

and

Carpenter v. Bott, 15 Sim. 606; 16 Law J. Rep. Chanc. 433.

We ask your Lordship to hold that there has been a failure of persons to answer the description in the gift to descendants, and that consequently the gift over to the charities takes effect.

Even if the gift to descendants be void for remoteness, the charities will be entitled under the terms of this gift over which is to take effect either on the death

of any descendant who takes or, in the alternative, if there be no descendant who takes.

No reply was called for.

HALL, V.C.—It is extremely difficult to determine the true construction and meaning of this singular will and to ascertain whether the testatrix intended a single, a collective or a successive enjoyment by the persons taking under this gift. The circumstance that she has mentioned “descendants” in the first part of the disposition would rather tend to the conclusion that several persons were intended to take, either concurrently or successively, but then the expression “any immediate or direct descendants” is not inconsistent with an enjoyment by descendants singly, and it may fairly be said that the expression “from and after his or her decease” points to an intention that one only of the descendants should take. In the forfeiture clause the word “descendants” is again used, but it may be merely intended to indicate that there was to be a forfeiture if any one of the persons there specified—that is, her brother, her nephew or their descendants—should abandon the name of Gawen. Certainly it would be a strange thing to say that under this disposition several descendants might take collectively, but that there should be a forfeiture if any one of those collective takers abandoned the name in question. Moreover, if a collective enjoyment was intended, it might well be that several descendants of different generations might come in under the gift from time to time and take concurrently—a most absurd and unheard-of course of limitation. Upon the whole I rather incline to the view that the gift was not intended to be limited to one particular descendant, but to include a series of descendants, who, it would rather seem—though it is not so expressed—were to take singly, separately and successively as such descendants; that is, according to the ordinary mode of devolution of a landed estate—that is, the eldest lineal descendant, not in age, but according to the ordinary devolution of heirship, being preferred. All these, however, are questions of immense diffi-

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culty, and I am not at all sure, notwithstanding my disinclination to hold the gift void for uncertainty, that that may not be the true solution of this particular case.

But assuming that the gift is not void for uncertainty, it is said that the limitation will take effect in favour of the first defendant, Charles Gawen Roberts-Gawen, as being a person answering the description contained in the gift. The answer which is made to that is twofold: First, it is said that the limitation is invalid because the gift, whether it be a gift to an individual or to more than one, is to a person or persons who would not necessarily be ascertained within the period required by law. For that proposition, *Tollemache v. Coventry* was referred to as an authority; and whatever may be thought of the decision in that case upon the particular facts, and notwithstanding the strictures or explanations, or attempted explanations, of it which we find in the very learned work of Lord St. Leonards on the Law of Real Property, it does rather seem that this case is within what Lord St. Leonards terms the doctrine of that case. But, whether the present case be within *Tollemache v. Coventry* or not, yet this disposition, whether treated as a disposition in favour of several collectively or successively, or of a particular individual, is, I think, covered either by the authority of *Kerr v. Lord Dungannon* (1) or by that of *Boughton v. James*; *Boughton v. Boughton* (2). These authorities seem to me to shew that this gift cannot be supported by reason of the uncertainty as to whether there would be a person having the required name so as to answer the description within the prescribed limit of time. Next it is said that, whether that be so or not, the gift is altogether void on a separate ground, which is, that the intention of the testatrix here was only to benefit persons who had the name of Roberts-Gawen at their birth, and not persons who only assumed that name, and, accordingly, that the present claimant, having only assumed the name,

is entirely outside the scope of this disposition. But, as I intimated in the course of the argument, I cannot think that upon the language of this particular will that is the true view. Looking at the state of the family when the testatrix made her will, considering that Roberts-Gawen was not the family name either of the testatrix or of her brother the admiral, nor yet of his son, unless it could be considered to be the son's family name by reason of his being the son of a man who had assumed that name, and observing that the expression here used is "descendants . . . who should bear the name of Roberts-Gawen only," I come to the conclusion that the testatrix meant to describe and include any person who bore the name, whether by reason of its being his name by birth or by assumption. I therefore hold that argument not to be correct.

Then it is said that if the gift to descendants fails, the gift over to the charities must take effect. The gift over is only "from and after his or her decease"—under which the charities cannot of course take until after the death of some one—"or in case of failure of any such immediate or direct descendants, &c." It follows from what I have said that there has not been any such failure because there is a person in existence who answers the description.

If in point of construction this had been an alternative disposition in such a way as to express that the gift over was to come into operation in any case, whether of the invalidity of the previous gift or of the incapacity of any person to take under it, there might have been something to be said for the contention in favour of the charities. But here the event has not happened in which alone the ulterior disposition was to take effect. The case is not like *Monypenny v. Dering* (3), in which there was an ultimate gift expressed to take effect in case there should be a failure of persons to take under the preceding gift, or in case of no person ever coming into existence.

That is not so here; we have no such express alternative words here applicable

(3) 2 De Gex, M. & G. 145; 20 Law J. Rep. Chanc. 153; 22 *ibid.* 313.

(1) 1 Dr. & W. 509; 12 Cl. & F. 546 (*nom.* *Lord Dungannon v. Smith*).

(2) 1 Coll. C.C. 26; on appeal to House of Lords, 1 H.L. Cas. 406.

In re Roberts.

to the present case. Nor have we here any words which, as a matter of construction, could be said to express that, as in *Doe d. Evers v. Challis* (4). Therefore it appears to me that the claim of the charities under the gift over fails on every ground, as also the claim of the first defendant, Charles G. Roberts-Gawen. The result is, that the 7,800*l.* Annuities passed under the residuary gift in the will of this testatrix to her brother, Admiral Gawen, and subsequently under the residuary gift in the admiral's will.

Solicitors—Tucker & Lake, for plaintiffs and defendants, except the Christian Knowledge Society; Bridges, Sawtell, Heywood & Co., for the Christian Knowledge Society.

MALINS, V.C. } *In re* THE SCOTTISH PETRO-
1881. LEUM COMPANY. ANDER-
Feb. 3. } SON'S CASE.

Shareholder — Prospectus — Change of Directors—Repudiation.

A. applied for shares in a company, on the faith of a statement in the prospectus that G. was the managing director. Before the shares were allotted G. retired, and another director was appointed in his place. A. received from the company the usual letter of allotment, together with a letter informing him of the change which had taken place in the direction; and at once wrote to the company withdrawing his application for shares:—Held, that A. had a right to withdraw his application, and that his name must be removed from the register of shareholders.

Motion.

This was a motion by Messrs. John Anderson & James Anderson to have the register of the above-named company rectified, by removing their names therefrom; and that the company might be ordered to pay the applicants the costs

of and incidental to the application, or that such order should be made as to the Court should seem meet.

On the 19th of October, 1880, the company was incorporated under the Companies Act, 1862 and 1867, as a company limited by shares, with a memorandum and articles of association, and a capital of 30,000*l.*, divided into 3,000 shares of 10*l.* each.

Shortly afterwards a prospectus was issued, stating that A. H. Gibson was the chairman of the directors, and that J. Ross and two other gentlemen were the other directors. These four gentlemen were also named in the articles of association as the first directors.

On the 8th of November, 1880, each of the Messrs. Anderson signed and sent to the company the usual form of application for fifty shares, and paid a deposit of one pound per share.

On the 16th of November each of the Messrs. Anderson received from the secretary of the company the ordinary letter of allotment, and an accompanying letter, informing him "that since the date of his application for shares, Mr. A. H. Gibson and Mr. J. Ross had retired from the board of directors, the former owing to pressure of private business, and the latter owing to Mr. Gibson's resignation," and saying that Mr. Courcier had been elected a director in the place of Mr. Ross.

On the same day each of the Messrs. Anderson wrote to the secretary of the company requesting him to cancel his application for shares, and to return the 50*l.* which he had paid on application, "as it was entirely in consideration of Messrs. Gibson and Ross being directors of the company, and in consequence of Mr. Gibson having stated that he would personally superintend and look after the business as a director, that he ever thought of applying for shares."

On the 19th of November each of the Messrs. Anderson received a letter from the solicitors of the company, saying "that the directors could not release him from the binding contract which had been constituted between himself and the company by means of his application and by the letter of allotment," and asking him

(4) 18 Q.B. Rep. 231; 21 Law J. Rep. Q.B. 237; on appeal to House of Lords, 7 H.L. Cas. 531; 29 Law J. Rep. Q.B. 121.

In re Scottish Petroleum Co.

to pay the money due upon allotment. No allotment money was ever paid; and Messrs. Anderson now moved to have their names removed from the register of shareholders.

Mr. Higgins and Mr. Wellington Cooper, for the motion.—We applied for shares on the faith of the statement contained in the prospectus that Mr. Gibson would be the managing director and that Mr. Ross would be one of the directors. The letter of the 13th of November, 1880 (accompanying the letter of allotment), stating that Mr. Gibson and Mr. Ross had retired from the board, justified us in at once withdrawing our application for shares—

Blake's Case, 34 Beav. 634; 32 Law J. Rep. Chanc. 278.

The other side may rely on

Hallows v. Fernie, 36 Law J. Rep. Chanc. 267; Law Rep. 3 Eq. 520; affirmed on appeal, Law Rep. 3 Chanc. App. 467;

but in that case the main misrepresentation relied upon was the statement in the prospectus that the company possessed six screw-steamships.

They were then stopped.

Mr. Glasse and Mr. Buckley, for the company.—

Blake's Case (ubi supra)

was decided on the ground of a misrepresentation in the prospectus, namely, that the statement contained therein that three persons (naming them) were directors of the company was false. But here there was no misrepresentation in the prospectus. Messrs. Gibson and Ross were in fact directors at the time the prospectus was issued.

The mere fact that after application and before allotment there has been a change in the direction is no ground for relieving a subscriber for shares from his contract—

Hallows v. Fernie (ubi supra);

and that is all that has happened here. That case is directly in point.

Mr. Higgins was not called upon to reply.

MALINS, V.C.—In this case the facts are free from doubt. It appears that,

shortly after the incorporation of the company, a prospectus was issued, in which it was stated that "A. Halliday Gibson, merchant, of Mincing Lane, E.C.," was the chairman of the directors; and I must assume that these two gentlemen, having entire confidence in Mr. Gibson, upon the faith of that prospectus, on the 8th of November, 1880, signed the common form of application for fifty shares each.

It is certainly an extraordinary thing that Mr. Gibson, who had been active in preparing the prospectus and attending meetings of the board, should, on the 9th of November, write a letter—not by himself, but by his solicitors—to the solicitors of the company, saying that "in consequence of other duties and engagements he would not be able to be a director of the company, and consequently not chairman." Then, in consequence of the retirement of Mr. Gibson, Mr. Ross declines to act as a director. Then, on the 13th of November, the company send to each of these gentlemen the ordinary letter of allotment, and an accompanying letter informing him "that since the date of his application for shares, Mr. A. H. Gibson and Mr. J. Ross had retired from the board of directors, the former owing to pressure of private business, and the latter owing to Mr. Gibson's resignation." Now Messrs. Anderson say, and say most reasonably, that they only applied for shares because Mr. Gibson was to be the chairman of the board of directors, and because they had entire confidence in him. Accordingly, on the 16th of November—the same day on which they received the letters of allotment—they, each of them, write to the secretary of the company to say that, having subscribed for shares upon the faith of Mr. Gibson's statement that he would personally superintend the business of the company, they must now decline to have any more to do with it. What could be more proper or reasonable? The company ought at once to have said, "We feel that we cannot now bind you, and we therefore give you the option of withdrawing." But, instead of that, the company persist in trying to fix these gentlemen with fifty shares each.

In re Scottish Petroleum Co.

Blake's Case entirely agrees with my view that, under such circumstances, these two gentlemen are not bound to be shareholders. In that case the Master of the Rolls decided that where a person takes shares on the faith of material representations made by the company, which turn out to be false, he may repudiate them. That decision proceeded on the ground that if a man takes shares on the faith of a prospectus, believing certain persons to be directors of a company—when in fact they are not—he cannot be fixed as a shareholder. *Hallows v. Fernie* is a case in which a man applied for shares on the faith of certain persons being directors. Before the shares were allotted to him, one of these persons had retired from the direction, and another director had been appointed in his place. But in that case, the shares having been allotted to the plaintiff in May, he retained them until September. The circumstances of that case are totally different. There the shareholder had retained his shares, and there was acquiescence on his part. Accordingly I find that the judgment proceeds entirely upon the ground that the plaintiff had retained his shares. Lord Chelmsford, in giving judgment, says, "If the directors were regularly appointed, and had duly allotted the plaintiff's shares, and he retained them, I do not see upon what principle he can now repudiate the contract, because (as he says) he was led to believe that it would be entered into with other parties than those by whom the allotment was made." The Lord Chancellor puts it entirely upon the ground that the plaintiff had retained his shares. So in this case, if Messrs. Anderson had paid the allotment moneys in respect of their shares, and had retained them, they probably could not now be relieved from them.

But here the basis of the contract was taken away before the contract was completed; and they repudiated the shares on that ground, as they had a perfect right to do. It is clear beyond all doubt that these gentlemen are not bound to take these shares. Their names must be removed from the register of members, and the company must pay the costs of the motion.

Mr. Higgins asked for costs as between solicitor and client, by way of "damages" for having their names improperly placed on the register, citing *Pontifex's Case* (1) and *Wood's Case* (2).

MALINS, V.C.—You may have your costs as between solicitor and client.

Solicitors—Sandom, Kersey & Knight, for the motion; Neish & Howell, for the company.

[IN THE COURT OF APPEAL.]

JAMES, L.J.
COTTON, L.J. }
1881.
Feb. 26.

In re HOLLAND.

Practice—*Lunatic Trustee*—*Cestui que Trust absolutely entitled*—*Vesting Order*—*New Trustee appointed*—*The Trustee Act, 1850, s. 3.*

When a sole trustee becomes lunatic, the Court, although the cestui que trust is absolutely entitled to the trust property, will not make an order vesting such property in the cestui que trust, but requires a new trustee to be appointed, in whom it will then vest the trust property.

Petition.

By a deed dated the 21st day of December, 1876, and made between J. Howarth of the first part, B. Collinge and Sarah his wife of the second part, T. Howarth of the third part, and J. Holland of the fourth part, certain leasehold hereditaments were assigned to the said J. Holland, B. Collinge and T. Howarth, their executors, administrators and assignees, to hold the said premises unto the said J. Holland, B. Collinge and T. Howarth, and their executors, administrators and assignees for the residue of a term of 999 years, created by an indenture of lease dated the 5th day of April, 1851, as to one undivided equal third part thereof unto the said J. Holland, his

(1) 15 W. R. 955; 36 Law J. Rep. Chanc. 903.

(2) 42 Law J. Rep. Chanc. 403; Law Rep. 16 Eq. 236.

In re Holland, App.

executors, administrators and assignees in trust for the said J. Howarth, his executors, administrators and assignees; as to one other undivided equal third part thereof unto the said B. Collinge, his executors, administrators and assignees, for the residue of the said term; and as to the remaining one undivided third part thereof unto the said T. Howarth, his executors, administrators and assignees, for the residue of the said term. At the date of this deed J. Howarth was beneficially entitled to the one undivided equal third in the leaseholds so assigned to J. Holland upon trust for him.

In January 1880 J. Holland was found lunatic by inquisition, and one Tweedale was appointed his committee.

J. Howarth now presented this petition, stating the above facts, and that he was still entitled to the said one undivided third share of the leaseholds held in trust for him by the lunatic, and that his interest was free from incumbrances, and he was desirous that the legal estate therein might be vested in him, and prayed for the usual vesting order.

Mr. Hadley, for the petitioner.—Under section 3 of the Trustees Act, 1850, the Court has jurisdiction to make this order.

[*COTTON, L.J.*—It is not the practice of the Court to make such an order. The petitioner having created a trust for some purpose or other now desires, the trustee having become lunatic, to obtain a retransfer of the property to himself—that is, to destroy the trust. I do not feel inclined to do that, even if the Court has jurisdiction. The proper course is to appoint a new trustee in the place of the lunatic.]

If that course is to be adopted, the petitioner will be put to additional expense and inconvenience in obtaining a conveyance to himself. He is the absolute beneficial owner, and it is not suggested that there is any impropriety whatever in what he now seeks to obtain. The evidence can be supplemented on that point, if desired.

The committee did not appear.

COTTON, L.J.—The petitioner must have had some object in creating this trust, and what he now proposes to do will put an end to that trust, and that the Court will never do. I do not for a moment doubt the *bona fides* of the petitioner, but the principle upon which this Court acts under the Trustee Acts is not to administer trusts, but to appoint new trustees, when required, for the purposes of the trusts. The only course, therefore, is to let the petition stand over for a new trustee to be appointed in the place of the lunatic, when the usual vesting order will be made, and the petitioner can then take such steps to put an end to the trust as he may be advised.

JAMES, L.J., concurred.

Ordered accordingly.

Solicitors—Robert Carter, agent for R. & G. Jackson, Rochdale, for the petitioner.

JESSEL, M.R. }
1880.
Dec. 4.

In re HARDMAN.
PRAGNELL v. BATTEN.

Practice—Partition Action—Sale—Parties interested—Service of Judgment—Dispensing with Service—Form of Judgment—Partition Act, 1876 (39 & 40 Vict. c. 17), s. 3.

Where in a partition action, at the request of the parties to the action, but in the absence of some of the other persons interested, a sale is asked for, the Court will not preface the order by a declaration that a sale is more beneficial than a partition.

Form of order for sale under section 3 of the Partition Act, 1876, providing that service of the judgment may be dispensed with.

Motion for judgment.

The action was for the sale under the Partition Acts of freehold and leasehold hereditaments, the plaintiff owning one undivided fifth, and the defendant another

In re Hardman.

undivided fifth. The other three-fifths had belonged to persons now dead, and whose representatives could not be found.

The statement of claim alleged that, having regard to the nature of the property, and the number of persons interested therein, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property amongst them.

The plaintiff and defendant desired a sale, and the action was accordingly heard as a short cause on motion for judgment.

The minutes followed form 3 at p. 1005 of *Seton on Decrees*, inserting the expression of opinion there mentioned. After directing a sale, in case it should be certified that all persons interested were parties, and the directions as to payment into Court, the minutes continued as follows:—

“But in case it shall be certified that some of the persons interested are not parties to this action, any of the persons interested are to be at liberty, after it shall have been certified that all persons who are not parties, and who ought to be served with notice of this judgment, have been so served, or that service of such notice has been dispensed with, to apply at chambers for an order for sale of the said hereditaments. And any party to this action is to be at liberty to apply at chambers for an order dispensing with such service on any person who cannot be served or who cannot be served without expense disproportionate to the value of the said hereditaments.”

The minutes then adjourned further consideration with liberty to apply.

Mr. S. Hall, for the plaintiff.

Mr. Caldecott, for the defendants, submitted that the order should not be prefaced by any expression of opinion, as all persons interested were not parties; and further, that the remainder of the order ought to follow form 3 in *Seton*, and should not conclude as above.

Mr. S. Hall submitted that the form as altered was correct, having regard to the provisions of section 9 of the Partition Act, 1868, and section 3 of the Partition Act, 1876.

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THE MASTER OF THE ROLLS was of opinion that the expression of opinion ought not to be inserted in the absence of the parties interested, because, after service of the notice of judgment, they must, under section 9 of the Partition Act, 1868, be deemed parties as though they had been originally made so. They would be bound by such expression of opinion in the subsequent application for sale, and it was unfair to decide as to the propriety of a sale in their absence. He therefore thought the form in *Seton* under the above circumstances wrong, and that the prefatory opinion should be omitted from the minutes. He also thought that, having regard to section 3 of the Partition Act, 1876, the other alteration suggested in form 3 was correct and ought to remain.

Solicitors—Van Sandau & Cumming, agents for Farrar & Hall, Manchester.

JESSEL, M.R. { *In re THE NORTHERN COUNTIES OF ENGLAND FIRE INSURANCE COMPANY (LIMITED).*
1880.
Dec. 13.

Company—Policy of Fire Insurance—Winding-up—Fire after Winding-up, and before Time fixed for sending in Claims—Proof—Companies Act, 1862, s. 158—Rule 25 of Orders of November, 1862—Judicature Act, 1875, s. 10.

The holder of a policy of assurance against fire granted by a limited company, and which is current at the date of the winding up of the company, is entitled to prove for the full amount of his policy, where a loss by fire exceeding such amount occurs after the winding-up and before the time fixed for sending in claims against the company.

Adjourned summons.

This was a claim by Daniel Macfarlane on a policy of insurance, dated the 8th of May, 1878, for 500*l.*, whereby the Northern Counties of England Fire Insurance Company agreed to insure the buildings of certain joiners' workshops in Paisley

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In re Northern Counties Fire Ins. Co.

against loss by fire in that sum until the 15th of May, 1879, and thenceforward annually as long as the premium was duly paid.

The premium due on the 15th of May, 1879, and to insure the premises for the year ending the 15th of May, 1880, had been paid.

An order for the winding-up of the company was made on the 13th of December, 1879, and was subsequently duly advertised in the *Gazette*. On the 22nd of January, 1880, the property insured was burnt to an extent exceeding 500*l*.

The usual advertisements for claims in the winding-up required all claims to be sent in before the 10th of April, 1880.

The applicant made a claim for the whole of the 500*l*., and the chief clerk, in adjudicating thereon, was of opinion that the claimant was only entitled to prove in the winding-up for the amount of premium for which he might have re-insured his property at the date of the winding-up order.

As numerous other similar claims had arisen in the winding-up, Macfarlane's claim was adjourned into Court as a representative case for the decision of the Judge.

Macfarlane swore in an affidavit filed in support of the claim that the property was not insured in any other office, and that he did not know until after the fire that an order to wind up the company had been made.

Mr. Ohitty and Mr. R. F. Norton, for Macfarlane.—We claim to prove for the full amount of the loss. The claim was a contingent one at the date of the winding-up, when it was impossible to estimate its amount, but during the winding-up the claim matured into an absolute one; and on the authority of

In re The Trent and Humber Company, 37 Law J. Rep. Chanc. 686; Law Rep. 6 Eq. 396; on appeal, 38 Law J. Rep. Chanc. 38; Law Rep. 4 Chanc. 112,

we are entitled to prove for the whole loss. According to

In re The Trent and Humber Case (*ubi supra*)
the 158th section of the Companies Act

relating to contingent claims is not cut down by the 25th rule of the Orders of November, 1862, so as to require the value of the claim to be estimated at the date of the winding-up order; and in fact we claim to prove independently of the 158th section.

They were stopped.

Mr. Davey and Mr. Oswald, for the official liquidator, in opposition to the claim.—We submit that, under the combined effect of section 158 of the Companies Act, 1862, and the 25th rule, the claim of the applicant under his policy ought to have been ascertained at the time the winding-up order was made, and no claim for loss happening afterwards can be entertained. In

In re The Trent and Humber Case (*ubi supra*)

there was a continuing breach, but here an approximate value could have been put on the liability of the company at the time of the winding-up, namely, by estimating what it would have cost to re-insure the property.

This is also a company within section 10 of the Judicature Act, 1875, and therefore, according to your Lordship's decision in

In re The Printing and Numerical Company, 47 Law J. Rep. Chanc.

580; Law Rep. 8 Ch. D. 535,

the rules in bankruptcy as to debts and liabilities provable will apply.

[*Mr. Macnaghten*, *amicus curiæ*, referred to

In re The Withernsea Brick Works, ante, 185; Law Rep. 16 Ch. D. 337.]

In bankruptcy every creditor is required by rule 67 of the Bankruptcy Rules, 1870, to prove his debt by swearing an affidavit according to form 82 of the Bankruptcy Forms, 1870, in which he is required to state that the debtor was "at the date of adjudication and still is indebted to me," &c. That shews that the creditor must set a value on his claim at the date of the winding-up order, which corresponds to the date of adjudication. The rule in a case of marine insurance we submit would be that the Court would estimate the liability at the date of the winding-up by ascertaining

In re Northern Counties Fire Ins. Co.

what a re-insurance at that time would have cost. Similarly, in a case of life insurance, the amount provable would have been the amount it would have taken at the date of the winding-up to effect a re-insurance, having regard to the state of the policy at that time—

Holdich's Case, 42 Law J. Rep. Chanc. 612; Law Rep. 14 Eq. 72.

Mr. Grosvenor Woods watched the case for another policy-holder.

THE MASTER OF THE ROLLS.—I have no doubt about this case. In the first place, not having seen the judgment in the case of *In re The Withernsea Brick Works*, I am in ignorance of it, but from what I understand from Mr. Macnaghten, the judgment was confined to the first words in section 10 of the Judicature Act, 1875, respecting "the rights of secured and unsecured creditors;" and, as I understand, the Court of Appeal held that the 10th section does not incorporate all the rules in bankruptcy, but only the particular rule which we know as the rule in *Kellock's Case* (1). Then I must assume that nothing was said as to the next words, "as to debts and liabilities provable." It does appear to me, until I am better instructed, that the meaning of that section is to make one law for bankruptcy, and for winding-up, when the estate is insolvent, and that it was intended that whatever the rules were in bankruptcy they should apply to windings-up. In that respect I entirely agree with the argument of the respondents. But I cannot say that the words in the section are perfectly clear to my mind. All that I feel now, or ever did feel inclined to say, and I believe I said it both in *The Albion Case* (2) and *The Printing and Numerical Company's Case* is, that it does appear to me that the proper meaning of the section is that, as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, the law of bankruptcy is to apply. The only question is, What is the law of bankruptcy?

(1) 39 Law J. Rep. Chanc. 112; Law Rep. 3 Chanc. 769.

(2) 47 Law J. Rep. Chanc. 229; Law Rep. 7 Ch. D. 547.

Until I am better instructed, I should think section 31 of the Bankruptcy Act of 1869 was pretty plain, and that any liability, contingent at the date of the adjudication which ripened into a debt during the bankruptcy, following the words of the section, was provable. The only argument I have heard against it is this, that it is provable according to the rules, and the rules make a man swear according to the form of an affidavit, which affidavit says he is indebted at the time of the adjudication. But if that were to cut down the meaning of the section, to prevent the creditor putting in an affidavit in any other form, it would be a singular result, because a man could not swear that another was indebted to him at the date of adjudication on a contingent liability, which was to be valued. It would not be true; and the result would be, therefore, that either the man must swear that which was not true, or he must alter the form of the affidavit; and I take it that the latter is the proper thing to do. However that may be, the mere effect of the form not fitting the particular case would not, of course, cut down the plain words of the enactment. It is not confined to a debt due at the period of adjudication, but is extended by express terms to any liability existing at the time of adjudication, which ripens into a debt during the bankruptcy. Now, put winding-up for bankruptcy, which I suppose you must, and any claim in respect of a fire occurring after the winding-up order, which you take to be the adjudication, and even before the claims are sent in in proof of debts, certainly before the close of the winding-up, would be provable. Of course the claim would not disturb previous dividends. If, therefore, the present question depended on the law of bankruptcy, I should be of opinion that the claimant was entitled to prove for the full amount of the damage caused by the fire.

The difficulties in adopting the other view are something extraordinary. In the first place, there is no debt due at the time of the adjudication. No doubt a man may in certain cases take a declaration of insolvency or an adjudication in bankruptcy as being a refusal to per-

In re Northern Counties Fire Ins. Co.

form the contract, and at his election may treat it as a breach of contract; but that is by election, and this man never made any, so that there would be no debt at all according to that argument. It appears to me, as I have said before, that that argument is unanswerable.

Then if it depended on the Winding-up Acts I should come to the same conclusion. The 158th section of the Companies Act, 1862, does not appear to me to be pointed to the proof of an ordinary debt actually due. The 107th and other sections of the Act seem to assume that ordinary debts are provable without any statutory enactment being necessary; and the 158th section is evidently framed with a view of extending the right of proof to debts which would not otherwise be provable. The 25th rule is limited to the proofs admissible under the 158th section—that is, to a certain class of proofs not otherwise admissible. It therefore appears to me that if this were a debt which without the 158th section would be provable, it is still provable in the winding-up. I may then make a further observation, that even if that were not the true view of the Act, I think the view of the rule taken in the case to which I have been referred, of *In re The Trent and Humber Company*, by the then Lords Justices, would lead me to the same conclusion, for they obviously think there, that if before the time of the proof the contingency has happened so that the debt is exactly ascertained, it may still be proved—that is, that the rule is not wanted, because you can ascertain the amount of the debt without it.

In every way it appears to me that this is a demand provable, and that the claim ought to have been admitted. I shall therefore make a declaration that the applicant is entitled to prove for the full amount of 500*l*.

Solicitors—Gatliff & Howse, for claimant; Clarke, Rawlins & Clarke, for official liquidator.

FRY, J. } THE LANDOWNERS' WEST OF
1880. } ENGLAND DRAINAGE AND EN-
Dec. 9, 10, } CLOSURE COMPANY v. ASH-
11, 13. } FORD.

Act of Parliament—Certificate Evidence—Company—Borrowing Powers—Debentures—Formalities—Mortgage—Deposit of Deeds—Companies Clauses Act, 1845 (8 & 9 Vict. c. 16), s. 42—Marshalling.

A statutory certificate under seal of execution of works given by directors of a company for the purpose of entitling the company to a charge,—Held, prima facie evidence only in favour of the company of the facts certified.

A lender to a company was held not bound to see that the loan had been duly authorised by a meeting.

The deposit of deeds of a company in respect of a past debt was held a mortgage to the extent of the company's power to borrow on mortgage then unexhausted, but only entitled to be paid pari passu with the mortgagees of the company's whole assets, to the extent of the particular assets.

The plaintiff company were incorporated by Act of Parliament for the purpose of reclaiming, draining and irrigating lands and executing similar undertakings. They were empowered to enter into contracts with "owners of limited interests in lands."

It was provided by the 34th section of their Act of Parliament (11 & 12 Vict. c. cxlii.) that after certain formalities for the protection of persons interested in the land and entitled to object had been complied with, and "after the due execution of the works mentioned in any such contract as aforesaid, or of any part of such works, such execution, together with the amount due in respect of the same being duly certified by three directors of the said company, under the seal of the said company, the said company shall be entitled to, and shall have a lien or charge upon the lands so drained, irrigated, warped, embanked, reclaimed, enclosed or improved as aforesaid, for the moneys or money mentioned in such absolute order or orders, or in such certificate of such three directors as aforesaid, as the case may be, and the same

Landowners' West of England Drainage and Enclosure Co. v. Ashford.

lands shall thenceforth be and continue liable to the payment of the said several moneys respectively to the said company, and such lien and charge shall have priority over every other charge or incumbrance affecting the same lands, except ground rent and rent-charges."

This action was brought by the company in liquidation and their liquidator to enforce a lien they claimed on certain land in Chichester Harbour, which had been reclaimed by them, acting under a contract made with Mary C. Pocock, one of the defendants, and the owner in possession of the fee in the property, subject to certain charges and incumbrances.

The defendants to the action were, exclusive of certain persons who had been dismissed—first, holders of debentures issued by the company; secondly, Mary Charlotte Pocock, the person with whom the plaintiff company had contracted in her capacity of owner of a limited interest in the land; thirdly, the West of England and South Wales District Banking Company (in liquidation), who claimed a lien in the plaintiff's interest in the land by virtue of the deposit of deeds referred to below; and, fourthly, W. Paxton and Robert Andrew Gibbons, who claimed a charge in the nature of a vendor's lien on the property in priority to everyone else, and one Thomas Pocock, who claimed an interest prior to the company.

The contract between Mrs. Pocock and the plaintiff company was dated the 26th of April, 1869. It provided for the reclamation of certain land at the price of 39,430*l.* 1*s.* 6*d.* She also executed a deed of mortgage to the plaintiff company, dated December, 1869, by way of further security.

On the 6th of February, 1872, a certificate made and entitled "In the matter of the plaintiff's Act, and in the matter of the contract of April, 1869," was executed by three of the directors of the company and duly sealed, by which it was certified that a portion of the works specified in that contract had been duly executed under the company's Act, and the contract, and that the sum of 20,000*l.* had been expended, and was due and payable

to the plaintiff company in respect of the execution of the works and the expenses attendant thereto.

In October, 1872, another similar agreement between the company and Mrs. Pocock was entered into.

The plaintiff's Act incorporated the Companies Clauses Act, 1845, so far as it was not varied or altered by or not inconsistent with the purposes and provisions of their special Act, and by its 46th section an express power to borrow on mortgage and on land was provided in the following terms: "That it shall be lawful for the company to borrow on mortgage or bonds such sums of money as shall from time to time be authorised to be borrowed by an order of a general meeting of the company, not exceeding in the whole the amount of one-third of the subscribed capital of the company then paid up, and for securing the payment of the money so borrowed, with interest, to mortgage the profits of the company and any lands of the said company, and, if they think fit, the future calls upon the shareholders of the company, or to give bonds in manner mentioned in the Companies Clauses Consolidation Act, 1845."

Prior to August, 1872, the company issued debentures to the extent of 7,570*l.*, by which they assigned to the lenders "the undertaking, the profits thereof and the whole of the lands of the said company and all future calls," and "all tolls and sums of money arising by virtue of" their Act.

On the 3rd of August, 1872, the company had overdrawn their account in the West of England and South Wales District Bank. On that day they deposited with the bank the contract with Mrs. Pocock and the mortgage by her, and affixed their seal to the following memorandum:—

"To the West of England and South Wales District Bank.

"The West of England Land Drainage and Enclosure Company hereby deposit in your hands deeds of property as specified below as security for moneys now due or which hereafter may become due from the said company to the said bank, and doth hereby undertake to execute, whenever called upon to do so, at its own expense, any

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further security or mortgage which may be required, the principal money to be ultimately recoverable not to exceed thirty thousand pounds; and the said company doth hereby charge the property specified in the said deed with payment of the said sum."

At that time the paid-up capital of the company was 30,600*l.*

The amount advanced by the bank at that time was upwards of 23,000*l.*, which was subsequently increased to upwards of 25,000*l.* The transactions with the West of England Banking Company had not been authorised by a general meeting of the plaintiff company. The bank was also the holder of some of the debentures issued by the plaintiff company.

The plaintiffs alleged by their statement of claim that, in addition to the 20,000*l.* mentioned above, they had expended in works other large sums which had been duly certified, and that since they had been put into liquidation the company had spent money, under the direction of the Court, in necessary works for the preventing an irruption of the sea on the mortgaged property.

They claimed a declaration that they were entitled to a first charge for the 20,000*l.*, an account of what further sums were due to them under the contract and for salvage. Counter-claims were put in by various defendants to enforce the charges they claimed.

In the first place, the questions at issue between the plaintiff company, Mrs. Pocock and her incumbrancers, were argued in order to determine whether the plaintiffs had any lien on the lands, and what was the position of such lien as to priority. And on this part of the case the question arose as to what was the effect of the certificate of the directors.

Mr. North, Mr. Lumley Smith and Mr. Dauney, for the plaintiffs, argued that the directors' certificate was conclusive of the work having been duly done.

Mr. Millar and Mr. Phipson Beale, for Mrs. Pocock; Mr. Thomas Pocock, in person; and Mr. Davey and Mr. Northmore Lawrence, for Messrs. Paxton and Gibbons, argued *contra*.

Mr. North replied.

Fry, J., after stating the position of the parties, and holding that Mrs. Pocock was a limited owner, said—Then the next question which arises upon the 34th section is this: Is the certificate given by the directors conclusive evidence of the two things stated in it, namely, the due execution of the works; and, secondly, the amount expended in the due execution of the works? The Act is silent as regards the certificate being evidence on the particular state of circumstances which arise here—that is, against persons having prior liens or charges on the property. It does contain a provision making it conclusive evidence in the event of the limited owner raising money on his own estate for the purpose of paying off the charge, and that fact opens an argument both ways. It has been contended on the one hand, if that is conclusive evidence in that case it must be, *a fortiori*, conclusive evidence in the other. On the other hand, it has been said that the expression in the one case imports silence in the other, and makes a difference in the two cases. I think that that section does not throw much light on the question whether the certificate is or is not conclusive evidence. It is important to observe that the persons who are to make the certificate are persons interested themselves. They fill no judicial or quasi-judicial position between the parties. They are themselves the directors or agents of the company which is to obtain the charge. I am bound to say I see no reason why, as against third persons who may be affected by that certificate, the certificate should be itself conclusive evidence of the things that are stated therein, the Act being silent as to that. According to my view, the words of the section, taken by themselves, import two things before the lien arises, namely, the due execution of the works; and, secondly, the certificate stating the due execution of the works; but I am inclined to consider that the true view is that the certificate is *prima facie* but not conclusive evidence of the due execution of the works, and of the amount which has been laid out upon them. I perhaps ought to observe, in addition, that the directors were under no obligation to make any

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statutory declaration, or to make any solemn affirmation of the truth of the certificate. They merely prepared the certificate, and filed copies of it in a certain manner indicated in the Act.

[His Lordship held as a matter of fact that the terms of the certificate were untrue, the works not having been properly executed, and that, therefore, the lien of Messrs. Paxton and Gibbons had not been displaced. He held, however, that Mrs. Pocock by the terms of her contract, and by not objecting to the certificate, had precluded herself from objecting as to the 20,000*l.*, and therefore that as against her the plaintiffs were entitled to a charge on the property to the extent of 20,000*l.* and interest.]

Mr. Fischer and *Mr. Cozens-Hardy*, for debenture-holders, were stopped in their argument that the debenture-holders had a charge on the interest of the company in the lands the subject of the action, and that the plaintiff company had no power to borrow except that provided by the 46th section of their Act.

Mr. Rawlins, *Mr. Daw*, *Mr. Kekewich*, *Mr. Hornell* and *Mr. Davenport*, for other debenture-holders.

Mr. Cookson and *Mr. Romer*, for the West of England Banking Company, contended that the plaintiff company had from its nature and necessities power to borrow and mortgage its property for the purpose of carrying out its operations, and the deposit of deeds gave a first charge on the subject of those deeds—

Re Hamilton's Iron Works; ex parte Pitman, Law Rep. 12 Ch. D. 707;

Re The Florence Land Company; ex parte Wingfield, 48 Law J. Rep. Chanc. 137; Law Rep. 10 Ch. D. 530;

Chambers v. The Manchester and Milford Railway Company, 5 B. & S. 588; 33 Law J. Rep. Q.B. 268.

That the deposit was made in respect of a past debt was immaterial—

Re The Patent File Company; ex parte The Birmingham Banking Company, 40 Law J. Rep. Chanc. 190; Law Rep. 6 Chanc. 83.

It did not affect the validity of the charge that it had not been sanctioned

by a meeting. If that sanction was proper, the neglect of it did not affect an outside person, who could not look into the internal management of the company—

Fountain v. The Carmarthen Railway Company, 37 Law J. Rep. Chanc. 429; Law Rep. 5 Eq. 316;

The Bank of Hindustan; Campbell's Case, 43 Law J. Rep. Chanc. 1; Law Rep. 9 Chanc. 1.

If the banking company were not entitled to priority, at any rate to the extent of the plaintiff company's power to borrow on debenture, so far as it was unexhausted, the bank had a charge on this part of the property *pari passu* with the other debenture-holders; and the other debenture-holders who had a charge on all the property of the plaintiff company must bring the other part into account before coming upon this part of it—

Bowen v. The Brecon Railway Company, 36 Law J. Rep. Chanc. 344; Law Rep. 3 Eq. 541.

Mr. Fischer replied.

Fry, J., said—I read the 46th section of the special Act as being a variation of and substitution for the 38th section of the Companies Clauses Consolidation Act; and with that variation it appears to me the subsequent clauses of the general Act may be read into and read with the special Act.

Now, what happened was this: On the 3rd of August, 1872, the company borrowed from various debenture-holders, represented by counsel before me, a sum of 8,870*l.* They had a capital subscribed and paid up to the extent of between 34,000*l.* and 35,000*l.*, and they had therefore, to use a common expression, a margin in their borrowing powers which was not exhausted. At the same date they were indebted to their bankers, the West of England Bank, in the sum of 23,350*l.* 19*s.* 9*d.*, or possibly a little more than that; and on that day they executed the deed which has been before me, and the terms of which are set out by the plaintiffs in the statement of claim.

Now, the first question is with regard to the rights of the West of England Bank

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against the other debenture-holders. The plaintiff company concedes that the debenture-holders are entitled to a charge upon the particular assets in question. The West of England Bank pleaded, and, I think, rightly pleaded, that the debenture-holders were entitled to a charge on the whole property of the company. It appears to me, therefore, that any detailed enquiry into the operation of the charge given in favour of the debenture-holders is not necessary. I will only say this: it appears to me that the charge is on all the lands of the company; and I think that, according to the true construction of those words, as against the grantors of the security, it must be held to cover the charges on the land, the subject of this litigation. I hold, therefore, upon the admissions and the reason of this case, that the debenture-holders have a charge upon the asset in question.

The second question that arises is with regard to the priority of the West of England Bank over these debenture-holders. It has been said that, notwithstanding the provisions I have referred to, the plaintiff company retains an inherent power to borrow money in a manner other than that pointed out by the Companies Clauses Consolidation Act and their own special Act, to an extent other than that pointed out by those Acts, and upon a security other than that indicated in those Acts. Having that inherent power, it is said they validly exercised it by creating a special charge upon a special asset by the deed of December, 1869. In my judgment the plaintiff company had no such power.

Now the question has arisen for decision more than once, and a very large number of *indicia* of indebtedness were, we know, issued for money borrowed under the name of Lloyd's bonds; and in the case which determined those rights, of *Chambers v. The Manchester and Milford Railway Company*, Mr. Justice Crompton in his judgment, having referred to the 8th section of the special Act, said this: "It is said that this leaves untouched the power of borrowing money on bond or by simple contract, so that, although the company are only bor-

rowing that sum on mortgage, the Legislature have left to the company a larger power of borrowing on other security; but it is a strange construction that, by an enactment giving them a limited express power of borrowing, they are to have a general implied power of borrowing. I agree with Mr. Lush that the more natural construction is that this is an enabling section, giving power to the company which it would not otherwise have possessed, and that the directors cannot borrow money in any other way so as to bind the company." That exposition of the law, so far as I know, has always been followed ever since.

Then the question did arise, whether the overdrawing by the company of the account at their bankers' to a small extent for the immediate necessities of the company was or was not prohibited by the effect of that section. Mr. Justice Crompton expressed his opinion that it was, saying, "I think Mr. Lush gave the right answer, that if a company were permitted to overdraw a small amount, there is no reason why they should not do so to any extent to which their credit would reach." I would only make this further observation, that, inasmuch as it is impossible for a company to borrow upon security other than that provided by the section of the Act, so also it is impossible for them to create a security for money already borrowed, which would only be another way of getting round the prohibition of the Act. The cases that have arisen on Lloyd's bonds, as they were called, have illustrated that, because they were acknowledgments of what was represented as an antecedent debt. I hold, therefore, there is no such inherent power in the company, and that the only claim the bank can assert is under the Act of Parliament.

Then arises the question whether they have any such claim. Now, in the first place, it appears to me that I must take the deed which was executed in favour of the bank as charging some of the lands of the company, because it creates a charge upon a deed which conveyed an interest in the lands of the company. Then the debenture-holders raise several objections to the bank's claim. They say,

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in the first place, that the 46th section requires that the amount to be borrowed shall be specified in an order of the general meeting of the company, and that no such order was given. I think the cases which have been referred to shew that that is a directory portion of the statute, and not one which it is obligatory on the lender to shew has been performed as against the company, but that the company borrowing money must be taken to have done all that was necessary to give themselves that power. Then is it a provision which the creditors of the company—I mean the debenture-holders of the company—can insist upon? The case I was referred to, before Lord Hatherley, of *Fountain v. The Oarmarthen Railway Company*, does shew that the provision with regard to the general meeting is inserted in the Act of Parliament for the benefit of the shareholders, and not of the creditors. They could not stop the company exercising that power, and therefore it does not interest them.

The next objection is, that the 41st section of the Companies Clauses Act provides that every mortgage for securing money shall be by deed under the common seal, duly stamped, and wherein the consideration shall be truly stated. Now, is the consideration truly stated in this instrument? It is not in express terms stated, but I think that the recital of the deposit as a security for moneys now due, or which might thereafter become due from the company to the bank, does disclose to me the true consideration, namely, forbearance in respect of an existing debt. Again, I ask myself, Is this direction with regard to consideration one which is absolutely obligatory, and which, if it does not appear, voids the instrument? I think it is not. I think that the consideration is required to be truly stated for the purpose of the stamp, and that the real object of the 41st section is to see that the revenue gets its fair share of money out of this transaction; and here the amount upon which the stamp is to be calculated is disclosed by the deed, because 30,000*l.* is the extent to which the deed is to go, and the amount which would be ultimately recoverable

upon it, and upon that amount the stamp, of course, will require to be paid. Therefore that difficulty seems to me not to avail the debenture-holders.

Then, in the next place, it is said that the 42nd section requires the distribution of the moneys realised for distribution among the debenture-holders, in proportion or according to the respective sums in the mortgages mentioned, to be advanced by such mortgagees respectively. There, again, it appears to me that is a directory clause, and that it would not avoid or make void a mortgage because it did not shew the amount advanced for such mortgage in terms. If it is ascertainable, it is enough; and here the main object of giving notice to everybody who takes after this mortgage, of the extent of it, is satisfied by the declaration that it covers the amount. Lastly, the mortgage is open to this observation, that it does not include the whole lands of the company, and it includes one only. But, according to my view of the 42nd section, every mortgagee who comes in under the Act, whatever the property charged in the mortgage may be, has to bring that property into hotchpot with all the other mortgagees; and all the claims, therefore, are consolidated, and all the subject-matters of the mortgages are consolidated; and upon the whole subject-matter the whole charge is made, and the whole proceeds of the subject-matter are distributed *pari passu*.

I hold, therefore, that to the extent of the difference between 8,870*l.* and one-third of the capital subscribed for and paid up on the 3rd of August, 1872, and no further, the bank have a mortgage debt *pari passu* with the other debenture-holders.

Solicitors—J. C. Stogdon, for plaintiff; Brownlow & Howe; J. H. Hortin; Clarke, Woodcock & Ryland; Ovans, Bayley & Adams; J. B. Batten; Longcroft & Myers; Coode, Kingdon & Cotton, and H. Philbrick, for defendants.

MALINS, V.C. }
1880. } THE MARQUIS OF CAMDEN
Dec. 1, 2. } v. MURRAY.

Will—Sale of Infant's Estate—Discretion of Trustees—Request of Guardians.

Where an infant's estates are vested in trustees, with power to them to sell at the request in writing of the guardians of the infant, the Court will not control the discretion of the trustees and compel them to sell the estates against their wish, when they are honestly exercising their powers, and are not guilty of any mala fides.

George, second Marquis of Camden, by his will dated in August, 1856, devised his estates in Kent and elsewhere to J. Pratt and H. Murray, to the use of his eldest son, the Earl of Brecknock, for life, and his first and other sons successively in tail male, with remainder to the use of his second son, Lord George Pratt, for life, and his first and other sons in tail male, with divers remainders over; and it was provided that it should be lawful for J. Pratt and H. Murray and the survivor of them, and the executors and assigns of such survivor, at the request in writing of the person who should for the time being be in the actual possession of or entitled to the receipt of the rents and profits of the estates, or, in case the person or persons who, if of full age, would for the time being be so entitled as aforesaid, should be under the age of twenty-one years, then, at the request in writing of the guardian or guardians for the time being of such person or persons, to convey by way of absolute sale all or any of the estates thereinbefore devised, and the inheritance thereof in fee-simple, as therein mentioned, and that the money to arise by such sale should be applied either towards discharge of the principal sums of money (if any) which should then for the time being be a charge upon or affect the estates for the time being subject to the limitations thereinbefore contained, or in the purchase of such other hereditaments as therein mentioned.

The testator died in August, 1856, and was succeeded by his eldest son, the Earl of Brecknock, who died in 1872,

leaving two children, the infant plaintiff (the present Marquis of Camden, who was born in February, 1872) and one daughter.

This suit was commenced in 1875 for the administration of the estate of the testator. J. Pratt had died, and one Hope had been appointed in his place. The guardians of the infant, who had been appointed by the Court, were originally the Marchioness of Camden (the mother of the infant), the Duke of Marlborough and Mr. Stewart. Mr. Stewart having retired, and the marchioness having married Captain Green, he was added as guardian by the Court in the place of Mr. Stewart.

The guardians had called upon the trustees to sell part of the estates in Kent, called the Wilderness estate; but one of the trustees, Mr. Murray, was opposed to the sale; and it was also opposed by Lord George Pratt, the second tenant-for-life under the will of the testator.

This was an application, by way of adjourned summons, that the trustees might be directed to sell the Wilderness estate.

Mr. Glasse and Mr. Alexander, in support of the application.—The evidence shews that the estate is now let at a rental of 1,700*l.* only, and that if it were sold it would probably fetch 190,000*l.*, and there would consequently be an increase of income of 4,000*l.* The only objection to its being sold is a sentimental one. The sale would be greatly for the benefit of the infant, as when he came of age there would necessarily be large accumulations of income.

Mr. Bristowe and Mr. Cust, for Lord George Pratt.—The present income of the estates is sufficient to meet all the expenses, and to leave a surplus.

The only ground stated for the sale is, that it will produce an increase of income; but the Court has no authority or power to sell the real estate of an infant simply because it would be beneficial to him—

Book v. Warth, 1 Ves. sen. 460;

Calvert v. Godfrey, 6 Beav. 97; 12

Law J. Rep. Chanc. 305.

The trustees are not agreed as to the

Marquis of Camden v. Murray.

propriety of the sale; one of them objects to it, and the Court will not compel trustees to exercise a power which is not compulsory upon them. The Court will never interfere with the discretion of trustees when it is fairly and honestly exercised.

Tabor v. Brooks, 48 Law J. Rep. Chanc. 130; Law Rep. 10 Ch. D. 273;

Oostobadie v. Oostobadie, 6 Hare, 410; 16 Law J. Rep. Chanc. 259;

Re Beloved Wilkes' Charity, 3 Mac. & G. 440; 20 Law J. Rep. Chanc. 588.

Mr. Pearson and Mr. Coltman appeared to watch the case on behalf of Mr. Murray, but did not take part in the argument.

Mr. Glasse, in reply.

MALINS, V.C., after stating the facts, proceeded—Now then, if the trustees do not agree in the proposed sale, as they do not, as Mr. Hope cannot sell without Mr. Murray, and as he will not concur in the sale unless he is obliged, is there any case shewn me why I should control him? He will not concur in selling unless he is controlled. Is a case established for any control? That the Court will exercise a control over trustees on proper occasions, and will oblige them to do in certain cases that which they themselves are unwilling to do admits of no doubt; in certain cases, but not in all cases, because if their discretion is absolutely uncontrollable, I should not interfere. That I recently decided in *Tabor v. Brooks*, where I felt myself bound to come to the conclusion on the authorities and the principles of the Court that I could not control the trustees, as there was on their part no *mala fides*, and they were honestly exercising their powers.

If Mr. Murray, who is the surviving trustee appointed by the testator, in the honest and *bona fide* exercise of his discretion, thinks that a case is not established for the sale of this estate, on what principle am I to control him? I certainly should only be justified in doing so on being satisfied that there was an absolute necessity for selling the estate, for the Court will not sell an infant's estate

unless there is an absolute necessity for so doing. No doubt in this case the future pecuniary interests of the infant would be promoted by selling the estate now for 190,000*l.*, but is there any absolute necessity for the sale? There is not, if there are means of keeping up the family residence and paying the charges and so forth; and I am satisfied on the whole that there is enough, and that therefore no case has been made out for the necessity of the sale.

Now, with regard to the future, I may assume that this infant when he comes of age may, like his uncle, Lord George Pratt, prefer the estate to the money. If I compelled the trustees to sell his estate, he might think when he came of age that it was the very place he should have preferred to live in if the choice had been left to him. Ought he not then to have the opportunity of deciding for himself? When the matter was before me in chambers, I took the view that it should be left till the infant attained twenty-one, and then for him to act as he thinks fit, and that is the view I take now. I cannot tell what the infant may think when he comes of age. It is my duty to preserve his estate, and the estates of all infants, in the condition in which the ancestor has left them, unless some overwhelming necessity is shewn for their conversion, and here there is no such necessity. I think the case wholly fails in establishing the necessity for a sale. The estate will not be less valuable when the infant comes of age than it is now. When that time comes he can keep it if he cares about it, or he can sell it; it is a question for him to decide, and for his decision I intend to leave it. The application for an order for sale must therefore be refused.

Solicitors—Capron, Dalton, Hitchins & Brabant, for plaintiff; Farrer, Ouvry & Co., for defendant; Nicholl, Manisty & Co., for Lord George Pratt.

[IN THE COURT OF APPEAL.]

BANKRUPTCY. }
 JAMES, L.J. }
 COTTON, L.J. } *In re SHARPE; ex parte*
 LUSH, L.J. } *MATTHEWS.*
 1881.
 Feb. 17.

*Liquidation Resolutions—Registration—
 Small Amount of Assets—Execution Creditor.*

The statement of affairs of a liquidating debtor showed his unsecured debts at 1,758l., and his net assets at 43l. The requisite majority of his creditors duly passed resolutions for liquidation by arrangement, and granted him his discharge. The registration of the resolutions was opposed by a creditor, who was in a position to sign judgment and levy execution, on the ground that there were no substantial assets, and that the proceedings were an abuse of the procedure of the Court:—Held, that the resolution must be registered.

Ex parte Early (Law Rep. 13 Ch. D. 300) followed.

Appeal from the decision of the Chief Judge.

In October 1880 W. H. Sharpe, a commission agent, filed his liquidation petition in the Brentford County Court. From his statement of affairs it appeared that his unsecured debts amounted to 1,758l., and his net assets amounted to 43l.

On the 11th of November the first meeting of creditors was held, when resolutions were duly passed by the statutory majority that the affairs of the debtor should be liquidated by arrangement, and a trustee was appointed, whose remuneration was fixed at 10l., and the debtor was granted his discharge.

J. Matthews, a creditor for 182l., who had commenced an action for his debt, and was entitled to sign judgment, and had been restrained by injunction, opposed the registration of the resolutions on the ground that there were no substantial assets, and that the proceedings were an abuse of the process of the Court. The Registrar overruled the objections and directed the resolutions to

be registered, and his decision was affirmed by the County Court Judge, and upheld by the Chief Judge on appeal. J. Matthews again appealed.

There was some evidence to show that the total amount of the debtor's assets as shown by the statement of affairs was very much under-estimated.

Mr. Yates Lee, for the appellant.—The Chief Judge followed

Ex parte Early (*ubi supra*), but that case is distinguishable. There the assets were sufficient to pay 1s. in the pound, and there was an execution creditor who would have swept off the assets if the resolutions had not been registered. Here the assets are infinitesimal, and, after payment of the liquidation expenses, there will be nothing or next to nothing left for a dividend. The debts of the assenting creditors amount to about 1,300l., of which 600l. is one debt, and the debts of the dissenting creditors amount to about 260l. The majority of the creditors are acting from motives of kindness to the debtor, and to the detriment of the dissenting minority. The case is within the principle of

Ex parte Staff, 44 Law J. Rep. Bankr. 137; Law Rep. 20 Eq. 775;

Ex parte Sir W. Russell, 44 Law J. Rep. Bankr. 42; Law Rep. 10 Chanc. 255;

Ex parte Aaronson, 47 Law J. Rep. Bankr. 60; Law Rep. 7 Ch. D. 713.

The object of the opposition is that the debtor should be made a bankrupt and examined as to his assets, and that the proofs should be investigated. The appellant does not desire to seize the assets for himself, and will undertake, if the appeal be allowed, to file a bankruptcy petition without delay.

Mr. Winslow and *Mr. E. C. Willis*, for the debtor.—The simple question is, Were the resolutions passed *bona fide*? That is a question of fact, and if the Court allows the appeal it will be overruling a question of fact which three Courts have decided in favour of the respondents. It is not suggested here that any creditor is a relative or personal friend of the debtor, or that the petition

In re Sharpe; ex parte Matthews (App.), Bankr.

was not honestly filed. The offer to present a petition in bankruptcy is now made for the first time, and is, we submit, intended to give colour to the appeal. The case is really covered by the decision in

Ex parte Early (ubi supra).

There, the opposing creditor was an execution creditor. Here, the appellant is in a position, should the appeal succeed, to sign judgment and levy execution at once.

Mr. Yate Lee, in reply.

JAMES, L.J., said—It appears to me that it is impossible to find any sound distinction between this case and *Ex parte Early*. In the early cases that have been referred to, the Court came to the conclusion that the resolutions had not been passed in the interests of the general body of the creditors, but for the sole benefit of the debtor. In *Ex parte Early* there was a contest between one creditor and the other creditors, who desired to have the assets, small as they were, distributed equally between all the creditors rather than to allow them all to be swept away by one execution creditor. That case is precisely similar to the present. I am of opinion, therefore, that the appeal should be dismissed with costs.

COTTON, L.J., said—I am of the same opinion. I can see no substantial distinction between this case and *Ex parte Early*. I think, therefore, that the resolutions must be registered, but I come to that conclusion with reluctance.

LUSH, L.J., said—I concur in the judgment of the other members of the Court that this case is exactly within the principle of *Ex parte Early*; and even if there had been no such authority, I should, on the facts here, have come to the same conclusion as the Court did there.

Solicitors—*Spyer & Son*, for appellant; *Greenfield & Abbott*, for respondent.

HALL, V.C. }
1881. }
Feb. 17. }

In re DOWSE.
DOWSE v. GLASS.

Will—Satisfaction—Annuity secured by Bond—Subsequent bequest of Annuity by Will.

A testator, who had for valuable consideration covenanted by bond to pay an annuity of 10*l.* to H. D. "so long as she should continue the widow of J. D.," by equal half-yearly payments on the 16th of June and the 16th of December, subsequently by his will bequeathed to her "an annuity of 30*l.* if she should so long continue a widow":—Held, that the circumstance that the annuity bequeathed by the will would not become payable until a year after the testator's death, while that secured by the bond was payable half-yearly, was sufficient to rebut the presumption that the one was intended by the testator to be in satisfaction of the other.

The testator, John Dowse the younger, by his bond dated the 16th of June, 1870, covenanted with the plaintiff, Hannah Dowse, in consideration of the conveyance by her to him of her estate and interest in certain freehold premises, and of the assignment to him of certain household furniture and effects (to which several properties she was entitled under the will of John Dowse the elder), to pay her "during her life, if she should so long continue the widow of John Dowse the elder, an annuity of 10*l.* by equal half-yearly portions on the 16th of June and the 16th of December in every year."

Subsequently, by his will dated the 1st of April, 1878, the testator gave to the plaintiff, Hannah Dowse, "an annuity of 30*l.* if she should so long continue a widow." He also gave to the plaintiff, Sarah Lewis Dowse, an annuity of 70*l.* if she should so long continue his widow, and appointed John Glass and the defendant executors of his will.

The testator died on the 1st of April, 1878.

John Glass died on the 20th of June, 1879.

This action was brought by the two annuitants against the defendant, the executor, claiming, amongst other things,

In re Dowse.

a declaration that the annuity of 10*l.* a year secured to the plaintiff, Hannah Dowse, during her life or widowhood, by the bond of the 16th of June, 1870, was not satisfied by the gift to her of the annuity of 30*l.* by the will of the testator, but that she was entitled during her widowhood to both annuities, and also, if and so far as might be necessary, the administration of the real and personal estate of the testator under the direction of the Court.

Mr. Northmore Lawrence, for the plaintiffs.—Although no doubt the general rule is, that a legacy greater than or equal to a debt is *prima facie* a satisfaction of the debt, yet the Court looks upon the rule with disfavour, and will lay hold of minute circumstances to take a case out of it—see

Clark v. Sewell, 3 Atk. 96;
Haynes v. Mico, 1 Bro. C.C. 129;
Richardson v. Elphinstone, 2 Ves. 462;
Adams v. Lavender, 1 M'Cle. & Y. 41;
Atkinson v. Webb, Prec. Chanc. 236;
Bartlett v. Gillard, 3 Russ. 149;
Fairer v. Park, 45 Law J. Rep. Chanc. 760; Law Rep. 3 Ch. D. 309;
Mathews v. Mathews, 2 Ves. sen. 635;
 2 Wh. & T. L.C. 382.

In the present case the annuity secured by the bond was payable half-yearly, while that bequeathed by the will would, in the ordinary course, not become payable until a year after the testator's death; and it is submitted that the difference between the times at which the two annuities were payable is a circumstance sufficient to rebut the presumption that the second annuity was intended by the testator to be in satisfaction of the first.

Mr. J. Pemberton Leach.—I submit that the difference which is relied upon is too slight to take this case out of the general rule. In all the cases in which the difference in point of time of payment has been held to rebut the presumption of satisfaction, the time has been fixed by the testator himself, and not, as in the present case, left to be determined by accident. He referred to

Atkinson v. Littlewood, Law Rep. 18 Eq. 595,

and

Theobald on Wills, p. 437;

and to

Weall v. Rice, 2 Russ. & M. 251; 9

Law J. Rep. (o.s.) Chanc. 116,

as shewing what difference is too slight to rebut the presumption.

No reply was called for.

HALL, V.C.—I think that the difference in this case between the interest of the annuitant under the bond and under the will, in respect to the times at which she was entitled to call for payment, is such as to prevent me from holding that the one annuity was intended by this testator as a satisfaction or discharge of his liability in respect of the other. The annuity under the will—assuming it to be apportionable under the Apportionment Act, 1870—is an annuity which could not become payable until the end of a year after the testator's death, because, supposing the death of the annuitant to take place during that year, and the apportioned part referable to that portion of the year to have accrued due, yet it would not be payable until the end of the year, inasmuch as the Apportionment Act makes the apportioned part payable only when, according to the will, the whole would have become payable. That being so, there is a substantial and important difference between these two annuities as regards the time of their payment. It may be questionable whether, for the present purpose, I ought to have regard to the Apportionment Act; but I assume that this annuity is apportionable under the Act, and that this testator must be taken to have known the law. Still, however that may be, undoubtedly the fact remains that the annuity under the will is payable at a different time from that secured by the bond. I may observe (though perhaps it is not material for this purpose) that the obligation of the testator in this case, as to the annuity of 10*l.*, was not a mere voluntary obligation, but for value; it was a proper debt for valuable consideration. Certainly that circumstance is not adverse to the present claim. On the whole, having regard to the authorities which have been cited, I think there is such a distinction between

In re Downes.

the two annuities as to enable me to come to the conclusion that this testator must have intended the one to be in addition to and not in substitution for the other, and I therefore hold that provision must be made for the annuity under the bond as well as for the annuity under the will.

Solicitors—Wood, Latham & Bigg, agents for J. T. Marshall, Devises, for all parties.

FET, J. }
1880. } POST v. MARSH.
Dec. 2, 3. }

Specific Performance—Evidence—Fraud on Public.

A contract was made by several writings of different dates. One such writing was not proved:—Held, that specific performance of the contract as shewn by the agreements proved could not be granted, nor damages for breach of contract given.

Specific performance and damages for breach of a contract in respect of publishing a book were refused on the ground that the plaintiff had insisted on a title-page false in respect of authorship, for which the defendant had not contracted.

The plaintiffs in this action were A. F. Post and B. F. Stevens. F. B. Marsh, the defendant, was an author. The plaintiff Post entered into negotiations with the defendant for the purpose of bringing out an illustrated guide-book to London, the letterpress of which was to be supplied by the defendant.

The plaintiff Stevens was a trustee for the co-plaintiff and other persons who had supplied money and were interested in the proposed publication, and it had been agreed that the copyright of the guide should be vested in the plaintiff Stevens as such trustee.

The work was proceeded with to a considerable extent, a portion of the manuscript had been supplied by the defendant, and he had prepared a larger portion, and had been paid a large part

of the consideration-money, when the parties disagreed as to the title-page, and the defendant refused to supply any more manuscript, and these proceedings resulted. The plaintiffs insisted in having the work described as "Kenny's Illustrated London, D. J. Kenny (assisted by John B. Marsh)," and the defendant insisted on having his own name as that of the author. J. D. Kenny was an American, who had published illustrated guides to American towns, but had no connection with the proposed publication. The plaintiffs claimed that the defendant might be ordered specifically to perform two agreements of the 20th of March, 1878, as modified by agreements of the 14th of November, 1879, and the 19th of January, 1880, by delivering up to the plaintiff Stevens the manuscript of "Kenny's Illustrated London," and by doing and concurring with the plaintiff in all acts necessary to vest the copyright of the said work in the plaintiff Stevens (the plaintiffs thereby offering to defray all the costs of such acts); secondly, an injunction to restrain the defendant from dealing with the manuscript without the plaintiffs' consent; thirdly, damages; and fourthly, costs.

The defendant admitted the two agreements of the 20th of March, 1878, one of which was in writing, and the other verbal, but the plaintiffs affirmed and the defendant denied that it was provided by the latter that the defendant would not require his own name to appear as author on the title-page. On the evidence his Lordship believed the defendant's assertion to be true.

The plaintiffs pleaded that the effect of the two subsequent agreements, which were in writing, was, that the defendant would complete the work and assign the copyright to the plaintiff Stevens, and hold all author's rights in the work subject to his disposition. The defendant denied the alleged agreements in writing of the 14th of November, 1879, and of the 19th of January, 1880, but stated that on the latter day he had agreed to go on with the work which had been broken off by the desire of the plaintiff Post, and insisted that his name must appear on the title-page. He also pleaded that the only

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title-page proposed by the plaintiff was untrue and calculated to deceive the public, and that no relief ought to be given to the plaintiffs whereby they could carry out such deception.

On behalf of the plaintiff it was stated that the written agreement of the 14th of November, 1879, could not be put in evidence because it was not stamped. But the evidence satisfied his Lordship that it had existed and contained recitals that might be important.

The Statute of Frauds and the impossibility of giving specific performance of such an agreement were also pleaded.

Mr. North and *Mr. Lawson*, for the plaintiffs, contended that there was sufficient evidence of the terms of an agreement that had been partly performed for the Court to grant specific performance. A complete agreement was constituted by the agreement of January, 1880, in the reference to the first agreement of March, 1878, without having reference to the intermediate agreement. At any rate, specific performance of the agreement in the form the defendant alleged it to have been made would be decreed. They asked, in case of their not being allowed specific performance, for damages.

Mr. Cookson and *Mr. Gardiner*, for the defendant, said—The plaintiffs relied on an agreement, a part of which was or might be material, namely, that constituting the alleged agreement of November, 1879, which part had not been proved, and the Court could not decree specific performance or give damages in respect of an agreement the terms of which it was in ignorance of. Moreover, the title-page which the plaintiffs had always insisted on was fraudulent, and the Court would not give relief in respect of a claim that was a fraud on the public.

Mr. North replied.

FRY, J. (after stating the facts) said—The first question which arises is this: Can the plaintiffs have judgment for specific performance of the agreements dated the 20th of March, 1878, and the 19th of January, 1880, omitting that of the 14th of November, 1879? In my judgment they cannot. Knowing as I do

the importance of producing original documents in order to ascertain what the real rights of the parties are, it appears to me impossible to give the plaintiffs specific performance of two agreements when I know that three actually regulate the right of the parties.

Mr. North very ingeniously argued that the Court must either take the statement of the plaintiffs or the statement of the defendant, so that if you take the statement of the plaintiffs then you know what the agreement of November was; if you take the statement of the defendant there was no such agreement at all, and therefore *quacunqve via* there is an agreement which ought to be specifically performed. I decline to accede to that argument. Often and often, when you come to look at the original documents, it appears that neither the plaintiff nor the defendant has stated the truth of the case. I do not think that the plaintiffs can come and ask the Court blindly to perform that which they allege to exist, but do not prove when the defendant puts them to the proof of it.

Then arises the further question, Can the plaintiffs have damages for the breach of an agreement of this sort, when one of the documents which they allege is not produced? I give the same answer to that question. I know from the evidence of *Mr. Stevens* that this suppressed or non-produced agreement contains a material recital, and I cannot give damages where the plaintiffs sue on an agreement they do not prove.

But this further objection appears to me to lie in the way of the plaintiffs' success, namely, that they have insisted throughout on a form of title-page which is not justified. I have already stated that when the book is said to be edited by *Kenny*, who took no part in the editing of it, it is, in my opinion, a falsehood, and therefore a fraud on the public. Even if the defendant had contracted that he would allow his manuscript to be used in this way, it would not be the less a false statement, but I do not believe he ever so contracted.

Therefore, in my judgment, when the plaintiffs insisted on that form of title-page, as their own statement of claim

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says they did, the defendant was justified in staying his hand and saying, Inasmuch as you are doing that which is not true as regards the public, and which is not consistent with my rights under the agreement, I will not supply you any further copy. The written agreement, it is true, does not express anything with regard to the defendant's name appearing on the title-page, but that certainly cannot give the plaintiffs any right to publish the defendant's work with a falsehood on the face of it. That being so, it appears to me that the plaintiffs cannot claim damages, because I think the defendant was justified in declining to go on under such circumstances.

If it had been shewn that the defendant had agreed to accept any title-page, whether true or false, the case might have been different; and for that reason I have investigated carefully the transactions between the parties.

The result is, I give judgment for the defendant with costs. But it must not be supposed that I hold the defendant is necessarily entitled to retain the manuscript and keep the money if the plaintiffs are willing to do what is right.

Solicitors—J. H. Johnson, for plaintiffs; Warburton & De Paula, for defendant.

JESSEL, M.R. }
1880. } WALLACE v. GREENWOOD.
Dec. 18. }

Practice—Partition—Request for Sale—Married Woman—Authority—Request for Sale by Counsel—Purchase-money—Conversion—Election to take as Personalty—Fund under 200l.—Separate Examination—Partition Act, 1876 (39 & 40 Vict. c. 17), s. 6.

An order for the sale of a married woman's share of real estate, when made with her consent or at her request under section 6 of the Partition Act, 1876, operates as a conversion of such share into personal estate; but a request for sale under that section should be made by a person with

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special authority to act on her behalf in the action, and a request by her counsel is not sufficient.

Crookes v. Whitworth (Law Rep. 10 Ch. D. 289) not followed.

Where in a partition action the share of a married woman in the proceeds of sale is under 200l. an order will be made for payment out to her upon her separate receipt and an affidavit of no settlement, and her separate examination as to her election to take the money as personal estate will be dispensed with.

In re Shaw (49 Law J. Rep. Chanc. 213) not followed.

Further consideration.

Action for the sale and partition of real estate devised by the will of W. Butler, deceased. Certain of the parties were infants and others married women, who sued and were sued with their husbands.

By the judgment, dated the 29th of November, 1879, the plaintiffs and defendants (other than the infants) being entitled to more than a moiety, "by their counsel requesting a sale and distribution of the proceeds instead of a division," the Court ordered an enquiry as to the parties interested and an enquiry whether a proposed contract for sale was beneficial for the parties, and, if so, that it should be carried into effect.

The chief clerk made his certificate as to the parties and the shares in which they were interested, and by an order of the 22nd of April, 1880, the contract was declared to be for the benefit of the parties, and it was ordered that the property should be conveyed to the purchaser, and the purchase-money paid into Court. The contract was subsequently completed and the purchase-money paid into Court accordingly.

The action now came on for further consideration, and it was proposed by the minutes in distributing the purchase-money to pay the shares of the married women, amounting to about 50l. each, to their respective husbands "in right of" their wives.

Mr. J. G. Wood, for the plaintiffs.—The only question that arises is, whether it is necessary that the married women should

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be separately examined to signify their election to take their shares as personal estate. In

In re Shaw (ubi supra)

Bacon, V.C., held it necessary where the share was under 200*l.*

I submit that the separate examination is unnecessary, seeing that the order for sale is made upon the request of the married women under section 6 of the Partition Act, 1876, and effected a conversion of their shares into personal estate, the request for sale by their counsel being a sufficient compliance with the section—

Crookes v. Whitworth (ubi supra).

He also referred to

Standerling v. Hall, 48 Law J. Rep. Chanc. 382; Law Rep. 10 Ch. D. 652;

Mildmay v. Quicke, 46 Law J. Rep. Chanc. 667; Law Rep. 6 Ch. D. 553;

Kelland v. Fulford, 47 Law J. Rep. Chanc. 94; Law Rep. 6 Ch. D. 491;

Arnold v. Dixon, Law Rep. 19 Eq. 113;

Rimington v. Hartley, Law Rep. 14 Ch. D. 630.

Mr. Smalman Smith, for the defendants.

THE MASTER OF THE ROLLS.—I must say I should not have found any difficulty in this case, had it not been for two decisions of Vice-Chancellor Bacon. Those decisions do not appear to me to be quite consistent, and with great respect I do not think they are right.

In *Crookes v. Whitworth*, the Vice-Chancellor decided that in a partition action a request for sale by a married woman might be made by her counsel authorised to act on her behalf—that is, without her separate examination. In *In re Shaw* he held that in a similar action, a married woman's election to take her share (though under 200*l.*) of the proceeds of sale of real estate, as personalty could only be taken by her separate examination.

Both things are very simple: in one case the Court requires evidence of the authority to make the request for sale on behalf of the married woman; and in the

other, it requires evidence of the married woman's desire for conversion of her realty into personalty.

There can be no doubt, I think, the word "authorised," in the 6th section of the Partition Act, 1876, must mean "authorised in some special manner," however, the Act does not point out any special manner. The Vice-Chancellor seems to have considered that the authority of her counsel was sufficient to signify a married woman's request for a sale; but I should have thought the Act required some special authority beyond that; if not, I do not see why the same authority should not be sufficient to signify her election to take her real estate as money. The Act says, "authorised to act on behalf of" the married woman, or other person under disability—that is, as I have already pointed out in *Rimington v. Hartley*, "authorised to act in the action." Here no one is authorised to act on behalf of the married woman in the action, for when a married woman appears jointly with her husband, as she does here, we do not consider it her appearance at all; it is the habit to say it is the husband's appearance. Therefore, had it not been for the case of *Crookes v. Whitworth*, I should have thought the Court would require some separate authority on behalf of the married woman. Certainly, speaking for myself, I should not be satisfied unless there were some separate and special authority on her behalf.

Let us first consider what the Act means. The 6th section says, "In an action for partition, a request for sale may be made, or an undertaking to purchase given on the part of a married woman, infant, person of unsound mind or person under any other disability, by the next friend, guardian, committee in lunacy (if so authorised by order in lunacy) or other person authorised to act on behalf of the person under such disability; but the Court shall not be bound to comply with any such request or undertaking on the part of an infant unless it appear that the sale or purchase will be for his benefit." Now a sale under that section of the Act, in my opinion, operates as a conversion. Where

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the Court has power to sell an infant's real estate, and orders it to be sold, the order operates as a conversion, and the estate then becomes personalty. There is no law that I am aware of which says that the Court is bound to preserve an infant's estate as realty during infancy; therefore, if the Court thinks it for the benefit of the infant to sell his estate, it has no hesitation in making an order for sale, and the estate then becomes converted into personalty. And the effect is the same in the case of a purchase. You may give an undertaking on behalf of an infant to purchase real estate, and this undertaking operates under the statute as a conversion into realty of the infant's personal estate to be laid out. It is, however, the practice of the Court to provide against the consequences of conversion, because it is considered right to do so; accordingly, the purchase is made in a manner authorised by practice. It is not necessary to reconvert the real estate purchased into personalty; the practice in Chancery is to declare the estate purchased out of the infant's money subject to a charge in favour of his personal estate. That is the practice, but there is no law that obliges the Court to do so—it is the practice, but not the law; and, moreover, the fact that it is not the law is shewn by the practice being as I have stated. In other words, if the Court does buy an estate on behalf of an infant, there is no law which compels the Court to prevent conversion taking place; but, according to the practice, a trust is declared, on conveyance, to recoup the infant's personal estate.

Having regard, then, to the sixth section of the Partition Act, 1876, when you have a request for sale made by a competent person, all the consequences will follow, including conversion.

It may be said, however, that a married woman is in a different position to an infant, because she is absolute owner of her real estate, subject to her husband's estate as tenant by the curtesy, and that if she sells, the purchase-money becomes his estate, subject only to her equity to a settlement. That is true; but the Act has enabled her to judge for herself whether she shall sell or not. She could

no doubt have sold and conveyed her estate before the Act, by a deed acknowledged under the Fines and Recoveries Act; but now, instead of selling by a deed acknowledged, she sells by statute; that is to say, by giving her consent. That being so, if the married woman consents, there is a conversion; if she does not consent, it does not appear to me that a conversion will follow. It will be observed that the check imposed by the latter part of the 6th section as regards a sale or purchase on behalf of an infant is not extended to the case of a married woman; and, singularly enough, it is not even extended to the case of a person of unsound mind. Perhaps the reason for this omission is that the draftsmen forgot the case of a person of unsound mind not so found by inquisition, where there ought really to be the same check. The result is that, in my opinion, since the Act of 1876, a married woman consenting to or requesting a sale of her real estate, is in the same position as if she had converted the property by an acknowledged deed. Then the question is, Is there sufficient evidence of her request or consent in the present case? I am of opinion there is not. There should be something definite to shew her request or consent. It appears to me that in this case the authority to request a sale is not sufficient; or, rather, it is not sufficiently proved.

Then I come to the next point. If the married woman's authority is not sufficiently evidenced, the purchase-money is liable to be laid out in the purchase of other real estate, unless she elects to take it as personal estate; and she can signify such election by separate examination. But her separate examination may be dispensed with as to waiving her equity to a settlement where the fund is under 200*l.*; that is in order to save expense where the fund is small. If the reason is good for anything, it is good also in the case of a sale by the husband. If the Court can dispense with examination in the one case, it can do so in the other, because the reason why formerly the Court, by separate examination, took a married woman's consent to treat money arising from the sale of her real estate as

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personal estate, was, that the Court would not put her to the expense of a fine; so that the Court took her consent upon her separate examination in lieu of a fine.

For the same reason that the Court will, on the ground of expense, dispense with examination as to waiving the equity to a settlement where the fund is small, I shall dispense with the examinations of the married woman in this case; and to make the analogy to the established practice complete, I will order the money in each case to be paid out to the married women on their separate receipt, and on affidavits of no settlements being filed.

Solicitor—J. H. Lee, agent for D. Whittingham, Nottingham, for all parties.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.	} <i>In re CAVANDER'S TRUSTS.</i>
BRETT, L.J.	
COTTON, L.J.	
1881.	
Jan. 26.	

Practice—Notice by Respondent to ask for Variation of Order—Original Appellant not Interested—Rules of Court, 1875, Order LVIII. rule 6.

The 58th Order, rule 6, of the Rules of Court, 1875, does not entitle a respondent to give notice of his intention to ask for a variation of an order if the point on which he desires it to be varied is one in which the appellant has no interest. He must himself give a separate notice of appeal.

On the 24th of April, 1880, an order was made upon a petition that a fund standing in Court should be sold, and certain part of the proceeds paid to Macan, Buckler and other persons mentioned in the order.

On the 30th of July, 1880, a further order was made discharging the former order, and ordering Buckler to pay the costs.

Within twenty-one days from the completion of the former order, Finnis and

Wylie, the assignees of Macan's interest, gave notice of appeal to vary it by directing payment to them instead of to Macan.

Afterwards Buckler gave notice of appeal against the order of the 30th of July, 1880, asking that it might be discharged so far as it discharged the order of the 28th of April, 1880, and directed Buckler to pay the costs.

Finnis and Wylie thereupon wrote and sent a letter to all the parties withdrawing their notice of appeal, but at the same time stated that they intended on the hearing of Buckler's appeal to contend that the Vice-Chancellor's order should be varied in accordance with the terms of their notice of motion. The ground on which they claimed to vary the order of the Vice-Chancellor in no way affected Buckler, the appellant.

Mr. Davey and Mr. C. H. Turner, for Buckler.

Sir H. Jackson and Mr. Colt, for Loe, the respondent on Buckler's appeal.

Mr. Horton Smith and Mr. Daumey, for Finnis and Wylie.

Mr. Northmore Lawrence, for other parties.

Upon the opening of the case it was agreed between Loe and Buckler that Buckler's appeal should be withdrawn. Finnis and Wylie thereupon claimed that the order under appeal should be varied in the manner mentioned in their letter.

JESSEL, M.R.—It is important to make a remark with regard to a point of practice, lest other practitioners should be misled as has happened here. Order LVIII. rule 6 is as follows. [Reads the Order down to "such contention."] Now the last words are general; but looking at the first few words of the rule, it is obvious that the notice directed to be given by the rule is to stand in the place of a cross appeal, and an appeal on a point which does not affect the appellant cannot be a cross appeal. It is true the notice may affect others; but in that case notice of appeal must be served upon them. But it was never intended, by dispensing with the necessity of presenting a substantive cross

In re Cavander's Trusts, App.

appeal, to enable a respondent to bring forward an entirely separate contention between himself and another respondent with which the appellant has nothing whatever to do. Therefore, where a respondent wishes to bring forward a question not affecting the appellant, he must bring an independent appeal. Another reason shewing that this is the true construction of the rule is this, that notice of the cross appeal must be given to the appellant; and why is notice to be given to the appellant who *ex hypothesi* has nothing to do with the question? I am reported to have said before, and I now repeat what I so said, that if, upon an appeal, notice by way of cross appeal has been given, the appellant cannot withdraw his appeal. He may withdraw it of course when he comes into Court, but he cannot withdraw it previously, so as to prevent the appellant by way of cross appeal from going on with his appeal and having his point argued.

BRETT, L.J., and COTTON, L.J., concurred.

Leave given to Finnis and Wylie to give notice of appeal within a week.

Solicitors—T. W. Buckler, appellant, in person;
W. H. Orchard; Pownall, Son, Cross & Knott;
Finnis & Wylie; W. W. Elliott; W. J. Godden;
and S. J. Wright, for respondents.

HALL, V.C. }
1881. } LEMAN v. THE YORKSHIRE
Feb. 3. } RAILWAY WAGGON COMPANY.

Agreement for Sale or Hire—Power of Distress—Bankruptcy—Fraud on the Bankruptcy Law—Reputed Ownership—Jurisdiction in an Action under Section 13 of Bankruptcy Act—Bankruptcy Act, 1869, ss. 13 and 34.

Agreement for the hire of railway waggons for the term of five years at a yearly rent of 10l. apiece, with power to the lessors, when the rent should be in arrear for seven days, to distrain goods on the lessee's premises, and sell, &c., as landlords may on distress for rent, the lessee at the end of the

term to have the option of purchasing the waggons for 5s. each.

The lessee having gone into liquidation, the lessors distrained under the agreement.

The agreement being admitted to be of a usual character having regard to the subject-matter, a motion in an action by the debtor and the receiver under his petition to restrain proceedings upon the distress was refused.

The agreement and the distress thereunder were held not to be in fraud of the general creditors in the lessee's bankruptcy. A power to distrain will not by itself in an ordinary case render such an agreement fraudulent against creditors in bankruptcy.

Quære, whether the jurisdiction under section 13 of the Bankruptcy Act, 1869, to restrain proceedings can be exercised in an action.

By an agreement dated the 5th of January, 1880, the Yorkshire Railway Waggon Company entered into an agreement with Messrs. D. New & Co., ironmasters (therein called the tenants), by which it was agreed that the company should let, and the tenants should hire, for the term of five years from the 15th of January, 1880, twelve railway waggons therein specified, for use in Great Britain, at the yearly rent of 10l. for each, payable quarterly in advance, with interest at ten per cent. on any sum not paid within seven days from its becoming due. The tenants were to keep the waggons in good repair, not to load them beyond as therein mentioned, nor with particular materials therein mentioned, and to pay certain penal rents for loading otherwise than as stipulated; were not to underlet, assign or part with the possession of the waggons without the company's consent, nor assume the ownership thereof, or the having any other interest therein than that of tenant under the agreement, and keep undefaced on each waggon the name plates of the company and the number of the waggons; not to alter the waggons without consent, and to make good damage. The company were to have power to inspect the waggons, and to repair them at the tenants' expense, upon default of repair after notice. The agreement contained the following further clauses:—

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5. If the tenants fail to pay any money for seven days after the appointed day, or to perform or observe any stipulation on their part herein contained for seven days after notice from the company requiring performance thereof, or if they become bankrupt or make an assignment for benefit of or compound with their creditors, or if any of the said waggons be or become liable to be distrained, seized or taken in execution, the company may at any time and any place seize and take away all or any of the said waggons and all goods then therein and end this agreement if they think fit, and sell and dispose of the said goods as in case of distress for rent on leases for years, but no such seizure or taking away of any waggon, or selling and disposing of goods, shall prejudice any right of action for recovery of any rent or damage for breach of this agreement in any respect. And it is agreed that the said rent shall be deemed due for the whole of the quarter current at the time of the same seizure or taking.

6. Whenever the said rent shall be in arrear for seven days the company may enter upon the land or premises of the tenants and distrain, remove, impound, keep, sell and dispose of any goods, chattels or effects therein for the rent so in arrear, and do all such acts and exercise all such powers, rights and remedies for satisfying the same arrears, and the cost of and incident to the same distress as landlords may do and exercise in cases of distresses for rent on leases for years.

7. That at the expiration of the said tenancy the tenants shall forthwith deliver up the said waggons to the said company at Wakefield in good working order, free from all charges for freight or otherwise, unless the waggons be purchased by the tenants as provided in the following clause.

8. That on the due completion of this agreement, and on payment within seven days after the same shall become due of all rents, interest and other moneys payable hereunder for the full period of five years for each waggon, it is hereby agreed that the said tenants, their executors, administrators and assigns shall have the option of purchasing all or any of the

said waggons for the price or sum of 5s. each.

Alfred James New succeeded to the business of D. New & Co. in July, 1880, and adopted the above agreement on their part. On the 3rd of January, 1881, he presented a petition for liquidation, under which Leman was appointed receiver. The company's bailiff, on the 24th of January, distrained for 60l. 15s. for rent and arrears of rent due under the agreement, and seized a locomotive tank engine stated to be of the value of 200l.

A trustee of the debtor's estate not having been appointed, the receiver of the debtor commenced this action against the company for an injunction to restrain them from removing or selling the distress, and from further distraining. The plaintiffs obtained an *interim* injunction, and now moved to continue it. It was not disputed in the argument that the hiring of waggons on terms such as the present was usual.

Mr. W. Pearson and *Mr. R. Roberts*, for the plaintiffs, after arguing that the distraint was excessive, took the point that the transaction was a fraud on the bankruptcy laws. The moneys payable were really for the purchase-money and interest thereon, not rent at all. A distress could not be executed after bankruptcy, unless within the exceptions in section 34 of the Bankruptcy Act—

Ex parte Williams, 47 Law J. Rep. Bankr. 26; Law Rep. 7 Ch. D. 138.

Ex parte The Birmingham, &c., Gaslight Company, 40 Law J. Rep. Bankr. 52; Law Rep. 11 Eq. 615, was distinguished by the Court of Appeal in

Ex parte Hill, 46 Law J. Rep. Bankr. 116; Law Rep. 6 Ch. D. 63.

If not protected by section 34, the distress was a legal process restrainable under section 13.

Mr. Graham Hastings and *Mr. Bunting*, for the defendants.—This case is not within section 4 of the Bills of Sale Act. [HALL, V.C.—I will relieve you from arguing that.]

With regard to the 13th section of the Bankruptcy Act, this Court has not to

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administer that enactment; and in any case, the present case is one of a *bona fide* rent.

Mr. Pearson, in reply.—This Court has the same jurisdiction as the Court of Bankruptcy as regards persons who, like the waggon company, are outside the bankruptcy.

HALL, V.C.—Supposing this Court can properly entertain this question, under the circumstances there would still remain to be considered the question, whether upon the merits any case has been made for the interference of this Court. It is said that this proceeding is a device and a sham, and on that ground the instrument ought to be considered as being inoperative as against the general creditors in bankruptcy. From what *Mr. Roberts* said, I rather collected that the proceeding was one which was commonly resorted to, and that the practice of letting property into the hands of a person who may in the exercise of an option become the owner of that property, is not otherwise than common. That seems to be admitted, but I cannot see my way to suppose that any case of reputed ownership on general grounds, by reason of the nature of the agreement, and so forth, could be established, particularly when it is said that it is a common and well-known mode of dealing with waggons. The question is, What is the subject of the agreement? We know that perfectly well. It is a waggon company. It is the common course of business to let waggons in this way. Therefore, there is nothing in the agreement itself which could be considered as indicating anything like fraud upon the creditors. The practice was known, and therefore they were not misled in any way by the possession of the particular property the subject of the agreement. The power to take under a distress whatever can be distrained in an ordinary case does not in itself indicate, as it seems to me, anything in the nature of fraud, or anything in the nature of such a dealing as upon general principles the Court ought to interfere with, and say, "You are not entitled to take possession under the clause in the agreement of what, according to that

agreement, you are entitled to take possession of for the purpose of satisfying that demand." That seems to me to be the correct view, even assuming that this Court has jurisdiction to deal with this question. The motion will be refused with costs.

Mr. Pearson asked for leave to amend the writ by naming the trustee as co-plaintiff, and that the order might be dated after the amendment. He said that a trustee would probably be appointed today.

Mr. Hastings objected, and

HALL, V.C., declined to give leave.

Solicitors—Torr & Co., agents for Wells & Hind, Nottingham, for plaintiff; Singleton & Tattershall, agents for Gill & Hall, Wakefield, for defendants.

MALINS, V.C. }
1881.
Feb. 22.

BAILLIE v. TRAHERNE.

Husband and Wife—Joint Tenancy—Personal Estate—Severance—Marriage—Covenant to assign.

The settlement, made on the marriage of A, contained a covenant by her and her intended husband to assign to the trustees any personal estate which should, during the coverture, vest in her or in her husband in her right. At this time she was entitled, as joint tenant with her sister, to certain personal property, expectant on the death of B. B died during the coverture:—Held, that the joint tenancy was severed by the marriage, and also by the covenant to assign.

SPECIAL CASE.

George Traherne, being entitled to personal estate in remainder, expectant upon the death of Frances Royds, by a codicil to his will gave the same to his daughters, the defendant *Ellin Baillie* (then *Ellin Traherne*) and *Frances Traherne*, as joint tenants.

He died in 1853.

By an indenture dated the 19th of

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April, 1854, and made between the plaintiff Hamilton Baillie, of the first part; the defendant Ellin Baillie (then Ellin Traherne, spinster), of the second part; and John Martin (since deceased), the defendant Evan Baillie, Hugh Entwistle (since deceased) and the defendant George Traherne, of the third part (being the settlement made in contemplation of the marriage shortly afterwards solemnised between the plaintiff and his wife), after reciting, amongst other things, that Ellin Baillie had lately transferred the sum of 5,000*l.* consols into the names of the trustees of the settlement, it was witnessed that the trustees should, after the marriage, stand possessed of the 5,000*l.* consols upon certain trusts for the benefit of Ellin Baillie, her husband (the plaintiff) and the children of the marriage. And it was by the same settlement further witnessed that, in pursuance of the agreement therein referred to as the "aforesaid agreement" (though there was not in fact any such agreement mentioned), each of them, the plaintiff and Ellin Baillie, covenanted with the trustees, that in case the marriage should be solemnised, and any personal estate should at any time or times during the coverture be given or bequeathed to, or in any manner vest in, Ellin Baillie, or in the plaintiff in her right, then the plaintiff and Ellin Baillie respectively would execute all such deeds and assurances as should be necessary for properly assigning the same to, or vesting the same for all the rights and interests of Ellin Baillie or of the plaintiff as her husband therein, in the trustees, so that the same might be held by them, upon such of the trusts thereinbefore expressed concerning the 5,000*l.* consols as should be then capable of taking effect.

Frances Traherne died in 1872, a spinster and intestate. The defendant George Traherne was her administrator. Frances Royds died in 1880.

The question submitted for the opinion of the Court was, whether the marriage operated as a severance of the joint tenancy created by the codicil to the will of George Traherne; and whether the covenant in the settlement also operated as a severance.

Mr. Higgins and *Mr. Stevens*, for the plaintiff Hamilton Baillie.—The joint tenancy was not severed by the marriage; nor was it severed by the covenant to assign contained in the settlement.

Caldwell v. Fellowes, 39 Law J. Rep. Chanc. 618; Law Rep. 9 Eq. 410,

may be cited against us, but in that case there was substantially an agreement to settle the particular property. They also referred to

Leak v. Macdonall, 32 Beav. 28.

Mr. Field, for the defendant George Traherne, the administrator of Frances Traherne.—The marriage of Mrs. Baillie severed the joint tenancy—

Bracebridge v. Cook, Plowd. 416; Co. Lit. 185 b.

In

Re Barton's Will, 10 Hare, 12; and

Armstrong v. Armstrong, 38 Law J. Rep. Chanc. 463; Law Rep. 7 Eq. 518,

it was held that marriage did not effect a severance, only because the property did not fall into possession during the coverture. Here the property fell into possession during the coverture.

Secondly, the covenant to assign, contained in the settlement, severed the joint tenancy—

Caldwell v. Fellowes (*ubi supra*).

Mr. Cracknell, for the other trustees of the settlement and Mrs. Baillie.

MALINS, V.C.—The question is, whether there has been a severance of the joint tenancy which existed between Mrs. Baillie and Frances Traherne under the will of George Traherne. Now any one of two joint tenants may sever the joint tenancy by an act of alienation. Personal property may be alienated in many ways—for instance, by deed or by marriage. Marriage gives to the husband the personal property of the wife in possession, and is as much an alienation as if the alienation were effected by deed. It will also vest in the husband all the personal property of the wife which falls into possession during the coverture. Therefore if a woman, being one of two joint tenants, marries, the result is a severance,

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and on the death of one of the joint tenants there is no survivorship.

Here at the time of the marriage the property was reversionary; and, if it had continued reversionary during the coverture, I think there would have been no severance. In such a case it could not have been reduced into possession by the husband, and the *jus accrescendi* would prevail. On this ground it was decided in *Re Barton's Will* and *Armstrong v. Armstrong* that there was no severance. But here the property fell into possession during the marriage. I think, therefore, that the marriage, in the events which happened, operated as a severance. This conclusion is in accordance with the opinion of the Court on the first of the two points in *Bracebridge v. Cook*.

Independently of the point which I have discussed, I should have thought, on the authority of *Caldwell v. Fellowes*, that the joint tenancy was severed by the covenant contained in the settlement to settle all property which should vest in Mrs. Baillie or in her husband in her right during the marriage.

Solicitors—C. W. Stevens, for plaintiff and for defendants Evan Baillie and Ellin Maria Baillie; Field, Roscoe & Co., agents for Bubb & Co., Cheltenham, for defendant George Montgomery Traherne.

HALL, V.C. }
Feb. 8, 9, 10, 11, } ROBERTS v. RICHARDS.
12, 14, 26. }

Watercourse—Easement—Prescription—Natural or Artificial Stream—Riparian Rights.

The plaintiff was the owner of a farm supplied with water by a small watercourse originating in a natural spring on the plaintiff's land, flowing, first, through the plaintiff's land, next through the defendant's land, and then through the plaintiff's land to the plaintiff's house. For seventy years and upwards, prior to 1879, the

plaintiff had almost exclusively enjoyed the watercourse. In 1879, however, the defendant, by means of a pipe, appropriated nearly all the water for the use of newly built houses. The plaintiff claimed the exclusive use of the water, and alleged that the watercourse through the defendant's land was artificial, and constructed, at a time immemorial, for the sole benefit of the plaintiff and his predecessors:—Held, that as no one could tell when the artificial part (if any) of the watercourse was made, the watercourse must be deemed to be a natural stream; or, if in part artificial, to have been made so as to give all the rights of a riparian proprietor to the defendant and his predecessors in title.

Sutcliffe v. Booth (32 Law J. Rep. Q.B. 136) considered and approved.

The plaintiff was the owner in fee-simple of a small farm, known as Tir Coch (or Ty Coch), in the parish of Llanaber, in the county of Merioneth. This farm derived its water supply from a small stream or watercourse which flowed in the following channel: it originated in a natural well or spring on the plaintiff's land (at a point marked A on a certain plan used at the trial), and thence flowed for some distance wholly through the plaintiff's land; it then (at a point marked B on the plan) entered the defendant's land and flowed wholly through, but very near to the boundary of, such land; it then again (at a point marked C on the plan) entered the plaintiff's land, and, enclosed at this part of its course by a covered drain, made its way to the plaintiff's house, and thence in a south-westerly direction. The stream had apparently flowed in this channel from time immemorial, and it was proved in evidence that for seventy years and upwards, prior to 1879, the plaintiff and his predecessors in title had had substantially the sole exclusive and uninterrupted enjoyment and use of the watercourse, and that the only use which the defendant had ever made of it was that two cows and a horse, which from time to time were depastured on his land, had drunk the water.

In the month of March, 1879, the de-

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fendant, who had some years previously erected on his riparian land, but at a considerable distance from the stream, some lodging-houses, fitted with baths, &c., caused a one-inch pipe to be inserted into the stream where it flowed through the defendant's land, and by means of such pipe conveyed the water therefrom for the household use of these houses. It was alleged, and not apparently denied, that the pipe so inserted was capable of carrying away six times the volume of water which usually flowed down the stream.

The effect of this act of the defendant was to deprive the plaintiff to a very great extent, in fact, almost wholly to cut off, his necessary water supply, and he accordingly brought this action against the defendant, claiming an injunction to restrain the defendant from diverting the water or any of the water from the watercourse, and from employing any means to prevent the water from the said well or spring and the water in the watercourse from flowing in its natural or accustomed course to the plaintiff's premises, and from permitting to continue on the defendant's lands any drain pipe or channel, having the effect of diverting any of such water, or interrupting or interfering with the plaintiff's water supply.

By his statement of claim the plaintiff alleged (paragraph 3) that the said channel or watercourse, where it passed through the defendant's land, was artificially formed upwards of twenty years before the acts of the defendant complained of, and, in fact, before the memory of any living person, for the purpose and with the effect of conveying the whole of the water from the said spring or well to Tir Coch House; and (paragraph 5) that if the owners or occupiers of any land or tenements of the defendant ever had any rights as riparian owners in respect of the original natural channel, such rights (other than the right for cattle to drink, if that had any reference to the natural channel) had long since ceased to exist; and (paragraph 6) that the plaintiff and his predecessors in title had for twenty years and upwards, and, in fact,

from time immemorial, enjoyed and exercised as of right the right to enter on the defendant's land, and to keep in repair the said channel or watercourse. It was further alleged that the only inhabited tenements on the defendant's land until the erection of the houses next after mentioned, were two cottages, situated at a distance from the watercourse, and near to a turnpike road; that the occupiers of the said cottages always derived their supply of water from a brook called the Ceilwart brook, which crossed the said turnpike road near the cottages; that the occupiers of the cottages, and of the defendant's land, never had any use of the said channel or watercourse as riparian owners or otherwise, except by allowing their cattle to drink there; that about ten years ago the defendant took down the cottages and erected at or near the site thereof some lodging-houses, fitted with baths and waterclosets, but that until 1879 the defendant arranged for and obtained a supply of water for the said houses from the Ceilwart brook, and the occupiers of the said houses never had any use of the said channel or watercourse.

The evidence as to the natural or artificial character of the watercourse was to some extent conflicting; it appeared, however, that where the stream first entered the defendant's land it flowed for some little distance in a course which might be natural, but that for the last part of its course through such land it was protected by an embankment, varying from twenty inches to two feet three inches in height, the surface of the water being about three inches above the level of the soil. There was evidence shewing that the plaintiff and his children had from time to time for many years past entered on the defendant's land for the purpose of repairing the embankment, removing obstructions and clearing the stream. It appeared also that the defendant during the last ten years had constantly repaired the embankment where it had been damaged by his cattle, and had cleansed out the bed of the stream for the purpose of keeping the water off his land. The defendant had been in personal occupation for about ten years

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before the commencement of this action, the land having before that period been in the occupation of a tenant.

Some evidence was also tendered for the purpose of shewing that the defendant's rights had been lost by severance of the portion of his riparian tenement on which the houses were from the residue thereof, but such evidence failed to shew that the defendant had parted with his ownership of the soil of any part of his riparian estate.

Mr. W. Pearson and Mr. Phipson Beale, for the plaintiff.—We submit that this is an artificial stream, formed before the memory of man, for the purpose of carrying the water to the plaintiff's house, and that we have acquired a prescriptive right under 2 & 3 Will. 4. c. 71. s. 2 to the exclusive use of the water by uninterrupted enjoyment for twenty years and upwards—see

Ivimey v. Stocker, 35 Law J. Rep. Chanc. 467; Law Rep. 1 Chanc. 396;

Sampson v. Hoddinott, 1 Com. B. Rep. N.S. 590; 26 Law J. Rep. C.P. 148;

and

Mason v. Hill, 3 B. & Ad. 304; 1 Law J. Rep. K.B. 107; 5 B. & Ad. 1; 2 Law J. Rep. K.B. 118.

The character of the stream is to be decided by the apparent intention of the person who created it, and the mode by which the supply of water is procured—

Beeston v. Weats, 5 E. & B. 986; 25 Law J. Rep. Q.B. 115;

and the evidence here is strong to shew that the watercourse is artificial. It is proved that the plaintiff and his predecessors in title have, from time immemorial, entered on the defendant's land for the purpose of repairing the banks of the watercourse, and this must have been done in exercise of and to protect their easement so acquired. At all events the portion of the stream between the points B and C is artificial, and that is sufficient for our purpose.

But even if the stream be treated as natural we are entitled to the relief we ask because the act of the defendant

amounts in effect to a total diversion of the water, and therefore an infringement of our right as riparian proprietors to have the water flow to us in its natural state—

Embrey v. Owen, 6 Exch. Rep. 353; 20 Law J. Rep. Exch. 212,

and further, as appears from that case, the question of the right to use the water is always a question of degree, and we submit that the user claimed by the defendant is an unreasonable user. They referred also to

Gale on Easements, 5th ed. pp. 218, 245 *et seq.*;

The Wilts and Berks Canal Company v. The Swindon Waterworks Company, 43 Law J. Rep. Chanc. 393; Law Rep. 9 Chanc. 451; on appeal, Law Rep. 7 E. & I. App. 697; *Wood v. Waud*, 3 Exch. Rep. 748; 18 Law J. Rep. Exch. 305;

Rameshur Pershad Narain Singh v. Koonj Behari Pattuk, Law Rep. 4 App. Cas. 121;

Lord Norbury v. Kitchin, 15 Law Times, N.S. 501; 3 Fost. & F. 292; 9 Jur. N.S. 182;

and

Holker v. Porritt, 44 Law J. Rep. Exch. 52; Law Rep. 10 Exch. 59 (on appeal from the Court of Exchequer) 42 Law J. Rep. Exch. 85; Law Rep. 8 Exch. 107.

Mr. Kekewich and Mr. Ingle Joyce, for the defendant.—This stream originating as it does in a natural source, and having flowed in its present channel from time immemorial, must be taken to be a natural watercourse—

Holker v. Porritt (ubi supra),

and the defendant therefore has acted within his right as a riparian owner, namely, to use the water for all ordinary purposes in connection with his riparian estate—

Wood v. Waud (ubi supra)

and

Lord Norbury v. Kitchin (ubi supra), which latter case shews that if there is not enough water to supply a riparian owner's house, he may take the whole without regard to those below him, and also recognises his right to feed his house

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at a distance, and by artificial means. The argument on behalf of the plaintiff ignores altogether the distinction which has been always drawn in the cases between user for ordinary and extraordinary purposes—see the cases cited, and

Miner v. Gilmour, 12 Moore P.C. 131, 156,

and

The Wilts and Berks Canal Company v. The Swindon Waterworks Company (*ubi supra*).

It is not suggested that the defendant has used the water for other than ordinary purposes. His natural right so to do is one which cannot be lost by non-user, and which may be asserted at his pleasure at any time—

Sampson v. Hoddinott (*ubi supra*).

But even if this stream be artificial we submit, on the authority of

Nuttall v. Bracewell, 36 Law J. Rep. Exch. 1; Law Rep. 2 Exch. 1,

and

Sutcliffe v. Booth (*ubi supra*),

that by its construction all the natural rights incident to a natural stream were conferred on the owners of the adjacent land.

As regards the alleged right of entry the evidence altogether fails, because such a right must be proved at the least in the first and last year of the prescriptive period—

Love v. Carpenter, 6 Exch. Rep. 825; 20 Law J. Rep. Exch. 374,

which has not been done; and also it must be shewn for the whole of the period to have been exercised as against the owner of the inheritance—

Winship v. Hudspeth, 10 Exch. Rep. 5; 23 Law J. Rep. Exch. 268,

whereas here, until about ten years before the action, the land was in the occupation of a tenant. Further, such a right of entry, if proved, would, at the most, be only evidence of a right or easement to have the stream flow in a particular direction. They referred also to

Chasemore v. Richards, 29 Law J. Rep. Exch. 81; Law Rep. 7 H.L. Cas. 349;

Bright v. Walker, 1 Cr. M. & R. 211; 3 Law J. Rep. Exch. 250;

The Stockport Waterworks Company v. Potter, 3 Hurl. & C. 300;

Blackburn v. Somers, Law Rep. (Ir.) 5 Chanc. 1;

and

Shelford's Real Property Statutes, 8th ed. p. 25.

Mr. W. Pearson, in reply.—The question as to the plaintiff's right to enter on the defendant's land is not now in issue; in fact such right has in no way been infringed. We rely on the evidence as to the entry on the land solely for the purpose of shewing that the plaintiff so entered in exercise of the easement which he claims to have acquired. It is absurd to suppose that the right of a riparian owner is unlimited, no matter what may be the size of the stream; it must be that the right is to be exercised with due regard to that and to every other circumstance of the case.

Cur. adv. vult.

HALL, V.C. (on Feb. 26).—The plaintiff claims to be entitled to all the water flowing down the watercourse shewn on the plan used in the trial by a blue line commencing at letter A, extending thence to letter B, thence to letter C, from which point the watercourse goes on to Ty Coch or Tir Coch, and thence in a south-westerly direction. His claim and the injunction he asks for extend, as I have said, to all the water. The plaintiff claims, as being the owner of Ty Coch, which consists of a house and lands known as Ty Coch, situate near the watercourse. He does not, however, claim as being a riparian owner, but as having for twenty years and upwards, and, in fact, from time immemorial, enjoyed as of right the uninterrupted use, &c., of the water along the watercourse for watering cattle in his fields above and below Ty Coch House and the household use of the occupiers of Ty Coch. The claim he so makes is a claim to an easement and not that of a riparian owner, what is so claimed being, however, the same claim as he might make as riparian owner, except that as such owner he could not claim exclusive enjoyment. His object

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being to get exclusive enjoyment, he has claimed by prescription an easement. There seems, however, in the statement of claim to be some qualification of his having had exclusive enjoyment, as he mentions the defendant, and the owners and occupiers of his (the defendant's) lands having allowed their cattle to drink the water. That enjoyment would seem to have been for only a few head of cattle, though apparently for all that depastured on the land when it was not being cropped. The watercourse the plaintiff, in his statement of claim, says (paragraph 5) "may be in places a natural channel repaired or amended;" and he says, "there has been from time immemorial a channel conducting the water from a certain spring or well." The defendant's land is a portion of the land between the spring and Ty Coch and the plaintiff says—[His Lordship then read paragraphs 3, 5 and 6 of the statement of claim as above set out and proceeded:] As regards the defendant and his predecessors having watered cattle, the plaintiff does not in precise terms admit any present right in the defendant as a riparian owner to that extent, and he expressly denies that the defendant has any other right. The claim to be entitled to enter on the defendant's land to repair the banks is put forward not as being the foundation of any distinct relief—indeed there is no disturbance of the alleged right stated; it is put forward as corroborative of the plaintiff's claim to the exclusive enjoyment of the watercourse. It appeared in evidence that the plaintiff had for a great number of years done such repairs and cleaned out the watercourse, and also that the defendant had for some few years done some repairs to the banks. It appears to me that under all the circumstances of this case the doing the repairs does not establish or with other evidence make out that the plaintiff's right is a right to an easement as distinguished from his having the ordinary rights of a riparian owner. The plaintiff says that the watercourse is artificial—at least, so far as it passes through the defendant's land—and therefore that the plaintiff has acquired a title

to an easement. In my opinion the plaintiff has not made this out. Certainly I think he has not done so as to the whole of that portion of the watercourse which passes through the defendant's land. I think that as no one can tell when the artificial part (if any) of the watercourse was made, and as there has been, as the plaintiff says, from time immemorial a channel from the spring to Ty Coch House, the watercourse must be deemed a natural stream throughout. As to this I observe that in *Holker v. Porritt*, Baron Martin says, "What were Walker's rights? He had a natural stream of water flowing from E to the trough—a stream as to which no one can tell when it began, and which must, therefore, be treated as a natural stream;" and in *Nuttall v. Bracewell*, Baron Channell said, "That an artificial stream may be on the same footing as a natural stream as regards the rights of riparian proprietors is held in *Sutcliffe v. Booth*." The head note of *Sutcliffe v. Booth* (which is correct) is as follows: "A watercourse, though artificial, may have been originally made under such circumstances, and have been so used as to give all the rights that the riparian proprietors would have had if it had been a natural stream, and therefore, in an action by one riparian proprietor against another for the pollution and diversion of a watercourse, it is a misdirection to tell the jury that if the stream were artificial, and made by the hand of man, the plaintiff could have no cause of action." Mr. Justice Wightman said, "We have been unable to see my brother Wilde; but upon a careful consideration of the circumstances of this case as they have been presented to us we have come to the conclusion that the rule ought to be made absolute for a new trial. It does appear very clear that the learned Judge in his direction to the jury treated the question whether the watercourse was an artificial or natural stream as decisive of the matter between the parties, and that he told the jury if they found that it was an artificial stream no right could be acquired with respect to that water way. That seems to have been his opinion. 'If,' said he, 'the stream is an artificial stream, made

Roberts v. Richards.

by the hand of man,' the plaintiff would have none of the rights he claims. If the jury found it was an artificial watercourse the other questions, in the view taken by the learned Judge, seem hardly to have arisen; but at any rate, so much stress was laid upon the distinction which the learned Judge drew between artificial and natural watercourses, that the jury may have been misled, and the cause decided on that very ground. We cannot agree that that is the true ground of decision, because although it may have been an artificial watercourse, it may still have been originally made under such circumstances, and have been so used as to give all the rights that the riparian proprietors would have had had it been a natural stream. We think, therefore, that there ought to be a new trial, and the rule must be made absolute." It appears to me a reasonable and the sound construction in this case, that if this watercourse was in part, or I should say even wholly, artificial, it was made so as to give all the rights of a riparian proprietor to all the riparian proprietors, or, at all events, to the defendant's predecessors in title, who allowed it to be made through their land. It is, I think, a reasonable and sound construction that the defendant's predecessors in title and their successors were to have all the rights of, and to be considered, riparian proprietors. Such rights have been in part enjoyed, namely, by cattle having drunk of the stream. I refer such drinking to the exercise of that right of a riparian proprietor as such: there is nothing to refer it to any other title. So, likewise, I refer the plaintiff's taking water for cattle and for domestic use to the exercise of the rights of a riparian owner: beyond those rights he has not had any enjoyment. The plaintiff in his statement of claim not only says, as I have mentioned, that any riparian rights which the defendant or his predecessors ever had (other than the right for cattle to drink, if that have any reference to the natural channel) have long since ceased to exist, but also says (paragraph 6), which I treat as established, that the occupiers of the defendant's houses never

had any use of the watercourse. The plaintiff has not, I think, proved such cesser, not forgetting the pulling down of the two old cottages mentioned in the statement of claim, and the building other houses on or near their site, or the alleged severance, if such there has been, of any portion or portions of the defendant's estate from such estate, so as not longer to be riparian. The rights of a riparian owner are, of course, not destroyed by mere non-exercise. (See the judgment of Mr. Justice Cresswell in *Sampson v. Hoddinott*.) Viewing the case in all its bearings, and weighing all the evidence, I find that the plaintiff has not made out a case entitling him to the relief which he has brought this action to obtain. The action is dismissed with costs.

Solicitors—Clarke, Woodcock & Ryland, agents for William Griffith & Sons, Dolgelly, for plaintiff; Gregory, Rowcliffes & Co., agents for Jones & Jones, Portmadoc, for defendant.

HALL, V.C. }
1881.
Feb. 18. }

DALEYMPLE v. HALL.

Will—Construction—"Unmarried"—Primary Meaning of Word.

The ordinary meaning of the word "unmarried" in the absence of determining context is "never having been married." Therefore, where a share of property was left in trust for one for life, but if he should die unmarried his share to be divided between the children of his brothers; and the tenant-for-life, who was at the date of the will a bachelor, died a widower without children, it was held that the gift to his brother's children did not take effect.

William Allen, who died in June, 1837, by his will, dated the 14th of February, 1837, gave his freehold and leasehold estates to trustees upon trust to divide the clear surplus of the rents and profits

Dalrymple v. Hall.

into six equal parts, and as to one-sixth part thereof upon trust to pay the same to Charles Green during his life, but if he should die unmarried, his share to be equally divided between the children of his brothers, but in case he should attempt to sell, mortgage or otherwise incumber the same then the testator directed that his share should be equally divided between his brothers. And as to the other sixth parts, upon the trusts therein mentioned. And the testator gave the residue of his personal estate as therein mentioned.

Charles Green had not been married at the date of the will; he afterwards married, and died in 1871, a widower, without leaving any children, and without having attempted to sell or incumber his share. This action sought a partition or sale, and a declaration as to the rights of the persons interested in the sixth share given to Charles Green for his life.

Mr. W. Baker, for the plaintiff, the heir-at-law of the testator.—The primary meaning of “unmarried,” in the absence of context, is without ever having been married—

Clarke v. Colls, 9 H.L. Cas. 601.

Mr. G. M. White, for defendants, children of Charles Green's brothers.—The construction suggested operates to cause an intestacy; but that construction ought to be adopted which makes the will operative as far as possible—

In re Sanders' Trusts, Law Rep. 1 Eq. 683;

Day v. Barnard, 1 Dr. & S. 351; 30 Law J. Rep. Chanc. 220.

The word is used in the Poor Law Act of 3 Will. & M. c. 11, in the sense of “not married at the time.”

Lett v. Banall, 10 Sim. 112,

shews that the result of an intestacy is an argument against any construction.

HALL, V.C.—This particular will gives a life interest, and then contains no disposition of the capital of the share, except in an event specified. Considering this, I have to ascertain what is that event, and to ascertain what is meant by the word “unmarried.” If it means “not

married at death,” the will would make no complete disposition of the share. It is true that in the event which has happened the share would be disposed of upon that interpretation, while on the other meaning it would not. But this will being manifestly imperfect, and not making a complete disposition in all events, I must interpret the word according to its ordinary meaning. It is said that the ordinary meaning is “without having been married.” Upon what has been said upon the point in the authorities, I must take that to be so. Here there is no context to affect the matter. This is not one of the cases where gifts over occur on the death of a person intestate and unmarried, and those cases have no application to this will; they are cases generally having reference to a particular marriage, or one then existing, where an interest is to take effect with reference to coverture, and ordinarily to procreation of issue. This is a case bare of any context to indicate the meaning of the word “unmarried,” and I must therefore take it as meaning “a bachelor.”

Solicitors—Tippetts & Son, for all parties.

BACON, V.C. }
1881.
Feb. 12.

In re KIT HILL TUNNEL
(LIMITED);
ex parte WILLIAMS.

Company—Winding-up—Secured Creditor—Mistake as to Value of Security—Proof—Judicature Act, 1875, s. 10—Bankruptcy Rules, 1870, rules 99–101—Companies Act, 1862, s. 107—General Order of November, 1862, rules 20–28.

Rules 99–101 of the Bankruptcy Rules, 1870, are by section 10 of the Judicature Act, 1875, made applicable to the winding up of companies.

A secured creditor of a company, on account of a mistaken estimate of its value, elected to stand upon his security. Having

In re Kit Hill Tunnel; ex parte Williams.

subsequently discovered its true value he sought to prove for his debt, after giving credit for the value of the security:—

Held, that he was entitled to do so, provided no dividend already declared was disturbed, this being his right under rules 99–101 of the Bankruptcy Rules, 1870.

R. H. Williams was the holder of three bills of exchange, for 500*l.* in all, dated the 20th of September, 1878, drawn upon and accepted by the Kit Hill Tunnel (Limited), and payable on the 23rd of January, 1879. As collateral security for the due payment of the bills, the company hypothecated to R. H. Williams the sums receivable from a number of shareholders named in the schedule to the letter of hypothecation in respect of a call of 10*s.* per share already made on the 12th of July, 1878.

An order to wind up the company was made on the 7th of January, 1879. The bills were dishonoured at maturity. On the 25th of November, 1879, Mr. Williams, having, in compliance with a notice to that effect, sent in his claim, attended at chambers to have it adjudicated upon. Upon that occasion, relying upon the probability of the calls hypothecated to him being sufficient to satisfy his debt, he elected to stand upon his security.

In June, 1880, Mr. Williams became aware, from an affidavit of the official liquidator filed on the 9th of that month, that up to that date there had been collected of the calls hypothecated to him only 55*l.* 19*s.*, and that it had been found upon investigation that most of the contributories liable in respect of those calls had paid them before the commencement of the liquidation, though it was not known whether the proceeds had found their way to the credit of the company, as the books could not be found.

On the 17th of December, 1880, an order was made for the liquidator to pay to the creditors a dividend of 5*s.* in the pound, and on the same day Mr. Williams took out a summons for leave to value his security and prove for the balance.

Mr. Buckley, for the applicant.—I am entitled now to prove for the balance of

my debt after valuing my security. My mistake in valuing the security ought not to prejudice me except to the extent that I cannot interfere with the dividend already declared—

Companies Act, 1862, s. 107. General Order of November, 1862, rules 20–28;

In re The London, Bombay and Mediterranean Bank, 43 Law J. Rep. Chanc. 683; Law Rep. 9 Chanc. 686;

Hicks v. May, 49 Law J. Rep. Chanc. 192; Law Rep. 13 Ch. D. 236.

There is nothing in section 10 of the Judicature Act, 1875, to make all the rules in bankruptcy as to proof of debts applicable to the winding up of companies. The limit of the operation of that section is defined in

In re The Withernsea Brick Works (Limited), ante, 185; Law Rep. 16 Ch. D. 337.

Mr. Winslow and Mr. O. H. Turner.— We submit that section 10 of the Judicature Act, 1875, imports rules 99–101 of the Bankruptcy Rules, 1870, into the winding up of companies. If that be so, the fact of the security realising a less sum than that at which the creditor valued it does not (according to those rules) entitle him now to increase his proof in consequence.

BACON, V.C.—In my opinion, section 10 of the Judicature Act, 1875, does assimilate the Chancery and Bankruptcy practice upon this point; but if the question had arisen in Bankruptcy, the applicant would now be at liberty to come in and prove, only without disturbing the dividend already declared. The order must therefore be in the terms of the summons.

Solicitors—R. W. Marsland, for applicant; J. Raven & Co., for liquidator.

[IN THE COURT OF APPEAL.]

BANKRUPTCY. JAMES, L.J. BRETT, L.J. COTTON, L.J. 1881. March 17.	}	<i>In re BATEY ; ex parte EMANUEL.</i>
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Liquidation—Resolutions—Ultra Vires—Power to carry on Debtor's Business to make Profits—The Bankruptcy Act, 1869, ss. 14, 16, 20, 25.

Under sections 14 and 25 of the Bankruptcy Act, 1869, a trustee has no power, nor have the creditors power to authorise the trustee, to carry on a debtor's business except so far as may be necessary for the beneficial winding-up of the same.

It cannot be carried on, however profitable, to make profits to increase the dividend, and a resolution passed by a statutory majority with such an object is not binding on a dissentient creditor.

This was an appeal from the decision of Mr. Registrar Murray, acting as Chief Judge.

On the 12th of June, 1879, W. Batey, ginger beer manufacturer, filed his liquidation petition.

The first meeting of creditors was held on the 2nd of July and was adjourned to the 15th of July, when resolutions were duly passed by the statutory majority accepting a composition of 20s. in the pound, payable by instalments, to be secured to the satisfaction of certain creditors. E. Emanuel, a dissenting creditor, was present at the above meeting but took no part therein.

The second meeting of the creditors was held on the 29th of July, when, the debtor having failed to give satisfactory security for the composition, resolutions were passed by the statutory majority of creditors—First, for liquidation by arrangement; second, two trustees were appointed; third, that the trustees should be at liberty to carry on the business of the debtor "for a period of twelve months, and for such further period or periods from time to time as the creditors in general meeting shall determine;" fourth, and the debtor was granted his discharge.

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E. Emanuel did not attend this second meeting.

On the 10th of August, 1880, a general meeting of the creditors was held, when a resolution was passed by the statutory majority that the trustees should "continue to carry on the business for a further period of fifteen months as from the 29th of July, 1880."

E. Emanuel had due notice of but did not attend this meeting, and on the 21st of August, 1880, by his solicitor, gave formal notice to the trustees that he dissented from the course they were pursuing, and objected to and was prejudiced by the delay in proceeding with the liquidation, and should, if necessary, apply to the Court to enforce his rights as a creditor.

On the 18th of October, 1880, E. Emanuel served the trustees with a notice of motion for a declaration (*inter alia*) that so much of the resolutions passed by the creditors as purported to authorise the trustee to carry on the business of the debtor were *ultra vires*, and for an order that the trustees might be directed to wind up the estate forthwith.

Prior to this notice of motion a dividend of 2s. in the pound had been paid by the trustees to the creditors out of the profits of the business, and on the 3rd of November, 1880, a further dividend of 2s. in the pound was paid. E. Emanuel received both dividends.

In opposition to the motion one of the trustees deposed as follows: "The reason for carrying on the business for a further period of fifteen months is, that the business is purely for a season only—that is to say, from April to the commencement of October—and that to call the creditors together before the expiration of the season is not fair either to the trustees or to the creditors, as the months of August and September are the two best months for business and profits in the season, so that to make up the accounts in the month of July—being near the middle of the season—the trustees cannot truly show a proper state of the trading; therefore the creditor at the last general meeting resolved to give the trustees a full season's trading, namely, fifteen months from the 29th of July, 1880. . . .

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In re Batey ; ex parte Emanuel (App.), Bankr.

"That at the general meeting of creditors, held on the 18th of August last, the propriety of immediately selling the business was fully discussed, and inasmuch as it was considered by the creditors present that there would be a difficulty in their disposing of the business on advantageous terms, it was considered by the majority of the creditors present that it would be most beneficial for the winding-up of the estate that the business should be continued for another full season."

The Registrar dismissed E. Emanuel's motion with costs.

E. Emanuel appealed.

Mr. Northmore Lawrence, for the appellant.—The form of the resolution passed at the adjourned first meeting of the creditors, purported to reserve to them the power of directing the trustees to carry on the debtor's business for an indefinite period. That was *ultra vires*. We do not now seek to impugn what has been done during the first twelve months under that resolution, but we say that the trustees, under section 25 of the Act, can only carry on the business so far as it may be necessary for the beneficial winding-up of the estate; and under section 14 of the Act the creditors have no greater power. They cannot therefore carry on the business to make profits for their own benefit. The terms of the 2nd sub-section of the 25th section of the Bankruptcy Act, 1869, are similar to those in the sub-section of the 95th section of the Companies Act, 1862; and in

In re the Wreck Recovery and Salvage Company, Law Rep. 15 Ch. D. 353,

it was held that the liquidator had no power to carry on the business of the company unless it was beneficial for the winding-up of the company. The principle of that decision governs this case. I submit, therefore, that the resolution passed at the second general meeting of the creditors was improper and invalid.

Mr. Horton Smith and *Mr. E. O. Willis*, for the trustees.—First, we say that the conduct of the appellant has been such as to disentitle him now to object to what has been done. He had due notice of all the proceedings, and did not dissent at the

first meeting and did not choose to attend the second meeting, and took no active steps until the 18th of October. He also accepted the dividends obtained by carrying on the business. He is therefore bound by his acquiescence in all the proceedings and cannot now complain. Further, it is competent to the creditors in general meeting to give directions for the winding-up of the estate and, for that purpose, for the carrying on of the debtor's business even for a considerable period—

The Bankruptcy Act, 1869, ss. 14 (sub-s. 4) and 20.

They did not go beyond their statutory powers in directing the trustees to carry on the business for twelve months, and it was competent for them at the expiration of the twelve months to meet and resolve that the trustees should carry on the business for a further limited period. This is not a case like

In re the Wreck Recovery and Salvage Company (ubi supra).

There the matter objected to was a project, not for the winding-up, but for the reconstruction of the company.

[JAMES, L.J.—It was never intended that a bankrupt's estate should be traded with. The object of the Bankruptcy Act was that a bankrupt's estate should be wound up with all convenient speed, and that his business should be carried on only so far as was necessary for the beneficial administration of the estate.]

No doubt that is so, and the question here is whether what the creditors have done is beyond their statutory powers. We submit it is not, and that on the evidence this is not an indefinite and unreasonable carrying on of the debtor's business for the purpose of trade and profit.

No reply was heard.

JAMES, L.J., said—It appears to me quite clear that the resolution passed at the second general meeting of the creditors directing the trustees to carry on the debtor's business for another fifteen months was *ultra vires* on the part of the creditors. The terms of the 25th section of the Bankruptcy Act, 1869, are exactly the same as those in the 95th section of the Companies Act, 1862, and only authorise the carrying on of the business so

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far as may be necessary for the beneficial winding-up of the same, and do not authorise it to be carried on, because it is very profitable, for the purpose of obtaining a larger dividend for the creditors. A resolution passed for such a purpose as that, a majority of creditors have no right to force on a dissenting minority. It is quite clear to my mind that the Legislature never intended that a trustee in bankruptcy should carry on a business as a going concern for the purpose of making profits. It seems to me that the affidavits of the trustees shew that they were not carrying on the business for the purpose of obtaining a beneficial winding-up of the estate, but with the object of making profits. In my opinion, therefore, the resolution passed on the 10th of August, 1880, was *ultra vires*, and the resolution passed at the first general meeting of the creditors was also *ultra vires* in so far as it provided that the business should be carried on "for such further period or periods from time to time as the creditors in general meeting shall determine." In other words, the creditors thereby purported to give themselves power to carry on the business generally for an indefinite period. The first twelve months may well have been understood by all the creditors to have been intended to give the trustee time to carry on the business so far as might be necessary for the beneficial winding-up of the estate, and it is now impossible for any creditor to object to what was done during that twelvemonth, and the appellant does not seek to impugn anything that was done during that period. But with regard to what took place at the second general meeting the appellant did protest in writing so soon as he knew of it, and took steps within a reasonable period to enforce his rights; and therefore he is entitled to come to the Court and ask them to interfere and to put an end to the trading, as he has done.

BRETT, L.J., said—It seems to me that the only power given by the statute to a trustee to carry on a bankrupt's business is that conferred by the 25th section, and that, upon the true construction of the 14th section, having regard to the

25th section, the only power the creditors have is to authorise the trustee to carry on the business to the same extent and for the same purpose, and that they cannot bind dissentient creditors beyond that. But then, how far can it be said that the creditors here have exceeded the authority and power given them by the statute? If what they have done is within their power, but is erroneous, I am not sure how far the Court can interfere; but if what they have done is beyond their power the Court is justified in interfering and putting an end to it. But the Court must look at all the facts to see whether what the creditors have done is for the purpose of a beneficial winding-up of the estate or was intended for something else. Here the first resolution provided that the business should be carried on for twelve months. It would be difficult to infer from that alone that it was not intended for the beneficial winding-up of the estate; but when one looks to the rest of the resolution, and how it was carried out by the subsequent resolution passed at the second general meeting of the creditors, it seems to me that the creditors did not authorise the trustees to carry on the business "for the beneficial winding-up of the same," but intended to give them authority to do something more. Under those circumstances it seems to me that the resolutions were beyond their power, and could not bind a dissentient creditor. I think, however, that the order to be made should be one that will not leave the trustees open to attack for anything they did during the first twelve months.

COTTON, L.J., said—What we have to consider is, whether the second resolution, and so much of the first resolution as directed the trustees to carry on the business for such period as the creditors might in general meeting determine, were within the power of the creditors. Now the 25th section of the Bankruptcy Act says the trustee shall have power to carry on the business of the bankrupt so far as may be necessary for the beneficial winding-up of the same. The trustee, therefore, can only do it for the purpose of winding up the business, and that is made

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more clear by the 14th section, which provides that when a debtor has been adjudicated bankrupt, "his property shall become divisible amongst his creditors; . . . and for the purpose of effecting such division the Court shall, as soon as may be, summon a general meeting of his creditors." That shews that the intention of the Act of Parliament is that the bankrupt's estate shall be at once realised and divided, subject to his business being carried on by the trustee under the 25th section to effect a beneficial winding-up. It is said that the creditors in general meeting have a large power over the trustee in directing the administration of the estate. But then the 14th section shews what that power is. The general meeting is to be held to appoint a trustee to administer the bankrupt's property, and the 4th sub-section empowers the creditors to give direction as to the manner in which the property is to be administered by him. Now the administration of the estate and the power given by the 4th sub-section are qualified by the opening words of the section, which enact that the meeting is to be summoned for the purpose of realising the bankrupt's property and dividing it amongst his creditors. It is true the 20th section says that the trustee in administering the estate is to have regard to the directions given by the creditors at any general meeting; but where no such directions are given his powers are defined by the 25th section, and in my opinion the creditors have no power to direct a trustee to carry on a business for any purpose other than that mentioned in that section, namely, the realisation of the assets. That being so, the second resolution passed by the creditors here shews that what was directed to be done was not done for the purpose of the beneficial winding-up of the business but for some other purpose, and the affidavit of the trustee corroborates that view. It is no doubt true that the creditors thought they were acting within their powers, but, in my opinion, the general power for carrying on the business for an indefinite time and the second resolution were not passed with the object to expedite the beneficial winding-up of the business, but

were intended for the purpose of getting profits by carrying on the business for that extended period. That is contrary to the provisions of the Act of Parliament and was *ultra vires*, and there must be a declaration to that effect.

Mr. Northmore Lawrence asked for his costs of the appeal and in the Court below.

Mr. Horton Smith submitted it was not a case for giving costs against the trustees. They had acted *bona fide* under the direction of the bulk of the creditors, representing some 10,000l., as against dissenting creditors representing about 3,000l.

JAMES, L.J.—The appellant is entitled to his costs of this appeal and of the Court below, not against the trustees personally, but out of the estate. There will be no order as to the costs of the trustees.

Solicitors—Harper, Broad & Battcock, for appellant; G. J. Jennings, for respondents.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.

JAMES, L.J.

LUSH, L.J.

1880.

Nov. 22.

THE OCEANIC STEAM NAVIGATION COMPANY v. SUTHERBERRY.

Administrator—Powers of—Trustee—Underlease by—Option of Purchase.

An administrator, although he may underlet the leaseholds of his intestate, if such a mode of dealing with the assets be advisable for the due administration of the intestate's property, cannot give an option of purchase at a future time.

Appeal from a judgment of the late Mr. Little, the Vice-Chancellor of the Duchy of Lancaster.

William Lawrence Sutherberry the elder, the lessee of a shipwright's yard in Liverpool, which was held at a pepper-corn rent, assigned the premises by way

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of mortgage to the defendants North and Brierley, to secure 3,500*l*.

In 1872 W. L. Sutherland died intestate, leaving his sole next-of-kin three children, namely, his son, the defendant W. L. Sutherland, and two daughters—one a married woman, Jane Harriet Thomson, and Helena Sutherland, a spinster.

W. L. Sutherland took out administration to his father's estate, and on the 1st of January, 1873, concurred with the defendants North and Brierley in granting an underlease of the property to the plaintiff company.

In the underlease there was a recital that W. L. Sutherland was possessed of or otherwise entitled to the property for the residue of the term of seventy-five years, subject to the mortgage; and the defendants North and Brierley and W. L. Sutherland, the parties of the first and second parts, demised the property to the company for a term of twenty-one years, at a yearly rent of 500*l*., and subject to certain contracts and provisions therein set forth.

The deed also contained a proviso, which was the subject of the present contention, whereby it was declared "that the said North, Brierley and Sutherland, or any of them, their or any of their executors, administrators or assigns, shall not, nor will at any time before the 1st of December, 1879, sell the said demised premises or any part thereof, or any term or interest therein, without first offering the said premises to the company for the residue of the said term of seventy-five years, at the price or sum of 6,500*l*. (freed and discharged from the said mortgage and from all future liability under this demise), and allowing them three months for determining on the acceptance of such offer; and the said company shall in like manner, at any time before the said 1st day of December, 1879, and before the said premises shall be sold as aforesaid, have the option of purchasing the same at the price aforesaid for the said residue of the said term, upon giving three months' notice to the said North, Brierley and W. L. Sutherland, or any or either of them, or their or any or either of their executors, administrators or assigns."

The plaintiffs made various improvements upon the property, and expended more than 11,000*l*. therein.

On the 18th of September, 1872, Helena Sutherland married J. Kennedy, and assigned her one-third share to the trustees of her marriage settlement upon the usual trusts. J. Kennedy died without issue of the marriage. On the 27th of September, 1872, Mr. and Mrs. Thomson assigned their interest in one-third of the leasehold premises to trustees upon certain trusts.

Subsequently W. L. Sutherland sold all his one-third share in the premises to his sister, Mrs. Kennedy, for the sum of 1,000*l*., and at her request assigned it to the trustees of her marriage settlement.

On the 30th of June, 1875, Mrs. Kennedy intermarried with J. Bore.

The company, on the 29th of May, 1878, served the lessor with notice of their intention to exercise the option of purchase reserved to them in the underlease, and a draft assignment was prepared to carry out the purchase. The trustees of Mrs. Thomson's and Mrs. Bore's settlements, however, opposed the sale, and refused to concur in the assignment.

The company accordingly brought the present action against W. L. Sutherland, Mr. and Mrs. Thomson, Mr. and Mrs. Bore and the trustees of their respective settlements, and North and Brierley, the mortgagees, claiming specific performance of the agreement.

Mr. and Mrs. Bore and the trustees of their settlements, by their statement of defence, denied the right of W. L. Sutherland to bind their rights by the agreement to sell, but submitted that they were willing to deal with the original share of W. L. Sutherland under the direction of the Court, and, upon the plaintiffs covenanting with them to indemnify them against the one-third of the mortgage debt, and paying to the trustees 1,000*l*., to assign the said original one-third to the plaintiffs, or as they might direct.

The action came on to be heard before the Vice-Chancellor of the County Palatine, and on the trial evidence was given

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that the former rent at which the property was sublet was 384*l.*; that it had remained unlet for some time previous to the grant of the underlease to the plaintiffs; and that a competent valuer had valued it at 6,000*l.* It also appeared that it had been put up for sale by auction by the administrator, but that no purchaser had been found for it.

The Vice-Chancellor held that the administrator was acting *ultra vires* in making the contract, and was in so acting guilty of a breach of trust, and therefore refused to grant specific performance of the contract, and dismissed the action with costs.

The company appealed.

Sir H. Jackson and *Mr. Neville*, for the appellants, contended that the administrator had a wider power than an ordinary trustee for sale. By his appointment the leaseholds vested in him, and he was able to dispose of them as an absolute owner; a purchaser from him was not put upon an enquiry as to whether the sale was necessary. They cited

Bac. Abr. tit. L, s. 7;

Williams on Executors, 6th ed. p. 878.

He might also grant an underlease if beneficial to the estate, as in this case it was clearly proved to be; and the case of

Keating v. Keating, 1 *Ll. & G. temp.*

Sug. 133,

was not against that contention, for in that case the power to grant an underlease was not disputed, but the particular lease granted was decided not to be beneficial.

Nor was the case of

Clay v. Rufford, 5 *De Gex & S.* 768,

where a trustee for sale was held not able to give a future option for purchase at a fixed price; but the administrator, with his larger powers, was justified in making the contract, which the Court would have sanctioned if the estate were being administered in Court. The plaintiffs had expended large sums of money upon the improvement of the property, which they would lose if the agreement was not to be carried out.

They contended, lastly, that, at all events, the plaintiffs were entitled to the

share to which *W. L. Sutherland* was beneficially entitled on payment of one-third of 6,500*l.*

Mr. Thompson, for the administrator.

Mr. North, *Mr. Clare*, *Mr. Gaydon*, and *Mr. S. Hall*, for the other next-of-kin and the trustees, and

Mr. J. P. Lake and *Mr. Arkcoll*, for *North* and *Brierley*, were not called upon.

JESSEL, M.R., said that he regretted that he was unable to dissent from the conclusion of the Vice-Chancellor.

An administrator was considered in a Court of equity as a trustee, whose primary duty was to sell the intestate's estate for the payment of his debts. It was true that, having the legal estate in the intestate's leasehold property, he might in some cases underlet it, and such underlease would be supported in equity as well as at law. That, however, was an exceptional mode of dealing with the assets, and those who accepted a title in that way must take it subject to the question whether that was the most suitable mode of so dealing with the assets. Here, very possibly, the letting of the property at 500*l.* a year was a proper letting, as the property had failed to find a purchaser when put up for sale. But the question here was not whether the rent was a proper rent, but whether the insertion of an option to purchase was justified, which would have the effect of fettering the exercise of the trust for sale, by preventing the administrator from selling the property to anyone but the plaintiffs for a period of seven years, at a price then fixed. It would be dangerous to hold that an administrator could do that, he being a mere trustee whose duty it was to sell within a reasonable time. It was clear that no such option could be given by an ordinary trustee; and an administrator, although not an ordinary trustee, was in a similar position, and to support what had been done here would, in his opinion, be an unauthorised and unwarranted extension of the powers up to that time understood to be reposed in an administrator. The agreement, therefore, must be considered a breach of trust, of which specific performance could not be enforced.

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There were, no doubt, special circumstances in this case. The intention of the company to build on the property was well known, and the company had built on it and very considerably increased its value; and there was no doubt that the price paid was a fair one at the time. But the fact of the outlay by the plaintiffs could not alter the position of the parties in a Court of equity, although it might be thought to have some bearing on the justice of the case.

JAMES, L.J., said that the case was one of singular hardship, but that the Court must not, because of the hardship in a particular case, do the great mischief of shaking the fixed rules of law; and the principles on which the case had to be decided had been settled by the authorities.

For the purposes of the case his Lordship saw no difference between an executor or administrator and any other trustee, the only distinction being, so far as he was aware, that the law did not expect an executor or administrator to give evidence to a purchaser, or enable a purchaser to require evidence from him, that what he was doing was necessary for the due execution of his trust. With that difference, he was exactly in the position of a trustee with the power to give receipts. It would be most dangerous if a trustee could enter into a contract for sale binding the estate for some years afterwards, whatever might be the alteration in the value of the property. It was immaterial that the administrator at the same time that he gave the option granted an underlease, and that he had power to grant that underlease. The agreement was a violation of the rules which had been laid down for the guidance of trustees in the exercise of their duty, and the mere fact that the agreement was a beneficial one would not justify the Court in upholding it. He therefore was of opinion that the appeal must be dismissed.

LUSH, J., concurred, though with reluctance.

THE COURT added to the order appealed from a declaration that the appellants

were entitled to an assignment of one-third of the property in which Sutherland was beneficially interested upon payment of one-third of the agreed purchase-money.

Solicitors—Williamson, Hill & Co., agents for Henry Thompson, Liverpool, for plaintiffs; Gregory, Rowcliffes & Rawle, agents for Hill & Dickinson, Liverpool; Field, Roscoe & Co., agents for Rowe & Pemberton, Liverpool, and for Miller, Peel & Hughes, Liverpool; W. W. Wynne & Son, agents for Simpson & North, Liverpool, for defendants.

FRY, J. }
1881. } HOLT AND COMPANY v. COLLYER.
Feb. 26. }

Covenant—Construction—"Beerhouse"
—Evidence—Technical Term.

The sale of beer not to be drunk on the premises was held not to be an infringement of a covenant not to carry on the business of a "public-house, tavern or beerhouse."

Evidence of the meaning of "beerhouse" in the brewing trade was not admitted in construing a covenant in a lease by a builder to a grocer.

The plaintiffs in this action were brewers, who held a lease for eighty years of a public-house at Bromley. The defendants were Mr. Collyer, a grocer at Bromley, and James Glaskin, a builder, the owner of an estate at Bromley on which both the plaintiffs' public-house and Collyer's shop were situated.

The plaintiffs' lease was granted by the father and predecessor in title of the defendant James Glaskin, and it contained a covenant by the lessor that in all future leases of premises on the estate a restrictive covenant should be inserted to prevent such premises from being used as "a public-house, tavern or beerhouse." The defendant Collyer held a lease from his co-defendant, Glaskin, by which he covenanted not to carry on certain specified trades on the demised premises, "or use or permit the premises to be used as a public-house, tavern or beerhouse."

Holt v. Collyer.

The defendant had recently obtained a licence to sell beer by retail not to be drunk on the premises where he carried on his business of a grocer.

The plaintiffs claimed an injunction to prevent the sale of beer by retail by the defendant Collyer, as being in contravention of the covenant not to use the premises as a beerhouse.

Mr. Cookson, Mr. Oswald and Mr. Ratcliff, for the plaintiffs, asked to be allowed to adduce evidence that in the brewing trade the word "beerhouse" included any place where beer was sold, whether under licence to be drunk on the premises or under licence only to be drunk off the premises. They referred to

Taylor on Evidence, 7th ed. p. 968, s. 1161.

[*Fry, J.*, did not allow the evidence of trade usage to be given.]

They contended that "beerhouse" or "alehouse" was synonymous with or at least inclusive of "beershop," or a place where beer was sold, whether for immediate consumption or to be taken home. They referred to *Johnson's Dictionary* and various editions of *Burns' Justice of the Peace*.

They distinguished the cases bearing on the subject, namely—

The London and North Western Railway Company v. Garnett, 39 Law J. Rep. Chanc. 25; Law Rep. 9 Eq. 26,

as being the report merely of an interlocutory application;

Jones v. Bone, 39 Law J. Rep. Chanc. 405; Law Rep. 9 Eq. 674,

as being a case which shewed that a covenant of this description did not apply to a kind of trade not in existence and not contemplated at the date of the covenant; and

The Bishop of St. Albans v. Battersley, 47 Law J. Rep. Q.B. 571; Law Rep. 3 Q.B. D. 359,

and

The London and Suburban Land Company v. Field, Law Rep. W.N. 1881, p. 11,

as merely shewing that a "beershop" did mean a place where beer was sold to be drunk off the premises, but did not decide

that a "beerhouse" did not include "beershop."

Mr. Millar and Mr. A. Thompson, for the defendant Collyer, and *Mr. Everitt*, for the defendant Glaskin, were not called upon.

Fry, J., stated the facts, and said—Now, that being so, two questions require my adjudication. The first is with regard to the principle upon which I am to determine the meaning of the word "beerhouse." The plaintiffs' counsel have pressed upon me that I ought to admit evidence shewing the meaning of the word "beerhouse" as understood in the trade. I have rejected that evidence, and I have rejected it for two reasons. [His Lordship explained that the plaintiffs were precluded owing to circumstances connected with the conduct of the action from adducing evidence of trade user, and proceeded:] But, independently of that observation, which applies only to this particular case, I rejected the evidence upon a broader and more general ground. In my view, the principle upon which words are to be construed in instruments is very plain. Where there is a popular and common word used in an instrument, that word must be construed *prima facie* in its popular and common sense. If it is a word of a technical and legal character it must be construed according to its technical legal meaning. If it is a word which is of a technical and scientific character, then it must be construed according to that which is its primary meaning in that technical and scientific character; and before you can give evidence of the secondary meaning of the word you must satisfy the Court, from the instrument itself or from the circumstances of the case, that the word ought to be construed not in its popular and primary signification, but according to its secondary intention.

Now is there anything here from which I can infer that the word "beerhouse" was not used in its primary and popular sense? The covenant which the plaintiff desires to have enforced against the defendant is contained in an indenture of lease made in 1879, which is not a trade instrument in any proper sense of the

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term. It is an ordinary lease by a landlord, who is not shewn to be a brewer or connected with the brewing trade, to a person who was not, according to the plaintiffs' own statement, connected with the business of selling beer at that time, and in respect of whom there is no evidence to shew that he was engaged in any way in the business. If there be, therefore, a technical signification to that word in the brewing trade or in the beer trade, there is no reason to suppose that the parties so used it in this instance; and to admit evidence now to that effect would be, in my opinion, contrary to the ordinary course and practice of the Court. I accordingly rejected the evidence, and I therefore proceed to consider the meaning of the word "beerhouse" according to what I will call its ordinary signification, not neglecting the use of dictionaries or any other means of information which may assist me in coming to a conclusion as to what is the ordinary meaning of the word. Now in coming to a conclusion as to what is the ordinary meaning of the word, I am greatly assisted by the decisions of two Courts of co-ordinate jurisdiction with this. One of them is the decision of Vice-Chancellor James, in which he held that a shop used as this is was not a beerhouse. The other is the decision of the late Lord Chief Justice Cockburn and Mr. Justice Mellor, both of them very eminent Judges sitting in the Court of Queen's Bench, in the case of *The Bishop of St. Albans v. Battersley*. The decision there no doubt turned upon the word "beershop," but their Lordships expressed their understanding of the meaning of the word "beerhouse" in a manner which seems to me not to be mistaken, and in respect of which Mr. Cookson very fairly said that their intention was apparent from the judgment. They drew the distinction between the words "beerhouse" and "beershop," and said that whereas "beerhouse" means a place where beer is sold to be consumed on the premises, a "beershop" is a place where beer is sold to be consumed off the premises. Well, then there is the more recent decision of the Court of Appeal in the case of *The London and Suburban Land Company v. Field*, in which Lord Justice

James reiterated the expression of opinion which he had given when Vice-Chancellor, and said that the word "shop" was perpetually introduced into leases because the word "beerhouse" has obtained a technical meaning, and must be so taken. Now, so far as I can gather from the shorthand notes of the judgments of the other two learned Judges of the Court of Appeal, they did not at any rate express any difference of opinion from him. It is quite true that there is one passage in the judgment of Lord Justice Cotton in which it is said there is something of an opposite aspect, but I am quite clear from the language of the passage that it has not been accurately reported by the shorthand writer.

That being the state of the authorities, I should feel myself bound by them in this sense, that unless I had a very strong and clear opinion that the decision of Vice-Chancellor James and the decision of the Court of Queen's Bench were wrong, I should think it a lesser evil to follow them than to give expression to a doubt leading to an opposite opinion in my own mind; and for this reason, that it is more important to the public that the meaning of the word "beerhouse" should be ascertained once for all, and should not vacillate from various opinions being expressed by different Judges, and that it should be decided definitely, because then persons who have to draw instruments relating to businesses of this sort will know on what principle to proceed, and counsel who are called upon to advise whether there is or is not a case to proceed upon at law in cases of this sort will know how to advise upon them. I am bound to say that, in my humble opinion, it would be a great evil that each Judge should overrule or decline to follow the opinions of other Judges when they are clearly expressed in the same matter. But, independently of the weight of authority, I should have come to the same conclusion as that expressed in those cases. I put this question to myself: Should I in ordinary usage and ordinary parlance call a grocer's shop, at which beer is sold either by wholesale or by retail, a "beerhouse," where the principal business carried on in that shop is that of

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a grocer, and where the business of the sale of beer is merely ancillary to that business of a grocer? and I answer, that I should not myself do so.

For those reasons it appears to me that the plaintiffs fail.

I ought perhaps to add that I think an inference in the same direction may be drawn from the collocation of words in the covenant itself, because, when I find that the word "beerhouse" follows "publichouse or tavern," I am rather led to infer that it is a house *ejusdem generis*; that is to say, a house where some alcoholic liquor is consumed on the premises.

I think, therefore, that the application of the plaintiffs in this present instance fails, and I accordingly dismiss the action with costs.

Solicitors—H. J. & T. Child, for plaintiffs; G. J. Nutt & Co., for defendant Collyer; Clapham & Fitch, for defendant Glaskin.

JESSEL, M.R. }
1881. } LONG v. OVENDEN.
March 8. }

Settlement—Will—Appointment of Share of Fund—Postponement of Enjoyment—Devolution of Income in the Meantime.

Where an invalid appointment of a share of certain proceeds of sale and of residuary real estate was made in favour of an infant, not one of the objects of the power, and where in case of the death of the infant under twenty-one a valid appointment was made in favour of A B, one of the objects of the power,—Held, that the income of the fund until the infant attained twenty-one, or until his death under that age, would go with the corpus of the fund, in the one case to the persons who took in default of appointment, and in the other case to the appointee A B.

By the settlement, dated the 1st of August, 1868, made upon the marriage of George Camfield and Martha Long, certain hereditaments at Langton, in the county of Kent, and the share of

Martha Long in the residuary real estate of her late husband, Charles Long, deceased, were granted to a trustee upon trust after the marriage for sale and investment, and after the death of G. Camfield and Martha Long upon trust for Charles Long, Albert Long, and the defendant Sarah Jane Ovenden and the children of the intended marriage, or some or one of them, in such shares, and with such future and executory and other trusts, and with such powers of maintenance or advancement, and upon such conditions and with such restrictions, and in such manner as failing a joint appointment Martha Long should by deed or will appoint; and in default of appointment in trust for Charles Long, Albert Long, and the defendant Sarah Jane Ovenden and the children of the intended marriage at twenty-one or marriage, as tenants in common.

No joint appointment under the power in the settlement was made; and by her will, dated the 11th of October, 1876, in exercise of her power Martha Camfield appointed that the trustee of the settlement after the death of George Camfield should stand possessed of the moneys to arise from the sale of the hereditaments at Langton, and of her share in the said residuary real estate upon trust as to one-third part to pay the income to her son, Charles Long, for life, or until he should attempt to deprive himself of the benefit thereof by anticipation, and after the death of Charles Long or the determination of his life interest upon trust to pay the said one-third part to her grandson, the defendant Arthur Long, as and when he should attain the age of twenty-one years; and in case her said grandson should die before he should attain the age of twenty-one years, upon trust to pay the said third part to her daughter, the defendant Sarah Jane Ovenden, for her separate use; and as to the remaining two third parts of the said moneys, upon trust for the defendant Sarah Jane Ovenden, in manner in the will mentioned.

George Camfield died on the 17th of March, 1878, and the testatrix on the 31st of March, 1878. There were no children of their marriage.

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Charles Long died on the 2nd of January, 1880, leaving his son, the defendant Arthur Long, surviving him, and an infant of the age of nine years.

Albert Long died in January, 1880, but no legal personal representative had yet been constituted.

This action was commenced by Esther Long, the legal personal representative of Charles Long, against Mark Ovenden, who had been appointed trustee of the settlement, Arthur Long and Sarah Jane Ovenden, and the plaintiff claimed that it might be declared that the above appointment by Martha Camfield, so far as made in favour of Arthur Long, was void, and that the share and interest in the trust estate, in respect of which there had been default of appointment, was divisible amongst the plaintiff, as the legal personal representative of Charles Long, the legal personal representative of Albert Long and the defendant, Sarah Jane Ovenden, on her bringing her appointed share into hotchpot, and ancillary relief.

The action now came on for trial.

Mr. Badnall, for the plaintiff.—The difficulty that has given rise to this action is the question how the income of the appointed fund that will accrue from the death of Charles Long until the death of Arthur Long, or until he attains twenty-one, is to go. It is clear that the appointment in favour of her grandson, Arthur Long, by Martha Camfield was unauthorised by the power, and Sarah Jane Ovenden only takes the share appointed to Arthur in case he should die before he should attain twenty-one—

Alexander v. Alexander, 2 Ves. sen. 640.

If he attains twenty-one, then I submit the whole third is unappointed—

Crompe v. Barrow, 4 Ves. 681 ;

and that the intermediate income will go with the capital to the persons who take in default of appointment. If, on the other hand, Arthur Long dies under twenty-one, then I suppose the intermediate income will go with the capital to Sarah Jane Ovenden.

Lord v. Lord, 36 Law J. Rep. Chanc. 533 ; Law Rep. 2 Chanc. 782 ;

Genery v. Fitzgerald, Jacob, 468 ;

and

Bective v. Hodgson, 10 H.L. Cas. 656 ; 33 Law J. Rep. Chanc. 601, were also referred to.

Mr. Chitty and *Mr. Rigby* appeared for the defendants.

THE MASTER OF THE ROLLS.—The first question is really not arguable. The trust is to pay one-third part of the settled funds, after the cesser of enjoyment by Charles, the father, to the grandson, as and when he shall attain twenty-one, and in case he shall die before attaining twenty-one, then over. Of course the appointment to the grandson is void, he not being an object of the power ; but the appointment, if he dies under twenty-one, in favour of one object of the power, will take effect as being within the limits of the rule as to remoteness.

The only question remaining is, What becomes of the income of the one-third after the death of Charles until the event happens of the grandson attaining twenty-one or not ? Is it unappointed or does it go with the capital ? I have no doubt that it goes with the capital.

The first question to be considered is, What is the capital ? It is a part of an ascertained trust fund. It is as specific a thing as you can well have. Treating the well-settled doctrine of a gift of a specific legacy as analogous, we find that if you give a specific legacy with a postponed enjoyment it carries intermediate income. If you give 10,000*l.* consols standing in the name of the testator, and so described, to A on his attaining twenty-one, he gets the 10,000*l.* consols as from the death. That is settled, because it is considered to be severed at the death from the rest of the testator's estate. Indeed, as regards general legacies, when there is a severance complete as from the death, they carry interest from the death and not from the end of twelve months, on this principle, that they are severed and taken away, and distinguished from the general property of the testator. Consols, however, may be regarded as a perpetual annuity redeemable, and therefore do not afford the best possible illustration.

The same principle would follow, I presume, if a man gave a flock of sheep

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to be delivered to A B on his attaining twenty-one. I suppose the intermediate increase of the flock would pass. Nobody could say that the lambs which were born in the meantime fell into the general estate of the testator; and so, I suppose, it would be in any other case where income or any other accretion accrued to the specific article, whether what was given was a chattel or a security.

If, then, that is so—if the principle is that such a gift is a gift of a severed fund or legacy, and is to be so treated—what is the difference between that and an appointment of a third of a fund comprised in a particular settlement? It is just as distinct and specific. No one could deny that if instead of its being subject to a power only this property had been the absolute property of the testatrix, and she had given it in these words—"one-third of the funds comprised in such settlement"—that would have been a specific legacy; and it is, in my opinion, not less specific for the purpose because it is given as part of a fund over which she had a power of appointment.

I should say that when you give a third share of a fund over which you have a power of appointment to A B at twenty-one, it carries with it the whole accretions of that share of the fund in the meantime, whether in the shape of income or otherwise. I say "or otherwise," because you may have accretions as regards personal estate of a totally different kind. If the fund consisted of railway stock you might have an allotment of new shares made by the company in respect of the railway stock, or you might have bonuses if the fund consisted of shares or stocks in other companies, and so on. It appears to me that the whole of the accretions, whether strictly income or not, pass by the description of the thing given, appointed or bequeathed, and consequently the intermediate accretions pass.

If I turn from general principle to the words of this appointment, I think the words very much favour the view I have stated. The testatrix first of all appoints one-third of the trust fund upon trust to pay the annual income thereof to her son

Charles for life or until he anticipates, and "from and after"—that is, immediately after—the death of her said son Charles, or the determination of his estate, upon trust to pay such one-third to the defendant Arthur Long upon his attaining twenty-one. The words "from and after" would have no meaning unless they carry the intermediate income. It is the only sense in which the trustees can pay the one-third "from and after;" that is to say, from the moment of Charles's decease or cesser of interest. On that event the one-third is separated or set apart and given to Arthur Long upon his attaining twenty-one. If one had to depend upon the wording, I should say it is clear that from and after the death or cesser of interest one-third is to be set apart and to be paid over to Arthur Long when he attains twenty-one, and that would carry the income to Arthur; but if he should die before attaining twenty-one, then the trust is "to pay the said one-third part" to her daughter. That is the one-third part Arthur would otherwise have taken. Whether Arthur attains twenty-one or not, the accumulation of income of the one-third part still goes on from and after the death of Charles or cesser of his interest; and it is the same part which is to go to the daughter. What is given to the daughter is in fact the same thing that is given to Arthur, so that if he dies under twenty-one the income from the cesser of Charles's interest goes with the capital to the daughter. If, however, Arthur attains twenty-one, then the appointment to the daughter fails to take effect, and both income and capital pass under the settlement as in default of appointment.

Solicitors—Sole, Turner & Knight, agents for Cripps & Son, Tunbridge Wells, for plaintiff; Collyer-Bristowe, Withers & Russell, agents for Stone & Simpson, Tunbridge Wells, for defendants.

BACON, V.C. } *In re RADCLYFFE.*
 1881. } PEARCE v. RADCLYFFE.
 Feb. 5. } DE FOE v. RADCLYFFE.

Costs—Executors—Action by Residuary Legatee—Rules of Court, 1875, Orders III. rule 8; XV. rule 1.

A residuary legatee objected to certain items in accounts furnished by the executors, amounting in all to about 100l., and issued a writ for an account specially indorsed under Order III. rule 8, and payment of the balance. An account was taken under Order XV. rule 1 without any pleadings being delivered, and the chief clerk disallowed all the items objected to, and made his certificate accordingly:—Held, that the executors must pay the costs of the action.

Further consideration.

Pearce v. Radclyffe was an action by one of two residuary legatees under the will of Caroline F. Radclyffe, who died in October, 1879, against the executors of the will. It appeared that on the application of the plaintiff the executors had, in April, 1880, furnished accounts of their dealings with the personal estate; and that the plaintiff objected to certain items of payment by the executors as improper and excessive, and also that they did not account for a sum of 11l. cash belonging to the testatrix. The total of the items to which the objections related was about 100l.

The executors, however, insisted on the correctness of their accounts and payments, and the plaintiff then issued her writ in *Pearce v. Radclyffe*, which claimed as follows:—

“To have the account of the personal estate of the said deceased rendered to her by the defendants taken under the direction of the Court, and to have certain items of payment therein charged by the said defendants disallowed as excessive and improper.

“Payment by the plaintiff of one-half of the balance appearing by such account to be in their hands, and such further and other sums as on taking the said account shall appear to be due from them.

“That on taking the said account, in addition to the sums therein appearing to

have been received, the defendants may be charged with the sum of 11l. money part of the estate come to the hands of the defendants, but not credited in their said account.

“Costs as against the defendants.”

No pleadings were delivered in the action, but an order was made on summons for an account under Order XV. rule 1, and on taking the account the chief clerk disallowed the defendants 105l. 19s. 7d., or rather more than the total amount of the objections of the plaintiff.

The action of *De Foe v. Radclyffe* was an action by Emma de Foe, the other residuary legatee, for a similar account. This action had been stayed on an account of the share payable to Emma de Foe being directed to be taken in addition to the account directed to be taken in *Pearce v. Radclyffe*.

The action of *Pearce v. Radclyffe* came on for further consideration in chambers, and was adjourned into Court at the request of the defendants, the only question being who was to pay the costs.

Sir H. Jackson and *Mr. Bardswell*, for the plaintiff.—This is not an action for general administration, but for an account. The items to which the plaintiff objected have all been disallowed. The proceedings were occasioned by the conduct of the executors, and they should pay the costs.

Mr. Nalder, for Emma de Foe.

Mr. Hemming and *Mr. W. Barber*, for the defendants.—The executors may have made mistakes, but they have not acted unfairly or improperly, and ought not to pay the costs.

BACON, V.C., after stating that he must take the facts as stated by the chief clerk's certificate, continued—Now, what is this case? A residuary legatee who asks the executors for her share of the residue is like a person who brings an action for money had and received on her account. It is no more than that. Being an executor, he has a right to have the account taken. He is in no better position than if he were only a defendant to an action for money had and received. That is the only difference between them.

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The plaintiff has never asked for more than is due to her. She has asked to have a true account rendered, and payment made to her of the sum that is shewn by the account to belong to her from the defendants.

I quite agree that the Court does deal indulgently with executors. It supplies deficiencies that have occurred by reason of the loss of vouchers and so forth, and it does deal in a liberal manner with the accounts of executors, as indeed in justice it ought upon all occasions to do. But this case does not come near that. Before this suit was brought the plaintiff complained that the money had and received by the defendants was not forthcoming, and she stated the grounds upon which she complained that a similar sum of money was due to her. The details are given in a letter, and a very temperate letter it was; and it pointed out that she did not insist upon all the charges but that there were excessive charges, which the executor—her trustee in a sense—had made against her; and it intimated that she should be reluctant to take proceedings, but that she should be driven to it if her just demand was not complied with.

Now, under these circumstances, I must apply the common rule and practice of the Court to the undisputed facts of the case. This person comes and says, "Pay me my money;" and the debtor does not pay, but says he is entitled to deduct certain sums from it. If the plaintiff is driven to invoke the assistance of the law to obtain that which it is her perfect right to have, am I to say that she is to do that at her own expense? Am I to allow executors who have withheld the amounts and rendered an untrue account to pass through the operation of this suit, and to do it at the expense of the residuary legatee? Upon no ground of reason or justice could I do that, and, indeed, it is contrary to the very well-settled rules and practice of the Court. I think the defendants must necessarily pay to the plaintiff her costs.

Solicitors—Letts Brothers, for plaintiff; E. Woodward, for Emma de Foe; J. M. Chamberlain, for defendants.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.

JAMES, L.J.

COTTON, L.J.

LUSH, L.J.

1880.

Nov. 25.

In re THRELFALL; *ex parte* BLAKEY.

Attornment Clause in Mortgage Deed—Landlord and Tenant—Tenancy from Year to Year—Tenancy-at-Will—Distress—Bankruptcy Act, 1869, s. 34.

*By deed dated the 1st of June, 1871, A mortgaged a mill and other premises to the trustees of a building society. The mortgage deed contained an attornment clause whereby A attorned tenant from year to year to the trustees in respect of the mortgaged premises at a yearly rent of 800*l.*, to be paid by equal quarterly payments, and it was thereby agreed that it should be lawful for the trustees "at any time after the 1st of September, 1871, without giving previous notice of their intention so to do, to enter upon and take possession of the premises, and to determine the tenancy created by the aforesaid attornment."*

A filed a liquidation petition on the 17th of May, 1879, when a receiver was appointed, and notice of the petition and the appointment was given to the mortgagees.

On the 19th of May the mortgagees entered and distrained upon the goods and chattels on the premises in respect of a half-year's rent:—

Held (affirming the decision of the Chief Judge), that the attornment clause created a tenancy from year to year, although determinable at the will of the landlord, and not a tenancy-at-will, and that the mortgagees were entitled, under the 34th section of the Bankruptcy Act, 1869, to distrain for the half-year's rent due from A to them at the date of the petition.

Morton v. Woods (9 B. & S. 632; 37 Law J. Rep. Q.B. 242; Law Rep. 3 Q.B. 658) *affirmed and distinguished*; (9 B. & S. 650; 38 Law J. Rep. Q.B. 81; Law Rep. 4 Q.B. 293) *explained*.

By an indenture of mortgage dated the 1st of June, 1871, James Threlfall (since deceased) and W. G. Threlfall mortgaged a cotton mill with land and buildings occupied therewith, machinery and other

In re Threlfall; ex parte Blakey (App.), Bankr.

premises, to the trustees of the Queen's Benefit Building Society, their heirs and assigns, to secure payment of 16,000*l.* and interest. The deed contained an attornment clause whereby J. Threlfall and W. G. Threlfall did thereby attorn and become tenants from year to year to the said trustees, their heirs and assigns, for and in respect of the mill and appurtenances, and certain plots of land then held and occupied therewith by J. & W. G. Threlfall at the yearly rent of 800*l.*, clear of all deductions, to be paid by equal quarterly payments, the first quarterly payment to be made on the day of the execution of the mortgage. And it was thereby agreed that it should be lawful for the trustees, their heirs and assigns, "at any time after the 1st of September, 1871, without giving previous notice of their intention so to do, to enter upon and take possession of the mill, buildings and premises whereof J. and W. G. Threlfall had attorned tenants as aforesaid, and to determine the tenancy created by the aforesaid attornment."

On the 12th of December, 1871, J. Threlfall died, having by his will devised and bequeathed all his real and personal estate to W. G. Threlfall, whom he appointed his executor.

On the 14th of May, 1874, W. G. Threlfall mortgaged the mill and other premises to Messrs. Schwabe and Crankshaw, subject to the mortgage of the 1st of June, 1871.

On the 6th of June, 1876, W. G. Threlfall further charged the same premises with payment to the building society of a sum of 4,000*l.* The mortgage to Messrs. Schwabe & Crankshaw was recited in the deed, and they agreed that this further charge should have priority over their mortgage.

This deed of charge contained no attornment clause by W. G. Threlfall, nor in any way shewed an intention of continuing the tenancy.

On the 17th of May, 1879, W. G. Threlfall filed a petition for liquidation, and on the same day Blakey was appointed receiver and manager, and entered into possession of the debtor's estate and effects.

Notice of the petition and appointment

of Blakey was on the same day sent to the trustees of the building society, who on the 19th of May, under their attornment clause, distrained upon the goods and chattels in the mill for a half-year's rent.

The first general meeting of creditors was held on the 30th of June, 1879, when Blakey was appointed trustee under the liquidation.

Blakey thereupon applied to the County Court of Lancashire for an order restraining the first mortgagees from proceeding with their distress, and to obtain a delivery up of the property and effects received thereunder.

The County Court Judge granted the application, being of opinion that the tenancy created under the attornment clause was a tenancy-at-will, and as such was determined by the presentation of the petition, and that the distress being levied subsequently was not protected by the Bankruptcy Act, 1869, s. 34.

The trustees of the society appealed to the Chief Judge, who, on the 10th of May, 1880, reversed the decision of the County Court Judge.

From the decision of the Chief Judge Blakey now appealed to this Court.

Mr. Joshua Williams and Mr. Finch (with them *Mr. De Gez*), for the appellant.—If the relation of landlord and tenant was subsisting between the parties when the distress was levied, no doubt it was lawful and would be protected by the Act. But here the tenancy was a tenancy-at-will, and, as such, was determined by the second mortgage when it came to the knowledge of the first mortgagees.

That a tenancy determinable at the will of one party must necessarily be determinable at the will of the other—see

Coke Lit. 55a

—and alienation by a tenant-at-will when it comes to the knowledge of the landlord does put an end to the strict tenancy-at-will—

Coke Lit. 57b.

So in

Doe v. Thomas, 6 Exch. Rep. 854;
20 Law J. Rep. Exch. 367,

a tenancy-at-will was determined by a vesting order made on the insolvency

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of the party creating the tenancy-at-will. The relation between landlord and tenant is personal, and when one of the parties has put an end to it, it is gone (*per Martin, B.*, p. 858).

At all events, at the date of the further charge the first mortgagees had notice of alienation, as the second mortgage is recited in that deed. In

Morton v. Woods (ubi supra)

a clause of attornment in very similar words to this was held by several of the Judges to shew an intention of creating a tenancy-at-will.

Mr. Winslow and *Mr. S. Taylor*, for the first mortgagees, were not called upon.

JAMES, L.J.—We are asked not to construe but to contradict a deed, so as to defeat the intention of the parties to it. The mortgagor was left in possession of the mortgaged premises, and, according to the usual practice, attorned tenant to the mortgagees. The intention of the parties in such cases is that the relation of landlord and tenant should be constituted between them. The mortgagor attorned tenant by the deed from year to year at a specified rent; his tenancy was determinable no doubt at the will of the lessors. The mortgagees would equally have had this power if the premises were in the possession of a third party, but it is the power usually given to a mortgagee to enable him to enter and take possession. We are asked to say, in spite of the express terms of the agreement, that this was not a yearly tenancy, but a tenancy-at-will.

No doubt there are expressions used in the case of *Morton v. Woods* that at first sight may seem to justify such contention. But in that case there was no actual demise, the mortgagee not having executed the deed, but for the purpose of giving effect to the obvious intention of the parties to the mortgage deed it was held that a tenancy-at-will was created.

COTTON, L.J.—We have here the express words contained in the attornment clause, but according to the appellants we are to say that the tenancy from year to year specified in the clause should be a

tenancy-at-will. But why are we not to give effect to express words? Why should we correct what the parties have said? But it is said that there is a power in the clause given to the mortgagees to determine the relation of landlord and tenant by entry and taking of possession. There is no principle of law which prevents persons who are free to contract from agreeing that a tenancy may be determined on whatever notice they like. No doubt without express stipulation there must be, for the purpose of determining a tenancy, a regular notice; but if parties who can contract do contract that there shall be no notice there is nothing to prevent them. But it is said that it is a tenancy at the will of the mortgagees. In a certain sense it is so, no doubt, because they are enabled to determine it on short notice; and a passage in Coke is referred to as saying that where a tenancy is at the will of one it must also be of the other. But Coke says nothing of the sort. All it says is, that if there is a demise without any other term fixed between the parties, except that it shall be at the will of the lessor, then it is implied by law to be also at the will of the tenant. But that in no way affects what we have here.

But it is said that this case is concluded by the authority of *Morton v. Woods*. In that case the Judges on the construction of a deed determined that there was not a demise for ten years, but that it was intended to be a tenancy-at-will. But they cannot have meant a tenancy-at-will with all its consequences. At all events, that opinion was founded upon the construction of the deed, and the construction of one deed cannot be an authority on the construction of another deed in different terms. Here I cannot arrive at the conclusion that the parties intended to create a tenancy-at-will when there are express words creating a yearly tenancy.

LUSH, L.J.—Although in *Morton v. Woods* the expression "tenancy-at-will" was used by some of the Judges while professing to define the relation between the parties to the deed, yet it must not be taken as an exact legal definition of it,

In re Threlfall; ex parte Blakey (App.), Bankr.

as is clear when the facts before them and the arguments of either side are considered. I am glad to find on looking back at the judgment I gave that I did not myself describe the tenancy as a tenancy-at-will. But the argument used in that case was that the attornment was for ten years, and, if so, void because not made by deed; and therefore, to carry into effect the real interest of the parties, the Judges said it was a tenancy-at-will, meaning a tenancy for an indefinite term not to exceed ten years, determinable at the will of the landlord. That is precisely like this case—every word is applicable to the relation between the parties here. There is a yearly tenancy, with an express proviso that the mortgagees shall be at liberty at any time to determine it by entry.

Solicitors—Gregory, Rowcliffes & Rawle, agents for Charnley & Finch, Preston, for plaintiff; Pritchard, Englefield & Co., agents for Grundy, Kershaw & Co., Manchester, for defendant.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
COTTON, L.J.
LUSH, L.J. } THE CAPE BRETON COMPANY
1881. (LIMITED) v. FENN.
Feb. 16.

Winding-up—Costs ordered to be paid to Contributory out of Assets of Company—Right of Contributory's Solicitors to sue in name of Company to recover Assets for Payment of Costs—Jurisdiction—Costs.

Where an order is made in a winding-up giving persons interested in the assets of the company leave to take proceedings in the name of the company on giving such indemnity as the Court shall direct, the giving of the indemnity is a condition precedent to the institution of any such proceedings, and must be the subject of a substantive application before such proceedings are taken.

Such leave will only be given to creditors or contributories of the company. Where,

therefore, a contributory obtained an order that his taxed costs of an application in the winding-up should be paid to him out of the assets of the company, and the contributory having become bankrupt, and the liquidators of the company alleging that they had no assets to meet such costs, the solicitors obtained an order that on giving such indemnity as the Court should direct they might bring an action in the name of the company against the former directors and promoters of the company with a view to increase the assets in the winding-up, and forthwith commenced such an action; on an application by the defendants in the action,—

Held, on appeal, that the order giving leave to bring the action must be set aside, and all proceedings in the action must be stayed, on the grounds, first, that the giving of the indemnity was a condition precedent which had not been complied with; and, second, that the order itself was made without jurisdiction, as the solicitors were not persons interested in the assets of the company.

Held also, that the solicitors must pay the costs of the defendants and of the liquidators as between party and party.

This was an appeal by the defendants from the refusal of Vice-Chancellor Malins to stay all proceedings in the action under these circumstances:—

In July, 1875, an order was made for the compulsory winding-up of the plaintiff company.

On the 8th of February, 1878, an order was made in the matter of the winding-up (which order was made upon an application by M. Rooney, a contributory of the company, for the removal of the official liquidators), directing the costs of M. Rooney of and incident to the application to be taxed and paid to him out of the assets of the company. Messrs. Harper, Broad & Battcock acted as his solicitors in the matter. These costs were subsequently taxed and allowed at 376*l.* 19*s.* 4*d.*, but the official liquidators alleged that they had no assets in hand available for the payment of the same, and declined to take proceedings against the former directors and promoters of

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the company for certain alleged misfeasances on the ground that they had no funds in hand to defray the expenses of such proceedings.

In June, 1879, an action commenced by M. Rooney against the promoters and some of the directors of the company for damages for fraud and misrepresentation in the prospectus of the company was dismissed for want of prosecution, and he was subsequently adjudicated bankrupt.

On the 15th of November, 1880, the Vice-Chancellor, on an application in the winding-up by Messrs. Harper & Co., as the solicitors of M. Rooney, ordered that the applicants "be at liberty, upon giving such indemnity as the Judge shall direct, to institute such proceedings as they may be advised in the name and on behalf of the said company against the former directors and the promoters of the said company, to have it declared that they or some of them are liable to pay certain moneys to the said company, and to obtain an order for payment thereof accordingly; the applicants undertaking to pay into the Bank of England to the credit of the liquidation whatever moneys they may receive from such former directors and promoters of the said company or any of them, and also undertaking to abide by any order the Court or a Judge may hereafter make as to the costs of and occasioned by such proceedings."

This application was supported by evidence, which went to shew that on the sale in 1873 to the company of certain coal areas in Nova Scotia certain directors and the promoters of the company were the real vendors to the company, and received out of the purchase-money paid by the company some 30,000*l.*, which it was alleged they were liable to refund to the company.

On the 17th of December Messrs. Harper, Broad & Battcock commenced this action in the name of the company against the late directors and promoters of the company, seeking to make them jointly and severally liable for the 30,000*l.*

On the 4th of January, 1881, the defendants applied to the Vice-Chancellor to stay all further proceedings in the action, or to set aside the writ and all the proceedings therein, on the ground that

the action had been commenced in the name of the nominal plaintiffs without proper authority, and asked that Messrs. Harper, Broad & Battcock might be ordered to pay the costs of the defendants and of the liquidators of the action and of the application.

The Vice-Chancellor, in dismissing the application with costs, said, "When this matter was before me in chambers in November last I thought it was a case in which I was bound to give the parties who made the application leave to use the name of the company, but of course I could only do so upon the usual terms of their indemnifying the company and the liquidators against the costs of the liquidation. I therefore made it part of the order that they should be at liberty to take proceedings 'upon giving such indemnity as the Judge should direct.' To whom were they to give that indemnity but to the liquidators; because, if the action was dismissed with costs then the liquidators would be liable for their costs, inasmuch as the name of the company was used, and therefore the liquidators were the persons entitled to indemnity against costs. I cannot see that these defendants should have any indemnity whatever. They find themselves sued by the company. What is their proper course? Their proper application should be that the liquidators should give them security for costs, and the Court then would have decided whether they were entitled to security or not. If I decided that they were entitled to security, I then should have required the liquidators to give such security as the Court should have thought fit. It is the liquidators, and the liquidators alone, who are bound to give security, because they have the whole of the assets of the company, if there are any, and are liable to the costs if the action fails. The application, therefore, should have been against the liquidators; but I find the liquidators supporting this application. I am not satisfied with their conduct. If they were dissatisfied with the undertaking of Messrs. Harper & Co., they should have said, 'We are not satisfied with the security,' and should have applied for further security. By

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the order of the 15th of November I decided what the security should be, and I am quite satisfied up to the present time. If the costs hereafter become very heavy it is quite open to the liquidators to apply to the Judge for further security. This application is entirely unfounded, and I dismiss it with costs."

The defendants appealed.

Mr. Davey, Mr. Farwell and Mr. Moulton, for the appellant.—Messrs. Harper & Co. have no interest whatever in the company, and are utter strangers to the winding-up. There was no jurisdiction to make the order of the 15th of November. The liquidators opposed it. There is no jurisdiction to give leave to a stranger to use the name of the official liquidator without his consent, or to sue in the name of the company without the consent of the company. Further, Messrs. Harper & Co. have not complied with the condition precedent on which the order of the 15th of November was made. They have given no indemnity. Their undertaking to abide by such order as to costs as the Court might make is not a compliance with the order. The liquidators are entitled to a substantial indemnity.

Mr. J. Pearson and Mr. Norton, for the liquidators, supported the appeal.

Mr. Higgins and Mr. Northmore Lawrence, for Messrs. Harper & Co.—The order of the 15th of November has not been impeached. It has in fact been adopted by the liquidators, who have obtained an order for leave to attend all the proceedings in the action. Messrs. Harper & Co. are not utter strangers to the assets of the company. They are entitled as Mr. Rooney's solicitors to be paid their costs out of the assets of the company.

[JESSEL, M.R.—No, they are not. The order is to pay Mr. Rooney.]

Yes; but they could prevent Mr. Rooney from getting the benefit of the order, and could intercept the money on its way to him and get a charge upon it. In a winding-up the Court has jurisdiction to permit shareholders and creditors to use the name of the company to bring an action, even if the liquidator dissents,

on giving such indemnity or undertaking as to costs as the Court requires—

In re The Bank of Gibraltar and Malta, 35 Law J. Rep. Chanc. 49; Law Rep. 1 Chanc. 69;

In re The Imperial Bank of China, India and Japan, 35 Law J. Rep. Chanc. 445; Law Rep. 1 Chanc. 339.

The Court has entire control over the administration of the affairs of the company, and just as in an administration suit the Court might allow an action to be brought or the name of the executor or administrator to be used by a creditor or legatee, so here we submit the Court has jurisdiction to allow Messrs. Harper & Co., who have a clear interest in increasing the assets of the company, to bring this action. The costs belong not to Mr. Rooney alone, but in equity they belong to Messrs. Harper & Co. and Mr. Rooney. That being so, Messrs. Harper have, we submit, an interest in the assets of the company—

Ex parte Oleland, 36 Law J. Rep. Bankr. 45; Law Rep. 2 Chanc. App. 808, 812.

On the other point the Vice-Chancellor was satisfied with the undertaking as to costs which Messrs. Harper & Co. had given. The indemnity was given not for the defendants, but for the liquidators, and they have by their conduct ratified and adopted the action.

JESSEL, M.R.—This is an appeal from an order of Vice-Chancellor Malins, refusing to set aside the proceedings in a certain action, brought in the name of the Cape Breton Company (Limited), against certain defendants, alleged promoters of the company, with the view of making them liable for certain alleged misfeasances with regard to the promotion of the company. The simple ground upon which the application was made was that the company had not authorised the suit, that it was instituted by some solicitors of the name of Messrs. Harper, Broad & Battcock, with a view to recover certain costs, which I shall explain presently, and without any authority from the company. Of course if that allegation were well founded the application in

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the Court below ought to have succeeded. The only point that is now open for discussion is, whether or not the company authorised the solicitors to institute the suit. It is not the ordinary question of whether there was actual authority or not, because it is conceded that the company was in liquidation under a winding-up order, and no authority is alleged to have been given by the company itself or by the board of directors. On behalf of the solicitors who have really instituted the action there is no concealment in the matter or affectation of authority from the company. They obtained an order from Vice-Chancellor Malins in chambers in the matter of the winding-up of the company, which authorised them to bring this action. Upon that two points arise for discussion: first of all, whether there was any jurisdiction to make the order; and, secondly, even assuming that there was jurisdiction to make the order, whether the order itself was not conditional, and whether the condition precedent had not been complied with. If either or both of these questions are answered adversely to the solicitors, of course the proceedings in the action were altogether unauthorised. In my opinion both should be answered adversely.

I will first of all take the smaller objection. The order was "upon hearing the application it is ordered that the applicants be at liberty, upon giving such indemnity as the Judge shall direct, to institute such proceedings as they may be advised in the name and on behalf of the company against the former directors and promoters of the company," and so on. Then it was ordered that "the applicants should have liberty to apply as they might be advised in reference to any moneys which they might pay into the Bank of England, and also with reference to any moneys which the promoters might pay, the applicants undertaking to pay into the Bank of England to the credit of the liquidation whatever moneys they might receive from such former directors and promoters or any of them, and also undertaking to abide by any order the Court or Judge might thereafter make as to the costs of and

occasioned by such proceedings." It is admitted that no application was made to the Judge for an indemnity, that no directions were given by the Judge as to such indemnity, but that the Judge when the subject-matter of this appeal came before him in the Court below said he should not have required any indemnity beyond the undertaking given in the order. It appears to me that that is not a compliance with the order. The undertaking given in the order shews that the indemnity was something *ultra*. They are both in the order itself. It is not even "upon giving such indemnity, if any," but "upon giving such indemnity as the Judge shall direct;" and it appears to me that without application made and proper consideration of the application, the Judge could not decide upon the hearing of the application in this action as to what was the proper indemnity to be given under the former order. That must have been an application in the winding-up and considered in the proper way. It seems to me, therefore, that nothing the Judge said upon the hearing of the application in this action could have any bearing upon the effect of the order, which appears to me quite plain. The leave to institute the proceedings was only upon giving the indemnity, which, of course, was a condition precedent, and has not been complied with. There has therefore been no leave, or rather no sufficient leave, and consequently there is no authority for instituting this action.

Then there is a question of very much greater importance, and that is, whether there is any authority whatever to give the leave. I wish to state the position of matters when this leave was given. It appears that a Mr. Rooney had applied in the winding-up to remove the liquidators. Upon that application an order was made that Mr. Rooney's costs should be paid to him out of the assets of the company. It is well known that such an order does not create a charge upon the assets, but limits his right to get paid out of the assets. The order itself does not alter the priorities as to right to payment of costs out of the assets. In many cases the liquidator has priority over all these

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orders, even for subsequent costs. It is not a charge upon the assets, but it is a right to get paid out of the assets in a due course of administration, and nothing more. It is a right given to the petitioner, and Messrs. Harper were the solicitors of Mr. Rooney in making that application. They of course would have a right, as against their client, to be paid their costs of that application, quite irrespective of the assets of the company. A personal demand could have been enforced against him, and if he had the means he could have been compelled to pay. Besides that, as between him and them, they might have a lien upon any sums coming to him under this order for payment of the costs until they were actually paid. Beyond that they could have no right whatever, for they were neither creditors nor contributories, and, if I may say so, they had no direct or even indirect charge upon the assets. They had the means of intercepting the payment to Mr. Rooney of any moneys coming to him under that order, if any were to come. That being their position, they applied to use the name of the company to sue the promoters and directors with the view of increasing the assets of the company by making them liable for misfeasance. Under what doctrine? It would be a difficult thing when the common law and statutes both were against anything like maintenance, to say nothing of champerty, to suppose that a solicitor intervening in this way—that is, his client getting an order for costs in some proceedings under the winding-up—could thereupon establish a right to intervene in the affairs of the company, not merely in the winding-up and distribution of its actual assets, but to increase its assets by suing the promoters and officers for misfeasance and *torts* simply with the view of obtaining the payment of his costs. I cannot imagine a more shocking result of the Winding-up Acts if this were really the law. It would hold out a premium to any solicitor who heard that there were acts which all the shareholders and creditors did not wish further to have enquired into, knowing it would produce no money to pay them, if he heard it would produce sufficient to pay costs for him,

merely because he had obtained through the medium of a client some trumpery costs in the winding-up, to intervene and sue all these people solely for the purpose of obtaining payment of his costs and any further costs in the litigation, everybody else being satisfied that nothing was to be obtained by these proceedings *ultra* costs. It does appear to me it would be a most lamentable result of these Winding-up Acts, if such an application were authorised by them. In my opinion, no such application is authorised, and I think there was no jurisdiction to make any such order. It is not pretended that there was any jurisdiction conferred by the Act in words, or by any section of it; and therefore, if the jurisdiction exists, it must exist upon some ground independently of the Act. It is then said that there are grounds independently of the Act, and that there is a general jurisdiction to authorise contributories and creditors to apply to institute a suit in the name of the company in a proper case. Two cases were cited in which the Appeal Court had given that leave, and I could add a great many more from my own knowledge and experience in winding-up matters, but then we must consider what they were. In the first instance this is well known: under the old Winding-up Acts the creditors had no *locus standi*, and when they had proved their debts and could not get payment were compelled to bring an action or file a bill, as the case might be. I have known such bills to be filed. It was afterwards that the creditors were admitted, but nobody else. The only parties to the proceedings in the winding-up are the contributories and the creditors. Of course you may have applications by parties in their own interest, as you have in administration suits and other cases, where their right is interfered with by the receiver and others so as to compel them to remove the difficulty in their way to establishing their rights or recovering their property. But beyond that there is no person who has a right to intervene in the winding-up proceedings except the creditors or the contributories. Why should we allow the solicitor of a creditor or contributory,

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there being nothing given him by the Act, to come in? As I have already said, it appears to me it would be a very serious injury to everybody. Then on what principle is it that a creditor or contributory has a right? On the same principle on which a man could have always filed a bill in the old Court of Chancery against his trustee to be allowed to use his name to recover the trust property to which he was entitled. That is the principle. Such suits were uncommon, because as a general rule the same relief was obtained by an application by motion in former days or petition, and in later days by summons in an administration suit. But that was merely giving the relief which he could have obtained by bill by the former method. It was not a different relief. Did ever any practitioner hear of an application in an administration suit on the part of a solicitor of a client who had obtained an order for costs? It is clear that no such application, I should say, was ever made; but it certainly would not have been entertained, nor would any action or bill have been allowed to be instituted by a person holding any such position. There never was such a thing. Therefore, if recourse is to be had to general principles to imply this jurisdiction which has not been conferred, it appears to me there is no sufficient reason to imply it either from the necessities of the case as regards a complete winding up of the affairs of the company, or from the principles well established in the former Courts applicable to similar relations such as between creditors and the owners, whether legatees or otherwise, of the assets of deceased persons. It seems to me not only that there is no occasion to imply it from the necessity of the case, but there is the greatest reason for not implying it on account of the mischief that would ensue. It appears to me, therefore, that no such order ought to have been made on the application of the solicitors, and that the order was made without jurisdiction and was itself a nullity. Deciding the case upon that point I do not wish to affect the costs of the appeal. I think the right order is to set aside the order and

all the proceedings, and to give the costs in the Court below and in this Court.

COTTON, L.J.—I agree with the Master of the Rolls in what he has said as to both grounds. I should have added nothing to what he has said, but I think the principal point is one of very great importance.

Now, had the Court power to authorise the solicitor in this case to institute proceedings in the name of the company? There is nothing in the Act of Parliament which gives the Court such power, and, *prima facie*, the proceedings in the name of the company ought to be conducted by the liquidator—an officer appointed by the Court and subject to the supervision of the Court. There may be, no doubt, special cases where—although the Court does not think fit to remove the liquidator on the ground that his conduct in not bringing an action is improper—it may give power to other persons to conduct the litigation which the liquidator is advised not to commence, giving proper indemnity to the Court against any consequences of that litigation. But who are the persons who can be authorised to take these steps? The creditors and the contributories are the persons who under the Act can intervene if they are advised that the liquidator does not properly do his duty. They can go to the Court and ask for the removal of the liquidator, and they are the persons, not under any special clause of the Act, but because they have a right to go to the Court upon a question of the power of the liquidator. They have a right in special cases to ask the Court for leave to do that which the liquidator is advised not to do or because he has no funds he does not do, namely, to take proceedings in the name of the company. But, in my opinion, the power of the Court to give leave to use the name of the company stops there and is confined to those who are parties to the winding-up. The Court has no power whatever to give persons in the position of the solicitors any authority to use the name of the company in any litigation against any other person. In my opinion, there-

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fore, this order of the Vice-Chancellor was made without any power, and must be discharged.

LUSH, L.J.—I am also of opinion that this order was improvidently made, and that it is not based upon any authority, either statutory or common law. Now, the Winding-up Acts only authorise the intervention of creditors and contributories besides the liquidator. These gentlemen, Messrs. Harper & Co., are neither creditors of the company nor contributories. They are persons who have a claim for costs against an individual. It is in that capacity alone that they stand before us. Now, as I have said before, there is no authority under the Companies Acts for the Court to intervene on behalf of gentlemen standing in that relationship, they not being either creditors or contributories, but merely persons who have a claim for costs against one of the contributories whose costs are directed to be paid out of the assets. All that the Court did by that order was to authorise the appropriation of so much of the assets as come in towards payment of these costs. That is all the effect of that order. Now, is there any authority for it in practice or precedent? Certainly I never heard before of any instance in which a solicitor having a claim for costs against his client had obtained an order against the wish of his client to sue in his client's name the debtors of the client, in order to provide a fund out of which he may get paid. I do not know, if this order stands, why every solicitor who has a claim against a client for costs which he cannot get paid should not obtain an order to search about and see among the client's debtors whether he cannot get payment in that way. That would be, to my mind, a most dangerous thing, and a much more mischievous practice than champerty and maintenance, which were so condemned at common law. I cannot foresee the extent of the mischief and the widespread litigation that such a sanction would encourage. Considering that there is nothing in the Companies Acts, nothing that I am aware of in any practice in any Court to sanction such an order as this,

I cannot help coming to the conclusion that it is entirely without jurisdiction. The Court has no power to order a solicitor to use the name of a client against the wishes of the client, in order to recover money by which he may get paid his bill of costs. I am therefore of opinion that the order is without any jurisdiction whatever, and it must be dismissed with costs.

Mr. Davey asked for the costs of the appeal and in the Court below, as between solicitor and client.

Mr. Northmore Lawrence.—The practice is settled by

Nurse v. Durnford, 49 Law J. Rep. Chanc. 229; Law Rep. 13 Ch. D. 764;

Newbiggin-by-the-Sea Gas Company v. Armstrong, 49 Law J. Rep. Chanc. 231; Law Rep. 13 Ch. D. 310.

The plaintiffs' costs are taxed as between solicitor and client, and the defendants' as between party and party, and are payable by the solicitor.

JESSEL, M.R.—Yes. That is the practice.

Mr. Norton, for the official liquidators, who had been served with the notice of appeal, asked for his costs as between solicitor and client against the defendants.

JESSEL, M.R.—You are entitled to your costs as between party and party against the solicitor.

Appeal allowed with costs accordingly.

Solicitors—Dollman & Pritchard, for appellant;
Norton, Rose & Co., for the official liquidator;
Harper, Broad & Co., for respondents.

JESSEL, M.R. }
 1881. } *In re REES. REES v. GEORGE.*
 Jan. 29. }

Will—Gift of Residue to Widow for Life, with Remainder to Children—Advances—Hotchpot—Interest.

Where a fund is given by will to be equally divided amongst the testator's children, and the will contains a proviso for bringing into hotchpot advances made by the testator to any of them, the advanced children are chargeable with interest on their advances up to the time of the distribution of the fund; but such interest is to be computed from the time fixed for distribution only, not from the date of the respective advances.

William Rees, by will made in 1854, gave all his real and personal estate to trustees upon trusts to sell and convert, and to stand possessed of the fund so formed, after payment of his debts, funeral and testamentary expenses, and various legacies, upon trust to pay the income to his wife until her death or second marriage, and, after her death or second marriage, to pay legacies of 200*l.* to each of his sons who should attain twenty-one years, and, after making such payments, upon trust to divide the then residue of the fund amongst all his children who should be living at her decease, and who, being sons, should attain twenty-one years, or, being daughters, should attain that age or marry under that age. The will proceeded to declare that as well all and every sum and sums of money, part of the principal of the vested or presumptive or expectant share or respective shares of each or any of his said children, which should be paid, advanced or applied by his said trustees or trustee towards the advancement in life or preferment in the world of any such child or children as aforesaid, as also all and every sum and sums of money which the testator might pay, advance or give to any of his said children during his life, for his or her advancement in life or preferment in the world, but not including any money paid by the testator for or towards their maintenance or education or pocket-money, should in each and every instance be brought into hotchpot, and accounted for

as part of the share or respective shares of such child or children of and in the residue of the trust fund.

The testator died in 1860, and this suit having been instituted for the administration of his estate, the chief clerk certified, amongst other things, that he left nine children, all of whom attained full age; and further, that he had during his lifetime made advances to four of them. The testator's widow died in 1880, whereupon the fund became divisible, and a petition having been presented for payment out of Court of the nine shares, the question arose, from what date the advanced children, in bringing their advances into hotchpot, were to be charged with interest on those advances.

Mr. Bevir, for the advanced children.—I submit that they are chargeable with interest as from the death of the widow only—that is, from the time when the fund was to be distributed. He cited

Andrewes v. George, 3 Sim. 393;

Poole v. Poole, Law Rep. 7 Chanc. 17.

Mr. Chitty and *Mr. Colt*, for the other children.—We submit that interest ought to be charged against the advances from the dates when they were made. Hotchpot means equality, but if one child has had the benefit of an advance, and also the income which would have been produced by it if it had remained a part of the common fund, at an earlier date than the other children get their shares, there is no longer equality. In

Hilton v. Hilton, Law Rep. 14 Eq. 468,

Vice-Chancellor Malins held that all sums which had been advanced to infants by way of maintenance after the testator's death must be charged with interest when the fund was divided on their all attaining twenty-one. He went upon the principle that the testator's object was to divide his estate amongst his children equally, and that principle applies here. In

Andrewes v. George (*ubi supra*) the decision turned on the peculiar wording of the will.

[THE MASTER OF THE ROLLS.—
Poole v. Poole (*ubi supra*)
 appears to be directly in point.]

In re Ross.

In that case the words were, "I nevertheless subject and make chargeable the share of my said daughter with the sum of 200*l.* already advanced by her to me, and direct my trustees to deduct the same, &c." That was not an ordinary hotchpot clause, but only a direction to deduct advances, without mentioning interest. So in

Andrewes v. George (ubi supra)

the direction was that the trustees should, "before they made such distribution or division of his estate, deduct and take from such of his said sons' and daughters' shares so much money as had been advanced and lent to him, her or them, by him, so as to render their shares quite equal and to the amount they would have been entitled to had he not advanced the said sums of money." That was not an ordinary hotchpot clause, and the Vice-Chancellor decided the case upon what he held to be the testator's intention, namely, that the deductions in respect of the advances should be made at the time when his property became divisible—that was, at the death of his widow.

Mr. Sturges appeared for an assignee of one of the children's shares.

Mr. Ince and *Mr. Romer* appeared for the trustees.

THE MASTER OF THE ROLLS. — I have often had to consider the question raised by this case, but as no decision of mine on it appears to have been reported, I will again state my reasons for the view I take of it. First of all, I will say that the case with which I have to deal presents no special features. It is an ordinary gift of residue upon trust for the testator's wife for life, with remainder to his children, with a proviso for their bringing into hotchpot sums which he advanced to them during his lifetime. I am not reading the exact words of the will, because, as I said before, there is nothing special in them. The question, therefore, is, How is the property to be divided amongst the children so as to give effect to the hotchpot clause? Now, all that the testator directs to be brought into hotchpot are the advances which he has made. If we read the will, we shall not find there a word about in-

terest on those advances. In this case, several of the children had large advances, and these are to be brought into hotchpot. What does that mean? It means that the children are to share equally. In what? Why, in the residuary estate after the widow's death. What is meant by bringing advances into hotchpot, therefore, is, that all the children are to share equally as from the death of the widow, getting each as much as they would have done had there been no advances. It follows that, in calculating their shares, you must treat it as if they had been ascertained at the widow's death, and you must reckon interest on the advances as from that date, in order to make as large a fund to be divided at the time of distribution as there would have been had there been no advances. But it was argued that the testator's intention, when he put this hotchpot clause into his will, was to put all his children on an equal footing, and that consequently, since they had the benefit of these advances before the widow's death, they ought to be charged with interest from the time when the advances were made. But that is not so. The object is to make the children equal as to their shares in the residue which is to be divided between them, and in nothing else. Therefore, interest is only to be regarded as a mode of calculation by which the children are to be put in the same position as if there had been no advances. That, in my opinion, is the principle on which the question ought to be decided.

Now, the reported cases do not throw much light on the subject, but I will refer to some of them. The first is that of *Andrewes v. George*. There the testator directed the income of his personal estate to be paid to his widow for her life, and then the estate to be divided amongst his children; and then there came a clause by which, after reciting that he had made advances to some of his children, he directed that his trustees should—[His Lordship read the passage previously cited in the argument, and continued:] Those words, no doubt, were very special, but the Vice-Chancellor Shadwell in his judgment said that "the testator meant the

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deductions in respect of advances should be made at the time when his property became divisible, namely, the death of his widow." He accordingly directed interest at four per cent. to be computed on the advances from the death of the testator's widow. He therefore took the same view of the general law as I do.

Then there was the case of *Hilton v. Hilton*. In that there was no previous life interest given, but, subject to an annuity to his wife, the testator empowered his trustees to apply so much as they should think fit of the income of his estate towards the maintenance of his children until the youngest should attain twenty-one, and then the capital was to be divided equally amongst all the children who attained twenty-one, or being daughters attained twenty-one, except one son for whom a different provision was made; and then there was a clause reciting that the testator had made advances to some of his children, and directing that all advances should be brought into hotchpot. The Vice-Chancellor Malins, relying, no doubt, to a great extent upon the wording of the will, held that the children must bring into account all sums which might have been received by them by way of advances from the testator, but with interest from the date of his death only.

The next case I will notice is that of *Field v. Seward* (1). There the question was whether interest on advances which the testator had made to a son should be charged as from the testator's death or as from the end of a year after his death. The Vice-Chancellor Bacon seems at first to have been caught by the argument, that since the son did not get possession of the share until a year from the testator's death, he ought not to be charged with interest until that date. "But," he goes on to say, "it is necessary, in order to carry out the testator's intention, that there should, as far as possible, be equality. Then if this share produces interest, and the fund with the interest it produces is to be divided equally, you must charge the advance with interest in order to produce equality. There is no other means

of doing it. The advanced son keeps the 2,550*l.* Is he also to keep the interest for a year which it would have produced? If he withholds for a year the contribution of the common fund, he must also be charged with the interest which it has produced during such withdrawal. Upon second thoughts, therefore, I think the contention that John Seward is chargeable from the death of the testator is a correct one." His reasoning in effect is, that the other children are to be just in the same position as if the advanced son had received no advances; that is, that when you come to divide the fund, you must, in the account, charge interest on the advance from the time when it would have produced interest had it formed a part of the common fund. So that his reason is the same as that which I have given for not charging interest during the lifetime of the testator.

There is one other case which is an authority in favour of my decision, though it assumes, rather than decides, the point. It is the case of *Poole v. Poole*. There was in that case a hotchpot clause, and a further provision, that if at the period of distribution, which was after the death of the testator's widow, one of the daughters, who was named, should be indebted to any or either of her brothers or sisters in respect of advances made to her, the trustees should be empowered to deduct all or any of such debts from her share, and pay the same to the brother or sister to whom the same might be owing. The daughter had borrowed some money from her brothers and sisters during the lifetime of the testator. The Vice-Chancellor of the Duchy Court of Lancaster had decided that the trustees were authorised to deduct from her share all these debts, though some of them were statute barred, with the interest on such as carried interest from the time when they were incurred. But the Court of Appeal, whilst agreeing with the Vice-Chancellor that the principal of the debts ought to be deducted, whether barred by the statute or not, held that interest on them ought not to be deducted. The Lord Justice James said, "The true meaning of the will appears to me to be that advances made to Margaret Beck by her

(1) Law Rep. 5 Ch. D. 538.

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brothers and sisters were to be put on the same footing as if the testator himself had made them. I think the fair interpretation of the testator's words is that he intended the advances to be allowed for as advances, not as debts; and that, therefore, only the capital ought to be brought into account, and not any interest accrued before the estate became divisible." Now there was nothing in the will about putting advances by the brothers and sisters on the same footing as if they had been made by the testator, but the Lord Justice thought that that was the meaning of it, and his opinion of the law as to advances made by a testator himself was so clear that he merely refers to it as the basis of his judgment on the question before him. I think I am entitled to say that, so far as the Lord Justice considered the point, that is a clear expression of his opinion that the view of the law which I take is the correct one. If, therefore, there were no other authorities upon the point, I should say that the law on the subject is perfectly plain, although there is no express decision upon it. There will, therefore, be a declaration that the children are bound to bring their advances into hotchpot, with interest at four per cent. from the death of the widow.

Solicitors—Warriner & Cross; Clarke, Woodcock & Ryland, agents for Farr & Wade, Newport, Monmouth; and Hunt & Son, agents for C. R. Lyne, Newport, Monmouth, for the various parties interested.

FEB, J.
1881.

Feb. 22, 23.

VIVIAN v. MOAT.
VIVIAN v. WALKER.

Landlord and Tenant—Notice to Quit—Disclaimer—Ejectment.

A denial by a tenant of his landlord's right "to raise the rent," coupled with an offer to pay the "customary rent," was held a repudiation of the landlord's title and to dispense with the necessity of giving notice to quit before bringing ejectment.

These were two actions of ejectment brought by the trustees of the will of the late Lord Cardigan to recover possession

of cottages. The defendants claimed to be entitled under the will of one John Waddington. Previously to 1866 a small rent, which had been increased, was paid to Lord Cardigan and his predecessors, the rent then being 11s. a year. In that year the agent of Lord Cardigan purported to raise the rent, and the tenant refused to pay more than at the rate of 11s. a year. Various correspondence took place between the parties and their agents and solicitors, and ultimately these actions were brought.

No formal notice to quit had been served, and a question in the action was, whether the correspondence shewed such a denial on the part of the tenants of the landlord's title as to amount to a waiver of notice to quit.

The material parts of the correspondence were an offer, in a letter dated December, 1870, "to pay to the estate of the late Earl of Cardigan the customary rent of 11s. a year;" and a letter dated March, 1876, from the solicitors of the trustees of John Waddington's will to the plaintiff's solicitors, which was in the following terms:—

"Referring to our letter of the 20th of January last to Mr. Bennett, and your letter of the 24th of January in answer thereto, and in which you say that 'the late Lord Cardigan, in accordance with his rights, raised the rents, and under these circumstances the trustees hold the representatives of John Waddington responsible for the amount due.' We beg to inform you that the trustees of the will of John Waddington dispute the late lord's alleged right to raise the rent, but they are ready, and hereby offer, to pay what is due in respect of the customary rent of 11s. a year, being, as they are advised, all that they are liable to pay in respect of the said property; and unless some steps are taken within one calendar month from this date for the purpose of substantiating the claim made by or on behalf of the late earl or his representatives, the trustees of the will of John Waddington will act upon the notice contained in the letter to Mr. Bennett of the 20th of January last, and pay over the moneys and rents now in their hands to the parties entitled thereto."

Vivian v. Moat.

Mr. North and Mr. Stallard, for the plaintiffs, said that the defendants had denied the existence of the relationship of landlord and tenant, and by thus disclaiming or repudiating their landlord's title had dispensed with notice to quit—

Woodfall on Landlord and Tenant, 9th ed. p. 225;

Doe v. Grubb, 10 B. & C. 816; 8 Law J. Rep. (o.s.) K.B. 321;

Doe v. Calvert, 4 Bing. 557;

Doe v. Evans, 9 Mee. & W. 48; 11 Law J. Rep. Exch. 9;

Doe v. Rollings, 4 Com. B. Rep. 188; 17 Law J. Rep. C.P. 268;

Hunt v. Allgood, 10 Com. B. Rep. N.S. 253; 30 Law J. Rep. C.P. 313;

Jones v. Mills, 10 Com. B. Rep. N.S. 788; 31 Law J. Rep. C.P. 66.

Mr. Cookson and Mr. Cozens-Hardy, for the defendants, argued that on the construction of the letters the defendants' agent had not denied the existence of the tenancy; they had merely asserted what was literally true, that their landlord could not raise and had not raised the rent, which remained what it had previously been. Though a landlord could determine a tenancy he could not raise the rent.

FRY, J., said—The question in the case now before me is a very short one, namely, whether or no the defendants have disclaimed or repudiated the title of the plaintiffs as landlords so as to enable the latter to maintain an action for ejectment without having given notice to quit. [His Lordship stated the facts, and with reference to the letter of March, 1879, said:] In my judgment that is an assertion not that the late lord had not raised the rent, but that he had not a right to raise the rent. Now every landlord has in popular language a right to raise the rent; that is to say, after determining the tenancy he may require an increased rent.

It has been ingeniously argued that the meaning of the letter is that the writers disputed the right to raise the rent in the past; in other words, that they say that the late lord had not successfully raised

the rent. But that is not the language of the letter—it is that he cannot do it. That must be taken coupled with the assertion that the rent is customary. I understand a customary rent to mean a rent which, by force of legal custom, enables the tenant to hold the land at a fixed rent.

Is that a sufficient repudiation of the landlord's title? In my judgment it is. I will refer to the language of Baron Parke in the case of *Doe v. Stanion* (1). He says, "But in order to make a verbal or written disclaimer sufficient, it must amount to a direct repudiation of the relation of landlord and tenant, or to a distinct claim to hold possession of the estate upon a ground wholly inconsistent with the existence of that relation, which by necessary implication is a repudiation of it." Applying that principle, I enquire whether the letter does not come within it. It appears to me distinctly to be an assertion of a right to hold possession on payment of a customary rent, which is inconsistent with the relationship of landlord and tenant.

I will make one other observation, that in the case of *Doe v. Calvert* Lord Justice Brett laid down that "notice to quit is only requisite where a tenancy is admitted on both sides; and if a tenant denies the tenancy there can be no necessity for notice to end that which he says has no existence." If that is a sound view it is quite clear that in this case no notice can be necessary.

Solicitors — Duncan, Warren & Gardner, for plaintiffs; Rooke & Son, for defendants.

(1) 1 Mee. & W. 695; 1 Tyrw. & G. 1065; 5 Law J. Rep. Exch. 253.

FRY, J. }
1881. }
March 5. } SMITH v. DAY.

Practice—Costs—Taxation—Evidence—Affidavit of Increase—Judicature Act, 1875, s. 21—Order on Costs, rule 28.

The recitals in a judgment in the Chancery Division were held sufficient evidence for the purpose of taxation, without an affidavit of increase.

This was a summons taken out by the defendant that the taxation of the plaintiff's bill of costs should be reviewed.

Judgment in the action was dated the 11th of November, 1880. After reciting the days of trial (8th, 9th and 10th of November, 1880), the reading of the pleadings, an answer and certain documents put in evidence, "and upon hearing the evidence of the several parties named in the schedules hereto in their examinations taken orally before this Court upon the several days set opposite to their names in the said schedules, and upon production of the several documents and other exhibits to certain of such persons in the third column of the said schedule, and upon hearing what was alleged by counsel for the plaintiff and defendant," an injunction against the defendant was ordered, and it was ordered "that the defendant should pay to the plaintiffs their costs of the action, to be taxed by the Taxing Master. The defendant carried in objections to a number of items of taxation, and also generally in the following terms: The defendant further objects to the whole taxation upon the ground that the counsels' fees and the payments to witnesses have been allowed without any evidence, except receipts, being before the Taxing Master that any of the payments in question have been made, or that the witnesses were material, or how many days they were in attendance, or that the amounts charged have been really paid to them.

In the Common Law Division the Taxing Master's rule is never to tax the bill without an affidavit of increase, proving the payments to the witnesses to have been really made; and the defendant

contends that he has a right to insist upon such evidence being produced in this case.

The Taxing Master answered the objections, allowing some and disallowing others. The part of the answer relating to the general objection was as follows:—

"In the Chancery Division of the High Court of Justice it is the practice for the Master to satisfy himself that the counsels' fees have been paid, and that the witnesses were material, and that they attended in Court on the days for which payments are claimed, and that all payments charged have been duly made. I have in this case satisfied myself on all these points by proper evidence, and I see no reason for departing from the practice by requiring what is known as an affidavit of increase."

Mr. Maidlow, for the summons, said—Where there was no express provision in the Judicature Act, and rules under it, and there is a variance between the old practice at common law and equity, the most convenient of the two practices is to be adopted in both divisions—

The Newbiggin-by-the-Sea Gas Company v. Armstrong, 49 Law J. Rep. Chanc. 231; Law Rep. 13 Ch. D. 310.

It was the invariable and necessary practice at law to require the evidence by an affidavit of increase—

Grey on Costs, p. 496; and in some cases in Chancery such an affidavit has been required. The practice is to be assimilated, and therefore in this case that which is clearly the better practice for the Common Law Division ought to be adopted in this.

He referred also, as affording a presumption that in matters connected with fees of counsel the common law rule is the better, to

Harrison v. Wearing, 48 Law J. Rep. Chanc. 365; Law Rep. 11 Ch. D. 206,

where it was held that in witness cases the common law rule as to allowing refreshers is to be adopted.

Mr. North and *Mr. Vernon Smith*, for the plaintiff, were not called upon.

Smith v. Day.

Fry, J., said—It appears from the statement of Mr. Maidlow, which is no doubt accurate, that at common law the practice is to require an affidavit of increase, and he has also stated that in some cases also in this division the Taxing Master does require such affidavit.

He has cited authority to shew that in cases, unprovided for by the rules, where the practice before the Judicature Act was passed was different in equity and at common law, the Courts are now to take the better practice. That is a proposition in which I entirely agree. And he says that in this case the common law practice is the better. Is it? I am not at all convinced that it is, having regard to the form of the judgment which is pronounced in this division. In the Common Law Division, if I am not mistaken, the judgment gives no information as to the matters in an affidavit of increase, and the Taxing Master, not unnaturally, requires evidence to satisfy himself of those facts. But in the form of judgment which prevails in this division that information is given in the judgment itself. I cannot help observing that the Taxing Master is an officer of the Court, and has the means of communicating with the other officers of the Court, and getting information from them as to the course of the trial. It appears to me that to require in all cases the affidavit of increase is not desirable; it would be only adding another item of expense to the numerous serious items of costs which already exist. I am bound to say that, as Mr. Maidlow observes, the expense will fall on the applicant, but the persons who have to give instructions which incur such costs are not the persons who have to pay; the person who would have to pay here would derive no benefit.

I have no intention to require in all cases an affidavit of increase; but I have, on the other hand, no intention to lay down a general rule that the Taxing Master is not to require such affidavit if he thinks in the particular case that it is requisite.

In this case I may observe that when the parties were first before the Taxing Master the defendant did not ask for an affidavit of increase, but only did so after

the certificate had been given. I have asked counsel to point out where he can find a single payment allowed that has not been made or a single witness allowed for who was not called, and he has failed to do so. And the simple result, if I were to accede to the application, would be to increase the expense; therefore I dismiss the summons with costs.

Solicitors—F. & T. Smith & Sons, for plaintiff;
R. H. Ward, for defendant.

[IN THE COURT OF APPEAL]

JAMES, L.J. }
COTTON, L.J. } *In re BARKER (in Lunacy).*
1881.
Jan. 22, 24. }

Lunacy—Sale of Real Estate of Lunatic—Conversion—Equity to a Reconversion—Partition Act, 1868, s. 8—Leases and Sales of Settled Estates Act, 1856 (19 & 20 Vict. c. 120), ss. 23–25.

By an order made in a partition action certain real estate was sold in which a lunatic was interested, and the proceeds of sale representing his share were paid into Court to the credit of the matter of the lunacy, but was not carried over to a real estate account.

Upon the death of the lunatic, intestate, his administrator presented a petition for payment out of the moneys representing his share, but it was held that the moneys still retained the character of land, and as such passed to his heir-at-law.

The words of the 23rd section of the Leases and Sales of Settled Estates Act, when introduced into the Partition Act by section 8, are not to be restricted to a sale of settled estates only, but extend to all sales effected under the Partition Act.

An action of *Barker v. Barker* was instituted in 1875 for the partition or sale of real estate devised by the will of Samuel Barker, in which P. J. Barker was interested as tenant in common with

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his brothers and sisters. In the course of the year 1876 P. J. Barker was found a lunatic by inquisition.

An order was made in the action on the 10th of January, 1877, directing the real estate to be sold. Such real estate was accordingly sold, and in pursuance of a subsequent order dated the 26th of April, 1879, made in the action, certain sums of consols and sums of cash, which represented the share of the lunatic in the proceeds of sale of the real estate, were carried over to the credit of the matter of P. J. Barker, a person of unsound mind.

The lunatic died on the 26th of May, 1880, intestate, and letters of administration of his personal estate were granted to his brothers, Samuel Barker and Edward Barker.

His heir-at-law, Henry S. Barker, was an infant.

The administrators now presented a petition in lunacy, asking for transfer and payment out of Court to them as the administrators of the estate of the lunatic of the said sums of consols and cash.

Mr. Bagshawe and *Mr. Norton*, for the petitioners.—The estate having been rightfully sold, which is the sole question for consideration in these cases, all the consequences of conversion must follow—see

Steed v. Preece, 43 Law J. Rep. Chanc. 687; Law Rep. 18 Eq. 192;

following

Flanagan v. Flanagan (cited in *Fletcher v. Ashburner*, 1 Bro. C.C. 500);

and see

Arnold v. Dixon, Law Rep. 19 Eq. 113.

Nor is there here any equity in favour of any party for reconversion by reason of the incorporation of the Leases and Sales of Settled Estates Act (19 & 20 Vict. c. 120), ss. 23–25, as mentioned in

Foster v. Foster, 45 Law J. Rep. Chanc. 301; Law Rep. 1 Ch. D. 588.

The fund was paid to a person “absolutely entitled” when it was carried over in the lunacy, not being carried to any real estate account.

The cases of

Kelland v. Fulford, 47 Law J. Rep. Chanc. 94; Law Rep. 6 Ch. D. 491;

Mildmay v. Quicke, 46 Law J. Rep. Chanc. 667; Law Rep. 6 Ch. D. 553;

Ex parte Bromfield, 1 Ves. 453, 461;

Ex parte Phillips, 19 Ves. 119;

Cooke v. Dealey, 22 Beav. 196;

Re Mary Smith, Law Rep. 10 Chanc. 79,

were also referred to and commented on.

Mr. Byrne, for the next-of-kin.

Mr. Macnaghten and *Mr. Edward Martin*, for the heir-at-law of the lunatic, an infant, were not called on.

JAMES, L.J.—We have had an opportunity of considering this case, and we will not trouble you, *Mr. Macnaghten*.

I am of opinion in this case that the order ought to be made in favour of the heir-at-law; that is to say, we ought to treat the funds in question as real estate. There is, it seems to me, a broad general principle underlying all these questions, which is this, that where property is taken compulsorily from any person who is not *sui juris*, and who is not competent to make the subsequent alteration in the dispositions or the devolutions of that property, which would naturally follow such a change, the presumption is that the Legislature intended, if the words of the Act of Parliament really admit of that interpretation, not to interfere with any legal rights or any legitimate expectations of any persons whatsoever. The sole object of the change was for the purpose of that particular change—that is, in this case it was to enable the property to be disposed of advantageously; and one can conceive a great number of very unjust consequences that would follow if any other rule were to be adopted. Here the lunatic was not capable of making any alteration with regard to his property, by reason of this change; and that being so, we come to the consideration of the words of the Act of Parliament with that leading principle, as it seems to me, to guide us. Here the Act says, in so many words, that where the property is sold, then the money is to be paid into Court in every case where there is a sale made under the

In re Barker, App.

Partition Act. How is the Court to deal with it? The Court is to deal with it in exactly the same way as it would be dealt with under the Settled Estates Act; that is to say, we must read the Act of Parliament as if all those clauses in the Settled Estates Act were repeated *totidem verbis* in the Partition Act. That being so, we find that the words are, that the money is to be laid out to the same uses as before; it is to be settled; and that means it is to be limited to the same uses, which is in fact a reconversion, unless the matter is governed by the other words, "or to a person absolutely entitled." That seems to me, according to the construction put upon it under the Lands Clauses Act, a person becoming absolutely entitled; and I am of opinion in this case the money ought to be dealt with as real estate. I am of opinion that what was done in lunacy cannot alter that right. If it was anything it was a mere clerical slip. In all probability the point ought to have been mentioned to the Court, and the money would have been carried over and earmarked, and dealt with as the produce of the real estate. It was not to affect the right. We never could have intended, by any act of that kind, to make the slightest alteration in any person's rights or expectations, and therefore we are not in any way hampered, and the parties are not in any way prejudiced by what was done by carrying it to the general account of the lunatic; and I think the proper order to be made will be for the payment of this money, the produce of the estate, to the person who would have succeeded to the estate if the property had not been interfered with.

COTTON, L.J.—What we have to do is to determine, on the death of the lunatic, to whom certain funds standing in Court to his credit are to be paid, and in my opinion the money which has been produced by the sale of part of his real estate—his undivided share in the property—ought to go to his heir-at-law.

The question turns on the effect of the 8th section of the Partition Act. The sale was under that Act, and not under any contract entered into on behalf of the lunatic. If that had been so, then,

in the words of the Lunacy Regulation Act, there would have been a conversion, because, when a contract is made by or on behalf of a person to sell his real estate, that adds to his personal estate and diminishes his real estate. But here the sale was made under the Partition Act, and without any contract or consent on behalf of the lunatic so as to bind his estate under the Lunacy Regulation Act, and being so made, it remains real estate. We have to construe the 8th section, and that introduces into the Partition Act section 23 of the Settled Estates Act. Now, under the Settled Estates Act, the money produced by the sale of real estate still undoubtedly remains real estate under the provisions of the section I have referred to, and it did seem to me that the only question here was, whether we could give a limited interpretation to the words of the 23rd section when introduced into the Partition Act. In the Settled Estates Act they refer necessarily to settled estates; but in terms they refer to all sales of all estates, without expressing that they are to be sales of settled estates; and when they are introduced into the Partition Act, which is general in terms, they apply to dealings with all estates, whether settled or not settled; and, in my opinion, we are not justified in restricting the words of the 23rd section, when introduced into the Partition Act, to a sale of settled estates only, but we must fairly construe it, and apply its terms to all sales effected under the Partition Act. If that is so, there is a direction in the Partition Act that the moneys arising from sales under that Act, are either to be invested in land or applied in paying off incumbrances on land settled to the same uses, or to be paid to some person becoming absolutely entitled. Now I quite agree in what the Lord Justice has said as to those words, to be settled in the same manner as the hereditaments. That, in my opinion, does not mean settled in the sense of limited to uses, which will not give an absolute interest to anybody, but must be confined or limited to the same uses as the land, the sale of which produced the money. The greater doubt was, as to the words "or the payment to any person becoming absolutely entitled."

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Those words point to a person who is not at the time of the sale entitled, but one who becomes entitled; and if it were necessary to give an opinion upon that, I should say it meant becoming absolutely entitled in the sense of being entitled to the money absolutely so as to enable him to do what he pleased. But that is not the position occupied by the committee of a lunatic, and certainly not by the lunatic in a case like this; and as regards the payment into Court in the lunacy without carrying it to a real estate account, that, in my opinion, ought not to alter the rights of the parties. It was done without the matter coming before the Court, and although the attention of the Judge who attends to these matters out of Court is called to matters arising on such reports, yet certainly I had no intention, and I think it ought not to be imputed to any Judge when such an order was made, that he had any intention of altering the rights of the parties by any account to which he might direct the money to be carried. It must be dealt with without reference to the account to which the money is carried, and as if there had been no such carrying over at all. Indeed the carrying it to an account does not alter the rights at all, but simply calls the attention of the Court when the money is paid out to the fact that a question arises about it, and instead of being, as apparently it is, cash, it is to be considered whether it does not still preserve the character of real estate. The title of the account is immaterial as regards the rights of the parties, and looking to the true construction of the Partition Act, and of the section introduced into it from the Settled Estates Act, I am of opinion that this money still retains its character of land, and must go to the heir-at-law.

Solicitors—Ridsdale, Craddock & Ridsdale, agents for Nicholson, Sanders & Co., Wath-upon-Deane; and for Watson & Esam, Sheffield; and for Wood, Atkinson & Co., Manchester, for all parties.

JESSEL, M.R. }

1881.

Jan. 21, 28. }

PASCOE v. RICHARDS.

Practice—Motion by Defendant upon Admissions in the Pleadings—Defendant's Right to Relief where no Counter-claim—Rules of Court, 1875, Order XL. rule 11.

A defendant who has not counter-claimed is entitled to move under Order XL. rule 11, upon the admissions in the reply and previous pleadings, to have the action dismissed on the ground that the plaintiff is not entitled to any relief against him. Under the above rule the "relief claimed" is not confined to the old technical meaning of relief claimed by bill in Chancery, but the word "relief" is to be used in its larger and more ordinary sense, and will accordingly include relief from the liability incurred by being a defendant to an action, the "relief claimed" being that asked by the motion under the rule.

Litton v. Litton (Law Rep. 3 Ch. D. 793; sub nom. Linton v. Linton, 46 Law J. Rep. Chanc. 64) considered.

This was a motion under Order XL. rule 11, that the action might be dismissed on the ground that upon the admissions contained in the pleadings no cause of action was shewn against the defendants.

The action was by the plaintiff, who sued on behalf of himself and all other creditors of Charles Wemyss Pascoe, for an account of debts and the administration of his estate.

The plaintiff claimed to be a creditor for a sum of 245*l.* due to him on simple contract in respect of transactions with C. W. Pascoe, the testator, which happened more than six years before the issue of the writ.

The plaintiff alleged a payment on account by the testator in April, 1874, within the six years, and also alleged a promise to pay the debt immediately before his death on the 17th of January, 1880.

The defendants, the executors of the will, by their statement of defence denied the existence of the debt, and they claimed the benefit of the Statute of Limitations; and they further alleged that

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in March, 1872, the plaintiff had been adjudicated a bankrupt, and that the debt (if any) vested in his trustee. They also denied the alleged promise to pay by the testator.

In the plaintiff's reply he joined issue upon the defence, and alleged that as to the plaintiff's bankruptcy, such bankruptcy was annulled by order of the Court of Bankruptcy in November, 1875, and that a copy of such order was duly published in the *Gazette*.

The defendants, in their rejoinder, joined issue upon the reply.

Mr. Farwell, in support of the motion.

Mr. Chitty and *Mr. Mounsey Heysham*, for the plaintiff, took a preliminary objection to the motion, that under Order XL. rule 11 defendants who had not counter-claimed could not move upon admissions in the pleadings, as they were not parties "claiming relief" within the meaning of the rule. They referred to

Litton v. Litton (*ubi supra*).

The word "relief" used in the rule is a technical word, and refers to that relief claimed under the old practice by bill in Chancery, and must at all events mean the relief claimed by a plaintiff in his statement of claim or by a defendant in his counter-claim.

Mr. Farwell, contra.—The rule was intended to apply to the case of a defendant who had not counter-claimed. "Any party" in the first part of the rule includes a defendant, and the words "relief claimed" refer not to the old technical term "relief," but to the relief claimed by the motion.

Litton v. Litton (*ubi supra*)

was a different case, and upon the facts the decision was right, as the defendant moved in default of pleading, in reference to which event there are other express provisions in the rules. The books of practice are by no means uniform as to the construction of the rule. [He referred to

Wilson's Judicature Acts, 2nd ed. p. 279;

McIntyre and Evans' Summary of Practice under the Judicature Acts, p. 145;

Daniells' Forms, 3rd ed. p. 293;

Locock Webb's Practice of the Supreme Court, p. 272;

Chitty's Forms, 11th ed. p. 351;

and

Morgan and Chute's Chancery Acts and Orders, p. 561.]

Where the word "relief" is used elsewhere in the rules it is not used in its old technical sense, but in its very widest and most general sense, and I submit that, reading the rule in its ordinary sense, the defendant is entitled to move.

Mr. Chitty, in reply.

THE MASTER OF THE ROLLS.—If I found that Vice-Chancellor Hall had clearly decided the present point in *Litton v. Litton* I should follow his decision, and I should probably follow it, even if I differed from it, for it is important that the practice should be settled. But I do not think that the Vice-Chancellor did decide the present point, and it is also pretty clear that the practice has not been settled by his decision.

In the particular case of *Litton v. Litton* the plaintiff delivered a statement of claim, and the defendant a statement of defence, but the plaintiff did not reply in time, and the defendant then moved, under Order XL. rule 11, to have the action dismissed, on the ground that the defence must be taken to be admitted.

The report of the case is so short that it is difficult to make out what the decision really was, but the Vice-Chancellor says this in his judgment (1): "Order XL. rule 11 does not apply to a case like this"—and I agree that the rule does not apply to the case of a defendant moving against a plaintiff in default of pleading; "for a defendant seeking to dismiss an action in this manner"—that is to say, on the ground of the plaintiff having made default in pleading—"is not a party applying for relief within the meaning of that rule." I agree entirely. He then goes on: "It is not at all a case of 'relief.' The defendant's proper course, if the plaintiff does not within the six weeks give notice of trial, is himself to give notice; or under the new rule (4a) of Order XXXVI. he may move to dismiss for want of prose-

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cution. The motion is misconceived, and must be dismissed with costs."

The point the Vice-Chancellor decided was simply this, that where a defendant desires the action dismissed, where the plaintiff is in default he cannot come under the rule, but must give notice of trial or move to dismiss for want of prosecution. It seems to me nothing more or less was intended to be decided, and that the Vice-Chancellor did not intend in a different case to guide another Judge as to the meaning of the rule.

I have looked at two books of practice, and I find the construction stated in one way; and if no other view had been taken by the other text-writers I should probably have followed the construction so stated, as it is undesirable, as I have already stated, that a settled practice should be disturbed even if such practice be in strictness scarcely warranted by the true interpretation of the rules. But, on the point before me, I do not find that there is any settled practice, for I find other statements as to the construction of the rule in other books of practice. I cannot therefore consider that there is any settled practice on the point. This is at once seen from looking at Mr. Wilson's note to the rule. He says (*Wilson's Judicature Acts*, 2nd ed. p. 279), "A defendant claiming merely to dismiss the action for want of prosecution is not entitled to proceed under this rule;" and he cites *Litton v. Litton*. Nothing more is said, therefore it may fairly be concluded that there is no rule of practice which may be said to be binding upon me, and therefore I am thrown back upon the rule itself.

This rule is certainly not framed as well as it might be, but what I may call the enacting part is clear enough. "Any party to an action may at any stage thereof apply to the Court or a Judge for such order as he may, upon any admissions of fact in the pleadings, be entitled to, without waiting for the determination of any other question between the parties." The words "any party" must include a defendant, and he may apply for such order as he is entitled to upon any admissions of fact in the pleadings. Now I quite agree there may be other words in the context controlling what I

call the enacting part; but then I take it the context must be as clear as the enacting part, and if you want to cut down the enacting part, you must have words clearly shewing such was the intention of the Legislature. The rule then goes on: "The foregoing rules of this order shall not apply to such applications, but any such application may be made by motion so soon as the right of the party to the relief claimed has appeared from the pleadings." Now, if it could be shewn that the words "relief claimed" refer to the relief claimed by a statement of claim or counter-claim, then no doubt the words in the foregoing part of the rule would be restricted to their narrower sense; but it appears to me the words "relief claimed" are only put in by way of description of the application, and that they mean simply the relief claimed by the motion.

Why should the word "relief" be limited to its technical sense of the relief claimed in an old Chancery suit by bill, and why should it not bear its ordinary and more conventional sense? Now there are two reasons which shew that the word "relief" is used in its latter sense: In the first place, because the new rules apply to every kind of action—both to the old common law actions and to suits in Chancery—and therefore the word when used in the new rules is generally applicable to any kind of action; in the second place, because, when we look at the whole subject-matter of the rule, we find that its subject is the mode of procedure in seeking relief, and not the nature of the relief sought for; and when you are dealing with a general term like "relief," which has no limited meaning pointed out, you cannot cut it down to a technical sense without considering what the subject-matter of the rule is. For instance, taking it in its general sense, no one feels greater relief than when an action is dismissed which is brought against him. In my opinion, no term could be better applied to a case where a defendant asks to have an action dismissed, and I do not see why I should alter the ordinary meaning of the word.

It has, moreover, been argued that the word is used in that sense elsewhere in the rules; for instance, Order XIX. rule 8

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is as follows: "Every statement of claim shall state specifically the relief which the plaintiff claims." Now it will be observed the term "relief" is not there confined to the relief sought by an old Chancery bill, but it refers also to claims for damages, and is used in a larger than its old technical sense. Then the rule goes on: "Either simply or in the alternative, and may also ask for general relief. And the same rule shall apply to any counter-claim made or relief claimed by the defendant in his statement of defence." It is there clearly not used in its old technical sense, for what relief can a defendant claim in his statement of defence except to be relieved wholly or in part from the action? Then rule 9 of the same order provides that "where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly." There again the word is used in the same sense. Then Order LII. rule 1 is as follows: "Where by any contract a *prima facie* case of liability is established, and there is alleged as matter of defence a right to be relieved wholly or partially from such liability, the Court or a Judge may make an order for the preservation or *interim* custody of the subject-matter of the litigation, or may order that the amount in dispute be brought into Court or otherwise secured." There again we find the word applied to the case of a defendant, namely, to his right "to be relieved wholly or partially," evidently from the action, and that I think very strong to shew that the word is elsewhere in the rules intended to be used in its full sense. The whole of the last-mentioned rule shews that the word is used in its widest and fullest sense, and in my opinion that is the sense in which the word is used in Order XL. rule 11.

Then, finally, if we look at the reason of the thing, it seems to me the word ought to be used in its largest sense. Is it fair for the plaintiff to have the benefit of the rule and not the defendant? In my opinion, it was intended to put a defendant in the same position as the plaintiff, and to enable the former to cut

the action short. The plaintiff may say, "I am not going to the expense of a trial when I cannot succeed." Then it would seem right that the defendant may say, "You have admitted you are wrong, why should not I have the action dismissed?"

On the other hand, it is suggested that the defendant might have demurred to the plaintiff's pleading and had it struck out, and then have moved to dismiss in default of pleading. The answer is, that one motion is much cheaper, and that it is much quicker to have the whole matter disposed of on one application.

If a plaintiff may move for judgment on the admissions in the pleadings, I see no objection to the defendant being permitted to do the same; and the Court would see that no injustice was done between the parties, for by the latter part of Order XL. rule 11, the Court may "on any application give such relief subject to such terms (if any) as such Court or Judge may think fit."

It seems to me, therefore, on the whole, on a fair and reasonable interpretation of the rule in question, that under it the defendant may move to dismiss the action either wholly or partially on the admissions in the pleadings.

[The question was then argued on the merits whether the defendant was entitled to have the action dismissed, and the Master of the Rolls held that, inasmuch as there was a promise to pay the debt within the six years alleged in the statement of claim, that promise could at the trial be proved to be in writing, in accordance with the provisions of Lord Tenterden's Act (9 Geo. 4. c. 14), and that the plaintiff on the pleadings was entitled to some relief. He therefore refused the motion with costs.]

Solicitors—Henry Aird, for plaintiff; Dollman & Pritchard, for defendants.

HALL, V.C. }
 1881. } *In re EMMET'S ESTATE.*
 Feb. 16. } *EMMET v. EMMET.*

Breach of Trust—Trust for Accumulation—Wrongful Retainer by Trustees—Compound Interest—Rate of Interest.

A fund was held in trust for a minor, to be paid to him at twenty-one, with a provision (in effect) for maintenance and advancement out of income, and accumulation of the surplus income during the minority.

After the cestui que trust attained twenty-one, the trustees retained the fund without coming to any explanation with him:—

Held, that the trustees wrongfully retaining the fund must be regarded as continuing under the obligation to accumulate, and was therefore chargeable with compound interest.

Wilson v. Peake (3 Jur. N.S. 155) distinguished. Amiss v. Hall (3 Jur. N.S. 584) remarked upon.

Part of the fund having been upon improper investments, or not kept distinct from the trustee's own moneys, he was charged in respect thereof as if it had been uninvested.

Under the circumstances the interest was charged at four and not five per cent.

Edward Emmet, who died in January, 1836, by his will gave his real and personal estate to John Hardwick and the testator's brother Henry Emmet, upon trust for the benefit of Henry Emmet during his life, and after his decease, as to one third share, for his children equally, the shares of sons to be conveyed, paid or transferred to them when they should respectively attain twenty-one. And the testator directed that in case any of the children of his said brother should be under age at the decease of the survivor of himself and his said brother, the yearly produce of the respective shares of such children, or any part thereof, should or might be applied in the maintenance, education and advancement of such children respectively, and the surplus (if any) should accumulate to and become part of the original share. There followed a clause of accruer of the children's shares. The will declared a trust of one other third share of the property (after the death of Henry

Emmet) for the children of the testator's brother, George Nelson Emmet, equally, the shares of such children respectively to be conveyed, paid or transferred to them respectively at the same ages and with the like power of advancement and benefit of survivorship and other trusts and powers as were thereinbefore expressed concerning the children of Henry Emmet, or as nearly so as might be, and the nature and circumstances of the case would admit.

The remaining third of the property was given in similar terms to the children of Mrs. Hardwick, the wife of the trustee John Hardwick; and there was a gift over of the first-mentioned third share, in default of children of Henry Emmet, in moieties for the children of Mrs. Hardwick and of G. N. Emmet in similar terms to the original gifts.

Henry Emmet died in 1839, a bachelor.

G. N. Emmet had, by his first marriage, two children, namely, the plaintiff Charles Alexander Emmet, who attained twenty-one in 1849, and Robert Alexander Emmet. He had, by a second marriage, five children, of whom four were born before the plaintiff attained twenty-one.

Robert Alexander Emmet attained twenty-one in 1857, and afterwards died, having left his property to his widow, the defendant Eliza Emmet, during widowhood, and afterwards (in the events which happened) to the plaintiff.

In 1840 G. N. Emmet was appointed a trustee of the will in the place of Henry Emmet, and shortly afterwards the residue of the estate, amounting to 6,000*l.*, was divided into two equal parts, one of which was transferred to G. N. Emmet on account of his children's share, the other being retained by Hardwick (who died in 1856) on account of Mrs. Hardwick's children.

The plaintiff alleged that G. N. Emmet never informed him or his brother R. A. Emmet of the receipt of the share as above mentioned; and that the plaintiff had not been informed of the fact until 1877. He brought this action (to which G. N. Emmet and Eliza Emmet were defendants) for an account of the estate come to the hands of G. N. Emmet.

G. N. Emmet alleged that the plaintiff

In re Emmet's Estate.

was aware of the receipt of the 3,000*l.*, the shares of the plaintiff and of Robert respectively being each one-sixth only of that sum; and that both the shares had been more than satisfied by payments and advances.

In answer to interrogatories the defendant G. N. Emmet admitted that he had retained the 3,000*l.* An order was, on the 22nd of March, 1880, made, directing an account of the receipts and investments.

G. N. Emmet died in July, 1880, and the action was prosecuted against his representatives. Before his death he had put in an account of the investments, as to which he stated that the reason why he was unable to bring it down to a later period and specify the subsequent investments was, that he had discontinued making specific investments of the trust estate, it having been his intention that all his children should participate equally in his estates.

The account shewed a receipt of 2,880*l.* in 1840; of which 1,000*l.* was invested on a mortgage, which was paid off in 1873; 500*l.* was invested in 1842 on a mortgage, which was paid off in 1848; 500*l.* lent in 1848 on a reversionary interest, which produced nothing, but G. N. Emmet held a policy on the mortgagor's life; 1,500*l.* invested on mortgage in 1841, paid off in 1842, of which 1,000*l.* was re-invested on a mortgage, paid off in 1848; re-invested in 1849, paid off in 1860; and 500*l.*, the balance, re-invested on mortgage, paid off in 1849; re-invested with 100*l.* of trustee's own on mortgage, paid off in 1853.

The action coming on for trial,

Mr. W. F. Robinson and *Mr. W. Wellington Cooper*, for the plaintiff, asked for an account with compound interest. As to moneys used by the trustee for his own purposes compound interest is calculated at five per cent.—

Williams v. Powell, 15 Beav. 461;

Jones v. Foxall, 15 Beav. 388; 21

Law J. Rep. Chanc. 725.

The trust for accumulation warrants compound interest—

Raphael v. Boehm, 11 Ves. 92; 13 Ves. 407;

Dornford v. Dornford, 12 Ves. 127;

Pride v. Fooks, 2 Beav. 430; 9 Law J. Rep. Chanc. 234.

Mr. Wm. Pearson and *Mr. Rigby*, for the representatives of G. N. Emmet.—The accumulation directed here was only for the period of minority, and therefore is no ground for charging compound interest after that period—

Wilson v. Peaks (*ubi supra*).

But a mere direction to accumulate the surplus after payments for maintenance and advancement is not a direction to accumulate for the purpose of charging compound interest. Any advancements made were chargeable against the children under the clause. Squandering trust money with deliberate dishonesty only entails a charge of simple interest at four per cent.—

Vyse v. Foster, 42 Law J. Rep. Chanc. 245; Law Rep. 8 Chanc. at p. 333.

Even where there is an express trust for accumulation the rule as to compound interest is a flexible one—

Jones v. Foxall (*ubi supra*).

There two classes of cases are referred to in which the charge is made, one of which, where it is put as a penalty for misconduct, is now displaced on the authority of

Vyse v. Foster (*ubi supra*).

Simple interest only was directed in

Amias v. Hall (*ubi supra*).

[HALL, V.C.—I do not understand that case. It may have been a motion on the answer for payment of money into Court. It is not a satisfactory authority.]

As to

Raphael v. Boehm (*ubi supra*), Lord Cranworth in

The Attorney-General v. Alford, 4 De

Gex, M. & G. at p. 851,

refers to Lord Eldon's language in that case. Lord Eldon went no further than to say (11 Ves. at p. 111), "Upon the whole I am not called upon to say that the Master has done wrong in this particular case."

Mr. Dundas Gardiner, for *Eliza Emmet*.

Mr. Robinson, in reply.

HALL, V.C.—The question relates to the construction and operation of the part of the will having reference to main-

In re Emmet's Estate.

tenance and the accumulation of surplus income. The capital fund is given to the children when they attain twenty-one. Then the testator says that if any of the children are under age at the death of the tenant-for-life, the trustees are to deal with the income of the respective shares by applying the income or any part thereof for the maintenance, education or advancement of the children, and the surplus (if any) is to be accumulated. Now, those trusts are trusts applicable to the shares of children under twenty-one. The trustees are to deal with the income of children, who are minors, for their maintenance, education and advancement. The proper construction of that provision is certainly that it creates a trust enduring only for the time specified. The trust is called into existence only by the fact of a child being under twenty-one; and that state of things which calls it into existence also, I consider, measures its duration. Therefore the trust for accumulation is applicable only to the income which accrues during the period while a child is under twenty-one. Such is the construction of the instrument itself. There being then no trust directed beyond the time of minority, we must first consider what is the obligation so created. There is a liability or obligation to accumulate the income subject only to such application as might be made of any part of it for the specified purposes of maintenance, education or advancement. The trust comes to an end when a child attains twenty-one. So far I hold the trustee liable to account at compound interest for non-accumulation. Does his liability go beyond the date when a child attains twenty-one? His duty was to hand over to a child the fund with the accumulations. He did not so hand it over, nor did he explain to the child what he was entitled to, but he left things as they were. But can I allow a trustee under such circumstances to say, Now I am holding the fund on a trust which does not require accumulation, and I can keep it in my hands without such liability? In my opinion, if he does not hand it over when he ought to do so, he must be taken to be holding it still on the same trusts. It has been said that Vice-

Chancellor Wood took a different view in *Wilson v. Peake*. That case is to be viewed with reference to its own facts. There the trust for accumulation came to an end by the operation of the Thellusson Act; the accumulation could go no further. I have heard nothing about that point in this case.

Then it is said that at all events the account should not be taken at five per cent. As to those portions of the fund which have yielded five per cent. no question can be raised; as to moneys which have been properly invested yielding some other rate, and which can be shewn to have been so invested, only the interest so actually yielded must be brought into account. As to other parts of the fund—which includes the security on the policy—there was altogether a bad investment; and the party interested has a right to consider the money as having been in the hands of the trustee, not invested at all. The same observation applies to other moneys which were not invested, but kept in the trustee's hands not distinguishable from his own money. With regard to the moneys so circumstanced, it appears to me that there has been a breach of trust in not keeping them properly invested and separated. The money having been subject to trusts for investment in a certain way, and accumulation, the question is, what rate of interest ought to be charged upon this money in taking the account? I think that there is no absolute rule of law which compels me under all the circumstances to charge this trustee five per cent.; and I shall charge him four per cent. The minutes will provide that interest on the capital moneys is to be carried on after 1849 in the same manner as up to that year. Balances must be taken half-yearly, every sum of interest bearing interest from the date when it was payable.

Solicitors—Vallance & Vallance, for plaintiff;
Emmet, Son & Stubbs, for defendants.

HALL, V.C. }
1881. } In re THE ROYAL SOCIETY OF
March 5. } LONDON AND THOMPSON.

Charity—Charitable Trusts Acts, 1853, ss. 24, 26, 62, 66; 1855, ss. 29, 48—Endowment—Charity maintained partly by Voluntary Contributions—Sale of Land—Consent of Charity Commissioners.

The Royal Society, a voluntary association, whose income was derived in part from the subscriptions or voluntary donations of its members, and in part from the interest of moneys bequeathed to the society upon special trusts, was possessed of land purchased wholly out of such subscriptions or voluntary donations. On a summons under the Vendor and Purchaser Act, 1874, for a declaration that the society could sell such land without the consent of the Charity Commissioners,—Held, that the land having been purchased by the society out of property which might be legally applied as income, did not form an "endowment" within the meaning of the Charitable Trusts Acts, 1853 and 1855, and that consequently, by virtue of section 62 of the Act of 1853, and section 48 of the Act of 1855, the society was, so far as respected this land, a charity expressly exempted from the operation of the Acts, within the meaning of the latter section, and could, therefore, notwithstanding section 29 of the Act of 1855, sell the land without the consent of the Charity Commissioners.

The Governors of the Corporation for the Relief of Poor Widows and Children of the Clergy v. Sutton (27 Beav. 651; 29 Law J. Rep. Chanc. 393; nom. The Corporation of the Sons of the Clergy v. Sutton) considered and followed.

Adjourned summons.

This was an application under the Vendor and Purchaser Act, 1874, for the purpose of obtaining a declaration that the Royal Society of London had, in respect of a certain estate at Acton, power, under the royal charters granted to the society by King Charles 2, or one of them, to sell and dispose of such estate, and that the consent of the Charity Commissioners to such sale was unnecessary. The estate in question contained 32½ acres, and the respondent, Mr. Thompson,

had contracted to purchase the same of the society for 32,250l.

The society originated in the voluntary association of a number of learned men during the time of the Commonwealth, and was subsequently incorporated under King Charles 2, who granted to the society three successive charters in the years 1662, 1663 and 1669, with full power to purchase, hold and grant lands. A royal licence was granted to the society by King George 1, to purchase, hold and enjoy in mortmain lands of the yearly value of 1,000l.

The general funds of the society were derived mainly from the contributions of members, such contributions being in part sums paid as annual subscriptions or as life compositions for annual subscriptions, and in part donations. Thus, for instance, in the month of November, 1718, the society received a sum of 70l. as a gift from Sir Isaac Newton.

In addition to these general funds, the society was also possessed of other special funds arising from gifts or bequests made to it upon special trusts or for special purposes.

The Acton estate was purchased by the society in the year 1732, and the conveyance of it to the society was a simple conveyance in fee-simple without declaring any trust. From a search of the society's records, it appeared that the whole of the purchase-money for the estate was paid out of the general funds of the society.

It appeared that the society was a purely voluntary association, and that the public had no right of access to its premises, and no control over its management.

The question whether or not the society could sell the Acton estate without obtaining the leave of the Charity Commissioners turned mainly upon the construction of the following sections of the Charitable Trusts Acts, 1853 and 1855:—

The Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), by section 24 empowers the Charity Commissioners, under special circumstances, to authorise sales of charity lands, and by section 26 enacts that such sales shall have the like effect and validity as if they had been authorised and

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directed by the express terms of the trust affecting the charity. By section 62 it is enacted that the Act shall not extend to the Universities and certain other specified institutions, "nor shall this Act extend or be applied to the Commissioners of Queen Anne's Bounty, or to the British Museum or to any friendly or benefit society or savings' bank, or any institution, establishment or society for religious or other charitable purposes, or to the auxiliary or branch associations connected therewith, wholly maintained by voluntary contributions, or any bookselling or publishing business carried on by or under the direction of any society wholly or partially exempted from this Act, so far as such business is or shall be carried on by means of voluntary contributions only, or the capital or stock of such business; and where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment, the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only to the exclusion of voluntary subscriptions and the application thereof, and no donation or bequest unto or in trust for any such charity as last aforesaid, of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the said board or the powers or provisions of this Act." By section 66 the expression "endowment" is defined to mean "all lands and real estate whatsoever, of any tenure, or any charge thereon or interest therein, and all stocks, funds, moneys, securities, investments and personal estate whatsoever, which shall for the time being belong to or be held in trust for any charity, or all or any of the objects or purposes thereof."

The Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), by section 29 enacts that "it shall not be lawful for the trustees or persons acting in the administration of any charity, to make or grant, otherwise than with the express

authority of Parliament, under any Act already passed or which may hereafter be passed, or of a Court or Judge of competent jurisdiction, or according to a scheme legally established or with the approval of the board, any sale, mortgage or charge of the charity estate, or any lease thereof;" and by section 48, "in the construction of the principal Act and this Act the word 'charity' shall include every institution in England or Wales endowed for charitable purposes, but shall not include any charity or institution expressly exempted from the operation of the Act of 1853."

By section 1 of the Act of 1855 it is enacted that the Acts of 1853 and 1855 are to be construed together as one Act, and any provisions of the principal Act inconsistent with the Act of 1855 are thereby repealed.

Mr. Graham Hastings and Mr. Ingle Joyce, for the Royal Society.—The present case is precisely covered by the case of

The Governors of the Corporation for the Relief of Poor Widows and Children of the Clergy v. Sutton (*ubi supra*),

which expressly decides that an investment by a charity of its voluntary contributions in land or other permanent security cannot convert it into an "endowment." We submit, therefore, that by virtue of section 62 of the Act of 1853, and of section 48 of the Act of 1855, the society is exempted from the operation of the Acts so far as regards this land, and that the sanction or approval of the Charity Commissioners is unnecessary.

Mr. W. Pearson and Mr. Methold, for the respondent.—The case cited cannot be reconciled with

Baumont v. Oliveira, 38 Law J. Rep. Chanc. 62, 239; Law Rep. 4 Chanc. 309,

in which it was held that the Royal Society was a charitable institution, and that a legacy bequeathed to it was a charitable legacy. Moreover, from the report of the arguments and judgment in the case cited on the other side, it does not appear that the operation and effect

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of section 29 of the Act of 1855 was brought to the attention of the Court. The Royal Society is not a charity expressly exempted from the operation of the Act of 1853, and therefore section 29 of the Act of 1855 is applicable, and the approval of the Charity Commissioners is necessary to any sale of the society's land.

Mr. Graham Hastings, in reply.—Section 29 of the Act of 1855 is set out in the Special Case stated in the report of *The Governors, &c. v. Sutton (ubi supra)*,

and must have been brought to the attention of the Court.

HALL, V.C.—I think that the cases which have been cited are capable of being reconciled.

The second Act of 1855 must be read in connection with the first Act of 1853, which, in sections 24 and 26, contains provisions for sale and exchange of charity lands. These are enabling clauses, and we have in the same Act of Parliament a section (section 62) which limits and defines the extent to which the Act is to be applied, and is what is called a clause of exemption from the Act. The terms of that exemption clause, so far as regards this property, are as follows, namely, "that where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment, the powers and provisions of the Act shall with respect to such charity extend and apply to the income from endowment only." That is in effect an exemption of this particular charity, except as is there particularly specified; so that, as regards this land, which was provided out of voluntary contributions, the charity is exempted from the Charitable Trusts Act, 1853, whatever may be the effect or operation of the Acts as to the income of the charity, treating it as a charity. We come then to the subsequent Act of 1855, which is to be read with the principal Act of 1853, excepting, however, that any provisions of the principal Act inconsistent with the subsequent Act are thereby repealed. The question then is, whether the section to which I have referred is inconsistent with

the second Act and is repealed so far as the particular provision now in question is concerned. When we come to the 29th section of the Act of 1855 we find a negative clause, prohibiting any sale, mortgage or charge of the charity estate. Those words "charity estate" are very large; but then, looking at the enabling powers granted by the former Act, was it intended by this section altogether to take away the exemption which is contained in the 62nd section? Upon this particular 29th section, if the Act stopped there, there might be a question to be discussed and considered; but when we come to the 48th section, we have a provision there that the word "charity" (which is the operative and the important word) is not to include any "charity or institution expressly exempted from the operation of the Act of 1853." If I am right in saying that this charity estate is exempted by the 62nd section of the Act of 1853, then I must hold that it comes within the 48th section of the Act of 1855, as being exempted from the operation of the Act of 1853. Being so exempted, it is not within the Act of 1855, because the 29th section of that Act is inoperative as to this "charity estate" by reason of such charity estate being exempted from the Act of 1853. I think that the two Acts must be read together, and that that is the result. According to my view the Legislature would have adopted some other and more precise method than this if it had been intended to sweep away what I hold to be an exemption, or by the Act of 1853 to put a fetter upon that which up to that time was not meant to be fettered at all. It was meant that an estate purchased by a charitable institution out of voluntary contributions should be left to the control of that body, because it was not in substance a "charity estate," although technically that body was a charity within the meaning of the Statute of Mortmain in so far that certain property was thereby prohibited from being given to it.

Then there is the authority of the case before Lord Romilly which has been referred to. I think there must have been a sufficient argument before he decided the case, and that counsel would hardly

In re Royal Society of London and Thompson.

have thought it fair to the Court to have passed over what might have been considered a fair question for argument. At all events, it appears that the 29th section was before the Court, and I cannot help thinking that upon consideration it must have been thought that the view which I have arrived at was the correct view of the two Acts when read together. I cannot think that the weight of the decision is weakened by the fact that the section is not referred to either in the argument or judgment. The order will be that, it having been proved to the satisfaction of the Court that the estate at Acton agreed to be sold was acquired by the Royal Society out of property which might be legally applied by such society as income, and does not form an endowment within the meaning of the Charitable Trusts Acts, 1853 and 1855, the Court doth declare that, notwithstanding the 29th section of the Charitable Trusts Act, 1855, the Royal Society has power to sell the same without the consent of the Charity Commissioners.

Solicitors—Few & Co., for Royal Society; Bolton, Smith & Co., for purchaser.

HALL, V.C. }
1881. } *In re* WARD, STURT AND
Feb. 19. } SHARP'S TRADE MARKS.

Trade Mark—Rectification of Register—Trade Marks Registration Acts, 1875 and 1877.

The power conferred on the Court by the Trade Marks Registration Acts to order rectification of the register of trade marks is applicable only to cases in which there has been some mistake in the original registration, not to cases where the register has become defective by reason of circumstances which have occurred subsequently to such registration.

Motion.

On the 10th of April, 1876, H. Sturt, J. C. Sharp, E. Sturt and F. Sturt, trading as "Ward, Sturt & Sharp," and "Sturt & Sharp," applied to the Registrar

of trade marks for the registration of a certain trade mark for cotton goods in class 24, and on the 21st of January, 1881, the applicants were informed by the Registrar that the committee of experts had placed the mark in the second class or B list of cotton marks, so that the registration could not be proceeded with except in pursuance of an order of Court.

During the interval between these two dates the applicants had ceased to carry on business under the style of "Sturt & Sharp," and "J. C. Sharp" had died.

H. Sturt, E. Sturt and F. Sturt now applied by way of motion that the registration of the mark in class 24 should be proceeded with, and that the register of trade marks should be rectified by striking out from the entry of the names of the registered proprietors the names and words "H. Sturt, J. C. Sharp, E. Sturt and F. Sturt, trading as," and also the words and names "and Sturt & Sharp." The registration of the mark in class 24 was not opposed, and the only question was as to the rectification of the register in the manner proposed.

Mr. Sebastian, for the applicants, submitted that although under rule 20 of the Trade Marks Rules, it would not be incorrect to register in the name of a firm which had ceased to exist, inasmuch as under that rule the registration relates back to the date of the application, yet it would be more convenient if the register were rectified so as to give only the name of the actually existing firm, and that his Lordship had power to direct the rectification under section 5 of the Trade Marks Registration Act, 1875.

Mr. Bigby, for the Registrar of trade marks, submitted that this was not a case for rectification, seeing that no mistake or error had been made; it was a case of alteration necessitated by reason of a devolution of interest, and the applicants, if they desired any alteration to be made, must apply to the Registrar as assignees or transferees under the rules applicable to such cases.

HALL, V.C., said that the term "rectification" was only applicable where there

In re Ward, Sturt and Sharp's Trade Marks.

had been some mistake or error in the original registration. That was not the case here, and he could not therefore accede to the application in that respect.

Solicitors—W. Sturt, for applicants; Hare & Fell, for the Registrar of trade marks.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
COTTON, L.J.
LUSH, L.J.
1881.
March 2.

In re FINCH.
ABBISS v. BURNBY.

Will—Devise of Real Estate to Trustees in Fee—Equitable Limitations—Contingent Remainder—Executory Devise—Remoteness.

A testator devised real estate to trustees upon trust for A for life, and after his decease upon trust to convey "to such son of B as should first attain twenty-five, when he should have attained twenty-five." A survived the testator, and B's eldest son attained twenty-five, after the death of the testator, but during the lifetime of A:—Held, that the gift to the son of B was not an equitable contingent remainder, but an executory devise, and that it was void for remoteness.

Decision of MALINS, V.C., reversed.

This was an appeal from a decision of Malins, V.C., reported 49 Law J. Rep. Chanc. 710.

Mr. Davey and Mr. Chapman Barber, for the appellant, the heir-at-law of the testator, urged the same arguments as in the Court below, and cited the same authorities.

Mr. Joshua Williams and Mr. Worsley Knox, for the respondent, the party claiming under the gift in the will, in addition to their arguments in the Court below contended further that the gift was not a contingent remainder but a vested interest, liable to be divested in the event of the *cestui que trust* dying before the estate fell into possession, and cited

Riley v. Garnett, 3 De Gex & S. 629; 19 Law J. Rep. Chanc. 146;
Andrew v. Andrew, 45 Law J. Rep. Chanc. 232; Law Rep. 1 Ch. D. 410.

No reply was heard.

JESSEL, M.R.—This is an appeal from a decision of Vice-Chancellor Malins upon an important question of real property law. The question is, first, whether the rules as to remoteness apply to what has been termed an equitable remainder; and the second question is, whether in the case before us there is a true equitable remainder at all, or merely an executory devise.

Now the gifts in the will, so far as it is necessary to refer to them, may be stated very shortly. There was a devise of freehold estates to trustees, naming them, and their heirs, which vests the legal estate in the trustees, upon trust to pay the rents to the testator's wife, Maria Finch, for her life, then upon trust that the trustees should, during the life of one Henry Mayer, an alien, who was then living, retain the rents for their own use during the natural life of Henry Mayer, and after his death upon trust to convey the freehold estates of the testator—I leave out the personality—"unto such son of the said William Macdonald as shall first attain the age of twenty-five years, when he shall have attained his said age of twenty-five years, his heirs and assignees absolutely for ever." Then there are certain conditions as to taking the name and arms, and a direction that in the meantime the rents should accumulate for his and their benefit. Now the only fact necessary to be stated is this, that William Macdonald had a son who, after the testator's death, but during the lifetime of Maria Finch, attained the age of twenty-five; and, Maria Finch and Henry Mayer being both dead, the question now arises, whether the limitation to "such son of William Macdonald who shall first attain the age of twenty-five years" is or is not void for remoteness. The Vice-Chancellor decided that it is not void for remoteness on certain technical grounds, which I will mention. Of course, if this is an equitable limitation—that is, a limi-

In re Finch, App.

tation by way of equitable devise—it is void for remoteness; the rule as to remoteness being that in order that a devise may be valid it must take effect within a life in being and twenty-one years afterwards. It may not take effect afterwards. It is obvious that if the lives of both Maria Finch and Henry Mayer dropped, leaving a son of William Macdonald under twenty-five years of age, he would be the person entitled to take the estate, were there no rule in respect of remoteness; but in that case the event might happen too late, because it might happen after the expiration of the twenty-one years after the death of Henry Mayer. Now the only ground on which the gift was supported was this: It was said that the gift to the son of William Macdonald was an equitable remainder, and that according to the law of remainders the estate could only take effect immediately on the death of the survivor of Maria Finch and Henry Mayer, and that consequently, as the son of William Macdonald was then living and had attained twenty-five, it could not be void for remoteness, as it must take effect not only within the life, but within the life in being and twenty-one years afterwards. And the argument before the Vice-Chancellor was this, that the same rules which govern devises of legal estates of freehold govern also devises of equitable estates, using the term “equitable” in the sense I have mentioned; and the Vice-Chancellor gave effect to that argument. Now the first observation to be made upon that is this: It is not quite accurate to say that these contingent equitable remainders, as they are sometimes called, stand in any shape upon the same footing as legal remainders. The reason why a contingent remainder under a legal devise fails, if at the death of the previous holder of the estate of freehold there is no person who answers the description of the remainderman next to take, is the old feudal rule that the freehold could never be vacant—there must always be a tenant to render the services to the lord; and therefore the remainder was destroyed altogether if it could not take effect in that mode; because, if it could not, then it never could take effect at all. Those

feudal rules were never held to apply to equitable estates; and it was sometimes expressed in this way, that the legal estate in the trustees supported the remainders. That was not, perhaps, the best mode of expressing the doctrine, but the real effect of the doctrine was that the legal estate in the trustees, fulfilling all feudal necessities and all the exigencies of the feudal laws, there being always an estate of freehold in existing persons to render the services to the lord, there was no reason why the limitation in remainder of the equitable interest should not take effect according to the intention of the testator. That that was really the effect of it can be shown in this way: Suppose at the time of the determination of the prior estate of freehold—I will say Maria Finch's life estate—there was no person capable of taking, that person afterwards coming into existence within the limits of the rule of remoteness was allowed to take. In other words, you could not tell, except for the rules against remoteness, that a person might not take at any distance of time after the determination of the life estate. So that the whole doctrine of limiting the period to the death of the tenant-for-life, or cesser of the prior estate of freehold, in order to ascertain who should take once and for ever, had no application whatever to equitable estates. If you recognise that as the true meaning of the doctrine you will see how it is that the equitable doctrine never adopted even part of the rule, the rule not applying at all. It is said that equity adopted the rule in order that it might follow the law as far as possible; but that was not so, and I gave an illustration in the course of the argument which I think is very good law and the law as it has, according to my experience, always been assumed without argument: that was, that where the fee is vested in trustees upon trust for a man for life, and after his death upon trust for such of his children as being sons attain twenty-one, or being daughters attain that age or marry under that age, and at the death of the tenant-for-life there were some children adult and some minors, it has always been held that the minors take; but if equity followed

In re Finch, App.

the law, as has been suggested, then, inasmuch as there were persons capable of taking at the death of the tenant-for-life, namely, the adult children—they would take to the exclusion of the children who were minors, because the children who were minors could not be let in, as they would be let in if they had attained the age of twenty-one years. It appears to me, therefore, that the moment you find there is the legal fee outstanding in the trustees, that doctrine of contingent remainders, which is applicable to legal estates, and which compels the vesting to go at the moment of the termination of the prior estate of freehold, or did compel it—because the law has now been altered by statute—ceases to have any operation; and on that ground, therefore, I think this appeal should be allowed.

But I think, also, on the second point I must differ from the conclusion arrived at by the learned Judge of the Court below. I cannot find any gift by way of equitable remainder to the son of William Macdonald. It is a gift to the trustees upon trust for the lady for life, then for their own benefit—which is not an equitable remainder, because, they having the legal ownership, there is no such thing as a separate equitable estate. They have a right to retain for their own benefit the rents during the life of Henry Mayer, and then on his death there is a direction to them to convey the legal estate to the first son of William Macdonald who attains twenty-five. That direction to convey does not give the son of William Macdonald an equitable remainder. First of all, there is the intervening ownership in the trustees, and, in the next place, it is only a direction to them to convey. It is nothing like a remainder. In my opinion, therefore, it must be an executory limitation, and subject to all the laws with regard to executory limitations; and consequently on this ground also I am of opinion that the decision appealed from ought to be reversed.

COTTON, L.J.—I am of the same opinion. There was one point argued by Mr. Williams as a point which he thought was in

his favour, namely, that this was a vested estate—that is to say, that the twenty-five years was not part of the description of the person to take, but that there was a gift to the first son, with a gift over if he did not attain that age. Now he said that there have been cases in which a violent construction has been put by the Court upon devises of real estates, so as to give effect to what was considered by the Court to be the intention of the testator. I asked him whether that violent construction has ever been put upon a devise of this kind—where there had been in the same gift and in the same words a gift both of real and personal estate—and he was unable to refer me to any such case. But I will deal with it independently of that, and ask how, admitting that that violent construction would otherwise have been put upon these words, he can say here that the attaining of twenty-five years is not part of the original gift and part of the description of the devisee, for the gift is “to such son of William Macdonald who shall first attain the age of twenty-five years.” Where there has been that violent construction put upon the words, it has generally been where there was some obscurity, some ambiguity in the original gift, and where there has been a gift over on the person not attaining that age. As Vice-Chancellor Wigram said, in *Bull v. Pritchard* (1), the Court construed the testator as giving all he had to the first taker, subject only to there being the gift over to the second devisee in the event of his not attaining the specified age. But here there is no gift over of that kind, and the attaining of the age of twenty-five is an essential part of the description of the person who is to take.

Well, that being so, assuming this is not a vested interest before the devisee attains twenty-five, is the devise bad or not for remoteness? As I understand, the Vice-Chancellor in his decision proceeded on this ground: He said, if there is a legal remainder, that of necessity must come in and vest on the ceasing of the particular estate upon which it is limited; and therefore, even although it

(1) 5 Hare, 567; 16 Law J. Rep. Chanc. 185.

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is to a person if he attains twenty-five, yet, as it must vest on the determination of the prior life estate, there could be no question of remoteness, for if it ever comes into effect it must come into effect within the time which is allowed by the rules against perpetuity. That no doubt is so; but then how does that apply to remainders of this kind—where the testator by his will, dealing with the legal estate and vesting it in trustees, has directed that they are to hold it in certain events and to certain times on particular trusts, even if he does it in a form which is in fact a remainder? That rule does not apply in equity, because in equity of course the feudal rule of tenure will not be allowed to defeat the trust which the testator has declared by his will, and even although at the determination of the particular estate the persons cannot be ascertained, yet it will afterwards compel the trustees to perform the trusts. That is to say, in respect of those persons who afterwards, and not at the time of the ceasing of the particular estate, answer the description, they would be allowed to come in, whether there were any at the time who answered the description or not; and that being so, where there is a declaration of trust by a testator, where he deals with the legal estate and creates a trust, that rule upon which the Vice-Chancellor has decided the present case can have no application.

But I quite agree with the Master of the Rolls that that question really does not arise here, because there is no limitation by way of remainder. The estate being given by the testator to trustees, he has directed that at a particular time their estate shall be put an end to by their conveying it away to somebody else, not directing them to hold it so as to have the equitable estate in somebody else during his or her life, and afterwards to hold, in trust for a remainderman, but they, having the fee absolutely in themselves, are directed after a certain time to convey that estate from themselves so as to give the person then entitled the legal estate. Of course equity would compel them to hold it after the particular time for the benefit of the person to whom they ought to convey, but as a matter of

limitation in the will it is not a limitation of an equitable estate in remainder, it is merely a direction to convey at a future time to somebody else, and therefore in this case I am of opinion that the question really does not arise; and that the trust to arise here at a period beyond that allowed by the rules of perpetuity must be dealt with as an executory direction to the trustees, and not as an equitable remainder. In my opinion, therefore, the decision of the Vice-Chancellor is erroneous, and must be overruled.

LUSH, L.J.—I am of the same opinion. It is somewhat remarkable that there is no decision to be found expressly upon this point, but I may observe that it has been published as the opinion of very eminent text-writers; and in the case that has been cited before us of *Blagrove v. Hancock* (2), decided by the Vice-Chancellor of England in 1848, it was assumed, as well by the counsel on both sides as by the learned Vice-Chancellor himself, that the doctrine with regard to contingent remainders is not applicable to equitable estates, and the reason appears to be a very obvious one. The doctrine as to contingent remainders was founded entirely upon the requirements of the feudal law, which necessitated that there should always be somebody in possession as tenant of the land to render service to the lord, and therefore if the estate did not happen to accrue at the time when the preceding estate ended, the contingency would not take effect at all.

Now the Court of equity never interfered with that doctrine at all, but when it came to deal with an equitable estate where, as here, the fee was given to trustees, they were held to be persons always at hand to fulfil the requirements of the feudal doctrine. That was an estate which the Court of equity dealt with according to its own principles, and its object was, disregarding the feudal law, to which there was no necessity of conceding, to give effect to the will and mind of the testator. Therefore, where the estate is, as in this case, given to trustees in fee-simple, with a direction to convey, or in trust, which is the same

(2) 16 Sim. 371; 18 Law J. Rep. Chanc. 20.

In re Finch, App.

thing probably, to a person on a given date the Court carried out that will and intention, and when the event arose gave directions for conveyance to the parties to take according to the terms of the will. But then came in another doctrine founded on principles of public policy, because it is plain that if these devises were carried out to the extreme, estates might be tied up for ages, and their rents accumulated, which is of course contrary to the public interest. Therefore the rule of law founded on public policy was applied, namely, that you cannot tie up an estate longer than for a life in being and twenty-one years afterwards. Now in this particular case the testator directed that the estate should, after the death of Henry Mayer, be conveyed by the trustees unto such son of William Macdonald as should first attain the age of twenty-five years, then the rents and profits of the estate were to be accumulated until he attained that age, and therefore it is obvious that, supposing the son of William Macdonald had been born in the very year that Henry Mayer died, the rents and profits of the estate would have been left to accumulate beyond the period of twenty-one years.

I may add that I do not wonder it has been assumed to be the doctrine, and that no express decision is to be found upon the point, because, when one considers the doctrine on which the Court has always proceeded, it seems to me to be perfectly clear that such a devise as this is an executory devise which the Court would give effect to, always provided that it is kept within the rule applicable to remoteness. If it had been a less period than twenty-five years, even twenty-one years, there would have been no difficulty or question about it; but it is beyond that period, and therefore the devise is void as one which might result in tying up the estate for more than lives in being and twenty-one years afterwards.

Solicitors—W. H. Dunster, for appellant; A. J. Murray, for respondent.

JESSEL, M.R. }
1881.
Feb. 7. }

SMITH v. DALE.

Administration—Executors appearing by same Solicitor—Defaulting Executor—Costs.

Two executors in an administration suit appeared by the same solicitor, to whom they had given a joint retainer. One of them was a debtor to the estate, and subsequently became bankrupt:—Held, as to the costs incurred by them prior to the bankruptcy, that the solvent executor was to be allowed only his own proportion of them out of the fund; the defaulter's proportion of those costs being set off against the debt due from him. But the costs incurred subsequently to the bankruptcy were allowed in full.

Watson v. Row (43 Law J. Rep. Chanc. 664; Law Rep. 18 Eq. 680) dissented from.

Charles Dale devised all his real estate to his sons, John Dale and George Dale, with a power (which was never exercised) to his wife, Tamar Dale, to sell or lease any part thereof; subject thereto his trustees were to hold the same to the use of Tamar Dale for life, and after her decease upon trust to sell it and stand possessed of the proceeds of sale as therein mentioned; and the testator gave all the residue of his estate to his wife absolutely, and appointed her his sole executrix until her death or second marriage, on the happening of either of which events he appointed his sons, George Dale and John Dale, to be his executors.

Tamar Dale survived her husband, and by her will she appointed John Dale and John Waddington her trustees and executors, and gave her residuary estate to her daughter, the plaintiff Ann Smith, and John Dale and George Dale, in equal shares. Tamar Dale died in 1874, and George Dale and John Dale thereupon took possession of the estate of the testator Charles Dale.

The bill in the suit was filed in 1874, and by it the plaintiff prayed for the execution of the trusts of the will of Charles Dale, the administration of the estate of Tamar Dale, and a declaration

Smith v. Dale.

that she was entitled to a settlement out of the property given to her by their respective wills.

John Dale, George Dale and Waddington were made defendants to this suit, and George and John Dale appeared by the same solicitor, and put in a joint and several answer. On taking the accounts it appeared that John Dale was indebted to the estate of Charles Dale, and had become bankrupt. The case now coming on for further consideration, the question arose whether the executors of Charles Dale's estate were to be allowed their costs in full, a personal order being made upon John Dale to pay the amount of his debt into Court, or whether their costs should be distinguished, and John Dale's costs set off against the sums due from him to the estate.

Mr. Davey and *Mr. W. W. Cooper*, for the plaintiff, stated the facts and referred to

Re Colquhoun, 5 De Gex, M. & G. 35; 23 Law J. Rep. Chanc. 515.

They were then stopped by the Court.

Mr. Ince and *Mr. B. B. Swan*, for George Dale.—No complaint is made against George Dale, and he is therefore entitled to be recouped out of the estate all the costs and expenses properly incurred by him. This can only be done by giving the executors their costs in full. Why should he lose his costs because he appeared by the same solicitor as his executor, when his only object in so doing was to save the estate the cost of a separate appearance? In

Watson v. Row (*ubi supra*),

which was on all fours with this, Vice-Chancellor Hall held that to deprive the solvent executor of the costs for which he was liable would be contrary to the rule of the Court, which always gives a trustee his costs unless he has behaved improperly. His Lordship distinguished this case from that of

Re Colquhoun (*ubi supra*)

and

Harmer v. Harris, 1 Russ. 155, pointing out that in the former there was no evidence of there having been a joint retainer, and that in the latter the de-

faulters were not co-executors with the defendant. At any rate the costs incurred subsequently to our co-executor's bankruptcy must be allowed in full.

Mr. W. Renshaw and *Mr. E. Outler* appeared for other parties interested.

THE MASTER OF THE ROLLS.—I feel no difficulty about the question in this case. The facts are that two executors or trustees appeared by the same solicitor, and it turns out that one of them has received money belonging to the estate and has made default in paying it over. The other executor had nothing to do with the receipt of the money, and is not liable for it. If there had been no question of default in the case, or if the executor who is not a debtor to the estate had appeared separately, he would clearly have been entitled to all his costs. But the defaulting executor would have been entitled to no costs until he had made good his default. That would be the strict punishment inflicted on him for his default. No doubt the Court recognises the rule by which he is allowed to set off his costs against the sum due from him, and thus make payment by anticipation. But the result either way is to deprive him of the whole or part of his costs.

Now take the case of the executors appearing together. You apply the same rule by knocking off the costs of the defaulting executor, leaving it to the Taxing Master to say what is the proper amount. It is left to him, on taxation, to say what is the fair amount. I should have thought there was no doubt about the rule. But it has been argued that, if one of the executors is not a defaulter, he is to get not only his own costs, but, besides that, all the costs of his co-executor. That would, in fact, be giving the solicitor the costs of the man who has made default. If the solvent executor appears by the same solicitor as the defaulter it is his own fault or misfortune. He ought to have appeared separately, as he would have been not only justified in doing, but entitled to do. His failing to do that cannot affect the rights of the beneficiaries of the trust fund.

Then as to the authorities. I will only cite two. The first is *Harmer v. Harris*.

Smith v. Dale.

It was an administration suit, in which some of the parties, who were debtors to the estate, would, under ordinary circumstances, have been entitled to their costs out of the estate; and this is how the costs were dealt with by the Master of the Rolls: He said, "The plaintiffs are indebted to the testator's estate in upwards of 170*l.*, and they ask, before they have paid in that sum, that they may receive the costs to which they are entitled out of the fund in Court. If I were to grant this demand, I should be going far beyond what any decided case authorises me to do. These parties cannot receive their costs while they continue debtors to the estate." That was right. Then it afterwards appeared that the same solicitor had acted in the suit for several defendants, of whom one was an executor entitled to be paid his costs and the others were debtors to the estate; and a question arose whether, under the description of "costs of the executor," the solicitor would have a right to receive out of the fund the whole amount of charges which had been incurred for the executor jointly along with some of the co-defendants, in the same manner as if he had appeared for the executor alone. Lord Gifford said, "Much of the costs may have been incurred for these defendants jointly. The costs of the executor are only that proportion of the costs due to the solicitor with which the latter, as between the co-defendants for whom he acted, could have charged the executor." In other words, he decided that in such a case the Court disallows a part of the costs, leaving it to the Taxing Master to decide how much is to be given to the party who gets his costs.

The other case is that of *Watson v. Row*. The head-note is as follows: "Two executors, defendants in a suit, gave a joint retainer to a firm of solicitors. In the course of the proceedings it was certified by the chief clerk that one executor, who had since died insolvent, was indebted to the testator's estate:—Held, that the surviving executor was entitled to be paid out of the estate all the costs for which he was liable, and that the costs incurred for the deceased executor in taking the account of his debt must be set off against

the sum found due from him." Now, if the decision had not been that the executor should have all those costs, it would have been quite right; but it was wrong, because it gave him all the costs for which he had made himself liable. The Vice-Chancellor, in his judgment, said, "The case before the Court is that of two executors employing a firm of solicitors on a joint retainer, and of a surviving executor, who, by reason of the joint retainer, is liable to pay the whole of the costs which have been incurred to that firm of solicitors in respect of the business done in the suit; and it has been contended that because the co-executor happened to become insolvent, and could not pay a balance due from him, therefore the solvent executor is only to be allowed one-half of the costs, and to be left to pay the other half out of his own pocket. That contention appears to me to be against the principle which this Court has always acted upon, namely, that a trustee must be allowed the whole of the costs which he is liable to pay to his solicitors in the suit." With the greatest respect to the Vice-Chancellor, I cannot hold that a trustee is necessarily entitled to be allowed out of the fund all the costs which he is liable to pay. He is entitled to be allowed those which he has incurred as trustee, but not those which he has incurred as a surety for his co-trustee. The effect of allowing him those costs would be to give them twice over. Consequently, as regards the costs incurred before the bankruptcy, George and John Dale's costs must be distinguished, and the former will have only his own proportion of the costs out of the fund. The Taxing Master will decide what that proportion is. John Dale's costs must be set off against the amount due from him. The costs incurred subsequently to the bankruptcy will be allowed in full.

Solicitors—Saffery & Huntley, for plaintiff; G. C. Sherrard, for defendants.

[IN THE HOUSE OF LORDS.]

1880. } DUNCAN, FOX AND COM-
 July 22, 23, 26. } PANY v. THE NORTH AND
 Nov. 27. } SOUTH WALES BANK.

*Bill of Exchange—Principal and Surety
 —Right of Indorser to Securities of Acceptor
 in hands of Creditor.*

The indorser of a bill of exchange is in the position of a surety for the acceptor, and, as such, upon payment to a discounteer of the amount due on the bill after its dishonour by the acceptor, is entitled to the benefit of securities of the acceptor held by the discounteer to secure the bill.

The holder of the bill and security is at liberty to deal with the bill without prejudicing his security at any time before notice of dishonour.

Quære, as to the rights of a stranger to the acceptors, who has given such security.

This was an appeal from a decision of the Court of Appeal, reversing a decision of the Vice-Chancellor of the County Palatine of Lancaster, in favour of the appellants. The case is reported 48 Law J. Rep. Chanc. 376; Law Rep. 11 Ch. D. 88.

The material facts of the case were as follows:—

In December, 1874, S. C. Radford, one of the partners in the firm of S. Radford & Co., deposited with the North and South Wales Bank the title-deeds to two freehold properties of which he was owner in fee, with a memorandum in respect of each property, signed by him, acknowledging that the deeds were deposited "in pledge to secure to the bank the balance for the time being owing to the said bank by my firm of Samuel Radford & Sons, for discounts and advances, and for all other moneys in and for which the said firm, whether alone, or jointly with any other person or persons, were or might from time to time thereafter be or become indebted or liable to the said bank, or the said bank was or might be or become indebted or liable on their account, or which the said bank might at any time claim against the said firm. . . ."

In January, 1876, S. Radford & Co. stopped payment, being largely indebted

to the bank, amongst other things, upon three bills of exchange, amounting to nearly 9,000*l.*, which had been accepted by them, indorsed by Duncan, Fox & Co., and discounted by the bank. The bills were dishonoured. The bank realised part of the securities, and admitted that the proceeds were sufficient to meet all other moneys owing to them by S. Radford & Sons and to leave a considerable balance to meet the above bills. The bank demanded payment of the bills from the appellants. The appellants becoming aware of the security held by the bank after the stoppage commenced this action against the bank, S. C. Radford, S. Radford & Sons, and Balfour, Williamson & Co., who by an order made in the action were appointed to represent the creditors of S. Radford & Sons other than the appellants and the bank, claiming a declaration that they were sureties for the payment by S. Radford & Sons of the balance due on the bills, an account of what was due to the bank from S. Radford & Co. after deducting the amount realised by the securities sold, an order to the bank to transfer the securities to the appellants on payment by them of the balance so found due, and foreclosure against S. C. Radford.

The bank were in the position of stakeholders, and the only contest was between the appellants and Balfour, Williamson & Co., who represented the unsecured creditors of S. Radford & Co.

Vice-Chancellor Little held that the appellants were sureties to the bank for the acceptors, and were entitled to the relief prayed.

The Court of Appeal reversed this decision, and this appeal was then brought.

Mr. Kay and Mr. Robinson (Mr. Neville with them), for the appellants.—The relations between the acceptor of a bill of exchange and the drawer, indorser or other parties whose names are on the bill are those of principal and surety, and are governed by the law applicable to persons in that position. The indorser is therefore entitled on paying the bill after dishonour to the benefit of all

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securities in the hands of the holder, who is the creditor, to meet the bill—

Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 5.

It is well settled that giving time to the acceptor without the assent of the drawer discharges the drawer—

Ex parte Wilson, 11 Ves. 410;

Pring v. Clarkson, 1 B. & C. 14; 2 Dowl. & Ry. 78; 1 Law J. Rep. (o.s.) K.B. 24;

Latham v. The Chartered Bank of India, 43 Law J. Rep. Chanc. 612; Law Rep. 17 Eq. 205;

Overend, Gurney & Company v. The Oriental Financial Corporation, Law Rep. 7 E. & I. App. 348;

Clark v. Devlin, 3 Bos. & P. 363;

English v. Darley, 2 Bos. & P. 61.

An indorsee of a bill of exchange takes subject to the equities affecting it arising out of the original transaction—

Holmes v. Kidd, 3 Hurl. & N. 891; 28 Law J. Rep. Exch. 112.

The rights of a surety are derived not from contract, but from general principles of equity. His right to securities held by the creditor is derived from the obligation of the principal debtor to indemnify him—

Yonge v. Reynell, 9 Hare, 809.

There is no direct authority; but the indorser of a bill of exchange is within the equity on which the rights of an ordinary surety rest—

Aldrich v. Cooper, 8 Ves. 382.

Mr. Benjamin and Mr. Marten (Mr. F. Thompson with them), for the respondents Balfour, Williamson & Co., contended that there was no authority for the position that the parties to a bill of exchange other than the acceptor were for all purposes in the position of sureties as regards him; that an extension of the principles of

Pledge v. Buss, Johnson, 663, and

Newton v. Chorlton, 10 Hare, 646; 2 Drew. 333,

to the relations of parties to bills of exchange would paralyse business and render banking impossible.

They cited

Byles on Bills, 12th ed. p. 245;

Pearl v. Deacon, 24 Beav. 186; 1 Do

Gex & J. 461; 26 Law J. Rep. Chanc. 761;

Helbert v. Banner, 40 Law J. Rep. Chanc. 410; Law Rep. 5 E. & I. App. 28.

[Towards the close of the arguments the Lord Chancellor called the attention of the counsel for the respondents to the case of

Praed v. Gardiner, 2 Cox, 86, as a direct and decisive authority in favour of the appellants. Counsel for the respondents attempted to distinguish the case as one of fraudulent dealing with the property of a third person.]

Mr. Kay, in reply, cited

Boulton v. Stubbs, 18 Ves. 21;

McTaggart v. Watson, 3 Cl. & F. 525;

Ex parte Yonge, 3 Ves. & B. 31;

Horne v. Bouquetta, Law Rep. 3 Q.B. D. 518;

Stirling v. Forester, 3 Bligh, 575.

Our. adv. vult.

THE LORD CHANCELLOR (LORD SELBORNE).—The appellants, Duncan, Fox & Co., are liable, as indorsers of three bills of exchange, dated the 25th of November, 1875, drawn upon and accepted by a firm of Samuel Radford & Sons, for the total amount of 8,920*l.* 15*s.* 3*d.*, and given to Duncan, Fox & Co., in part payment for wheat sold by them to Samuel Radford & Sons. The other appellants, Jonathan Robinson & Co., are liable as drawers and indorsers of two other bills, also drawn upon and accepted by Samuel Radford & Sons, under dates the 19th of November and the 14th of December, 1875, for the total amount of 5,432*l.* 7*s.* 6*d.*, on account of other wheat sold to Samuel Radford & Sons. All these bills were discounted, in the usual course of business, with the North and South Wales Bank, without any special agreement; and the bank has never parted with and still holds them. Samuel Radford & Sons stopped payment in January, 1876, and on the 24th of February following executed a deed of insolvency, under which their joint and separate estates are applicable for the benefit of their creditors,

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parties thereto, who are represented by the respondents. Neither the appellants nor the bankers are parties to that deed. The first of the five bills in question became due on the 22nd of February, three others on the 28th of February and the last on the 17th of March, 1876. They were all duly presented for payment and dishonoured, and notice was duly given of dishonour. Some payments have been made by the acceptors on account; and the amount now remaining due upon them is claimed by the bank, as to three from Duncan, Fox & Co., and as to two from the other appellants. The appellants are ready and willing to meet their liabilities on these bills, but they insist that a sum of 5,921*l.* 1*9s.* 6*d.* now in the hands of the bank, which has been realised from securities held by the bank under a certain memorandum of deposit, dated the 1st of December, 1874, ought to be applied to relieve them as far as it will extend, and also that the securities yet remaining unrealised under the same memorandum (valued at about 2,000*l.*), ought to be handed over to them, on payment of the balance which, after the application of the 5,921*l.* 1*9s.* 6*d.*, will remain due upon the bills. This claim is resisted by the respondents, who, for this purpose, may be regarded as standing in the shoes of Samuel Collins Radford, one of the partners in the firm of Samuel Radford & Sons.

The deposit consisted of the title-deeds of certain real estate at Liverpool, belonging absolutely to Samuel Collins Radford, which, by the memorandum of the 1st of December, 1874, were pledged to secure to the bank (whose customers Samuel Radford & Sons were) "the balance for the time being owing to the said bank by Samuel Radford & Sons for discounts and advances, and for all other moneys in or for which the said firm, whether alone or jointly with any other person or persons, were or might from time to time thereafter be or become indebted or liable on their account, or which the said bank might at any time claim against the said firm." At the time when the present question arose all dealings and accounts between the bank and Samuel Radford & Sons had

been closed, and nothing remained due to the bank, under the memorandum of deposit, except the balance then unpaid upon those bills. The property from which the sum of 5,921*l.* 1*9s.* 6*d.* was realised was sold by the bank after the commencement of the action. The bank is before the Court (subject to its right to receive payment of the balance due on the bills and of its costs) merely as a stakeholder. In its answer it professes to be "desirous of acting with entire impartiality, and holding an even hand between the plaintiffs and the defendants, and of dealing with the securities and the proceeds thereof under the direction of the Court"; and it offers, on receiving payment of what is due to it, to pay over any surplus, and to assign any property comprised in its security which may remain unsold, to such persons as the Court may consider entitled.

The question, therefore, as to the proper appropriation of the 5,921*l.* 1*9s.* 6*d.* and the remaining securities, is between the respondents, claiming in right of Samuel Collins Radford (one of the acceptors) and the appellants, the indorsers of the bills of exchange; and it ought, I conceive, to be determined upon the same principles as if the appellants had actually paid the bills, and as if the bank had paid the proceeds of the securities either to the appellants or into Court in this action. If in either of those events Samuel Collins Radford would have been entitled to an order against the appellants for repayment, or for payment out of Court of such proceeds, to be applied as part of his estate under the inspectorship deed, your Lordships' judgment ought now to be for the respondents; if not, the appellants are right. The Vice-Chancellor of the Palatine Court of Lancaster thought that the appellants were right; and, with the utmost respect for the Court of Appeal (which thought otherwise), I am of the same opinion.

In examining the principles and authorities applicable to this question, it seems to me to be important to distinguish between three kinds of cases: First, those in which there is an agreement to constitute, for a particular purpose, the relation of principal and surety, to

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which agreement the creditor thereby secured is a party; secondly, those in which there is a similar agreement between the principal and surety only, to which the creditor is a stranger; and, thirdly, those in which, without any such contract of suretyship, there is a primary and a secondary liability of two persons for one and the same debt; the debt being, as between the two, that of one of those persons only, and not equally of both, so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid.

It is, I conceive, to the first of these classes of cases, and to that class only, that the doctrines laid down in such authorities as *Owen v. Homan* (1), *Newton v. Chorlton* and *Pearl v. Deacon* apply in their full extent. If, so far as the creditor is concerned, there is no contract for suretyship, if the person who has, in fact, made himself answerable for another man's debt is, towards the creditor, no surety, but a principal, then I think that the creditor would not be subject to those special obligations which were described by Lord Truro in *Owen v. Homan* (1), and would not generally have his powers of dealing with securities circumscribed and restricted in the manner described by Vice-Chancellor Wood in *Newton v. Chorlton*, and by Lord Romilly and the Lords Justices in *Pearl v. Deacon*. If, for example, in *Pearl v. Deacon* the contract of suretyship had been only between Pearl and Pearson *inter se*, Messrs. Deacon dealing with them both as principals, and not with Pearl as a surety, I should take it to be clear that Messrs. Deacon might have distrained upon goods comprised in their security for the rent due to them from Pearson, without losing (as they did in the actual case) their remedy against Pearl. The difficulties, therefore, which in the present case appear to have weighed most upon the minds of the Judges in the Court of Appeal, would not ordinarily arise, unless there was a contract of suretyship properly so called,

not between the two debtors only, but between them and the creditors also.

It is, however, consistent with this that the person who, as between himself and another debtor, is in fact a surety (though the creditor is no party to that contract of suretyship), has against that other debtor, the rights of a surety; and that the creditor, receiving notice of his claim to those rights, will not be at liberty to do anything to their prejudice, or to refuse (when all his own just claims are satisfied) to give effect to them. The judgment of Lord Justice Turner in *Davies v. Stainbank* (2), and the cases of *Ex parte Hippins and Harrison* (3), and *The Liquidators of Overend, Gurney & Company v. The Liquidators of The Oriental Financial Corporation* are founded, as I understand them, on this view of the law. In such cases the equity is direct in favour of the surety debtor against the principal debtor; but it affects the creditor towards whom they are both principals only as a man who has notice of the obligations of one of his own debtors towards the other. As between the two debtors, the "established principles of a Court of equity," to which Sir Samuel Romilly referred in his argument in *Craythorne v. Swinburne* (4), judicially approved by Lord Eldon, are fully applicable. "Natural justice" (it was there argued) "requires that the surety shall not have the whole thrown upon him, by the choice of the creditor not to resort to remedies in his power." In *Aldrich v. Cooper* Lord Eldon speaks of a surety's equity as resting upon the same principles with that of marshalling, when one creditor of the same debtor is able to resort to either of two funds, and another creditor to only one. "It is not," he says, "by force of the contract, but that equity, upon which it is considered against conscience that the holder of the securities should use them to the prejudice of the surety; and therefore there is nothing hard in the act of the Court placing the surety exactly in the situation of the creditor." And soon afterwards (where he speaks of marshalling), "The principle, in some degree, is that it shall not

(1) 3 Mac. & G. 378; 20 Law J. Rep. Chanc. 314; affirmed 4 H.L. Cas. 997.

(2) 6 De Gex, M. & G. 679.

(3) 2 Glyn & J. 93.

(4) 14 Ves. 162.

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depend upon the will of one creditor to disappoint another;" and "The Court has said that if a creditor has two funds, the interest of the debtor shall not be regarded, but the creditor having two funds shall take to that which, paying him, will leave another fund for another creditor." And in *Yonge v. Reynell*, Vice-Chancellor Turner said, "When Lord Eldon says it is against conscience to sue the surety, it must be considered what is the meaning of that expression, and why this Court considers it against conscience that the surety should be sued; and I take it to be because, as between the principal and surety, the principal is under an obligation to indemnify the surety; and it is, I conceive, from this obligation that the right of the surety to the benefit of the securities held by the creditor is derived. The principle is not, I think, much dissimilar to that which applies where a man directs part of his estate to be employed in carrying on a trade, in which case the creditors of the trade have a right to resort to that part of the estate, because the trustees have a right to be indemnified out of it."

It appears to me that these principles of equity are not less applicable to cases of the third class—cases in which there is, strictly speaking, no contract of suretyship, but in which there is a primary and secondary liability of two persons for one and the same debt, by virtue of which, if it is paid by the person who is not primarily liable, he has a right to reimbursement or indemnity from the other—than to those of the second class, in which there is a contract of suretyship to which the creditor is not a party. To this third class of cases, the rights of an indorser against an acceptor of a bill of exchange may most properly be referred. The liability of the indorser to the holder is, by the law merchant, conditional, and (as was said by Mr. Justice Buller, in *Tindal v. Brown* (5),) "only secondary;" but, when the conditions required by that law are fulfilled, it becomes absolute, and is that of a principal; and the indorser's right, if he pays the holder, to recover over against the acceptor is not founded on any agree-

ment between him and the acceptor (who is as likely as not to be a stranger without any communication with him before the indorsement), but is established by the same law. But contracts of this kind, as well as suretyships proper, are entered into by all the parties to them with a knowledge and in view of the law by which they are governed. The acceptor, though he may know nothing of any particular indorser, knows that by his acceptance he does an act which will make him liable to indemnify any person who may indorse and may afterwards pay the bills; and he knowingly and intentionally undertakes that liability, as much as if the indorsement were the result of direct communication between himself and that person. Lord Eldon, in *Ex parte Yonge*, said, with his usual accuracy (his language being as applicable to an indorser as to a drawer), "The drawer of a bill of exchange is not strictly a surety for the acceptor. In general cases the acceptor is primarily liable upon the bill, and the drawer may be in the nature of a surety." The statement in *Smith's Mercantile Law* (3rd ed., p. 253) is also correct, and is established by many authorities, that "in the contract by bill or note, the maker or acceptor is considered the principal, and the indorsers as his sureties; and consequently, if the holder either discharge or suspend his remedy against the former, the latter, unless they have previously consented to it, or afterwards promised to pay with knowledge of it, are all immediately discharged." Mr. Smith uses, in this passage, the language of Mr. Justice Chambre in *Clark v. Devlin*, who stated that the case of *English v. Darley* was decided by Lord Eldon (in the Common Pleas) on that principle. I am unable to conceive any ground on which the principle which prevails in cases of suretyship should go so far as this, in favour of the drawer or the indorser, and not also extend (when the indorser is compelled to pay the bill, and when the question arises between him and the acceptor only) to securities deposited by the acceptor with the holder. In the present case the holder has actually in his hands a large sum of money realised by him from such securities. It is very

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difficult, on any rational principle, to distinguish the receipt of such a sum, under such circumstances, from an actual payment on account by the acceptor. Of the creditor's right, if he pleases, to apply it in payment of the bills there can be no possible question; yet it is contended that he may, at his option, give the money back to the acceptor, and sue the indorser on the bills; nay, more, that, if he does compel the indorser to pay the bills, without applying that money to them, a Court of equity is bound to leave the burden on the indorser, and restore to an insolvent acceptor the money which has been so realised from the securities. I cannot reconcile such a decision with the doctrine of Lord Eldon and Lord Justice Turner. No case before the present has been cited in which the right of a drawer or indorser to the benefit of such securities, as between himself and the acceptor, has ever been denied or doubted. The opinion of Sir John Byles, in his very learned treatise on bills, is, no doubt, no authority; and I will not lay stress upon the case of *Praed v. Gardiner*, because, as was observed by Mr. Marten, what was really done in that case was to marshal securities held by the creditor according to the equities of the different persons entitled to redeem them, and the exact grounds of the judgment do not appear. But I think that the principles deducible from all the authorities lead necessarily to the conclusion, that, under circumstances like the present, the equity between the indorser and the acceptor is the same as that between a surety and a principal debtor when the creditor is not a party to the contract of suretyship. That equity, according to my view of it, need not interfere with the ordinary operation of such a general covering security as that given by Samuel Collins Radford to the North and South Wales Bank, during the continuance of the dealings between the secured creditor and the acceptor of bills not overdue, which the creditor may hold or part with as he pleases. It will not incapacitate bankers who may hold such a bill, accepted by a customer and indorsed by a third party, from carrying on their dealings with that customer, by varying the securities re-

ceived from him according to the ordinary course of those dealings, as long as he remains solvent and before the acceptance has been dishonoured. It will not, in my opinion, tend to paralyse the business of discounting bills of exchange. But it is an equity which, in my judgment, does certainly attach, when the bills, overdue and dishonoured, and the securities, are found together in the hands of the secured creditor, at the time when he requires payment from the indorser; when the creditor has no other transactions then depending with the customer, and no claim upon the securities except for the bills themselves; and when the competition is between the indorser and the acceptor only.

For these reasons I think that the judgment under appeal is erroneous, unless it can be supported on the ground that the security in this case was given by one only of the partners in the firm by which the bills were accepted. But it appears to me that it can make no difference whether the security was given by all the acceptors or by one of them. In each case alike, the person giving the security is principal debtor as between the indorser and himself; and the interest, whether of a sole debtor or of one of two or more joint debtors, is not, in my opinion, to be regarded in competition with the equity of anyone who is in the nature of a surety for him, and whom he is bound to indemnify.

I therefore propose to your Lordships to reverse the decree appealed from, and to restore that of the Vice-Chancellor of the County Palatine of Lancaster. The bankers will take their costs here and below out of the fund arising from the securities; and the appellants must have their costs here and below out of any surplus remaining from the securities in the first instance, and (so far as the securities may not be sufficient to pay them) from the respondents.

LORD BLACKBURN.—The North and South Wales Bank had, amongst its customers, a firm of Samuel Radford & Sons. The bank had taken from Samuel Collins Radford, one of the partners in that firm, the title-deeds of some pro-

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party belonging to him, with two memorandums, by which he acknowledged to have delivered the title-deeds in pledge to secure to the bank whatever might be owing from the firm to the bank.

I do not think it either necessary or desirable to enquire what might have been the rights of the various parties under all the complicated state of things which might have arisen during the winding up of the transactions between the bank and Samuel Radford & Sons. It is enough to consider the state of facts which has in this case actually occurred.

The bank had discounted for one of the appellants two bills of exchange, and for the other appellant three bills of exchange accepted by the firm of Samuel Radford & Sons, payable at a bank in London. These bills were indorsed by the appellants respectively. At maturity they were dishonoured, and the firm was consequently liable to the bankers as holders of them, so that the equitable mortgage was held in pledge to the bank to cover, amongst other things, those bills. The bank gave due notice of dishonour to the several indorsers respectively, and they became bound to pay to the bankers, as holders, the amount of the bills, on having the bills delivered to them, so as to remit them to their former rights as holders against the acceptors, and any indorsers prior to themselves.

The estate pledged to the bank has, in fact, been converted into money, and partly from that source, and partly from others, most of the liabilities of Samuel Radford & Sons to the bank have been discharged in full, and some payments have been made by the acceptors on account of the bills in question. And now it is ascertained that, after all liabilities of the partners to the bank, except those on the five bills in question, have been discharged, there will remain on the equitable mortgage, partly realised, a considerable surplus, though not sufficient to pay the bills in full. The indorsers offer to pay the bills on having credit for the money realised, so far as not applicable to other purposes, and having the equitable mortgage transferred to them. Samuel Collins Radford has not become bankrupt, but the general

creditors of the firm insist that the indorsers of the bills ought to be made to pay in full, and then that the surplus of the pledged estate should be delivered to Samuel C. Radford to be applied for the general benefit. The appellants have filed this bill to have the memorandums and the title-deeds, together with the bills of exchange, delivered to them, on payment by them of what remains due to the bank on the bills. The bank is sure to be paid in full either way, and having no interest in the matter, does not wish to favour either party, and submits to deal with the bills of exchange and equitable mortgages, after satisfaction of the principal moneys, interest and costs, as the Court may direct.

The Vice-Chancellor held that the appellants were entitled to what they claim. The Lords Justices reversed his decision, and the substantial question before the House is, whether the indorsers of the bills have such a right.

I think it is clear that they have no such right by contract. They did not at the time when they got the bills discounted at the bankers so much as know that the bank held any security from Samuel Radford & Sons, and of course, that being the case, made no express stipulation about it; and there is nothing in the nature of an indorsement for value to give the indorser any right, during the currency of the bills, to any security which either his immediate indorsee, or any other holder of the bill, may have from any party to the bill. The indorser, by the law merchant, is liable, on having due notice of dishonour, to pay the amount of the bill to the holder for the time being, on having the bill restored to him; but till the bill is dishonoured there is nothing to prevent the party who may be the holder for the time being indorsing it, even without recourse, so as to make it impossible that he can ever be the person to whom the prior indorser will have to pay the bill. I think, therefore, with the Lords Justices, that there is neither principle nor authority for saying that the indorsers are, during the currency of the bill, sureties, or in the nature of sureties to the indorsee, so that they have any equity to prevent the in-

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dorsee from dealing as it may seem to him most desirable, with any other parties unless thereby he prevents himself from giving notice of dishonour, so as to give them their remedy against prior parties, of the bill; and I agree with them in thinking that any contrary decision would be very mischievous.

But though the indorsers had no such right by contract, yet after the bills were dishonoured and notice of dishonour had been given to the indorsers, the position of the parties was altered. Though the indorser is primarily liable as principal on the bill, and is not strictly a surety for the acceptor, he has this in common with a surety for the acceptor, that he is entitled to the benefit of all payments made by the acceptor, and is entitled, on paying the holder, to be put in a situation to have a right to sue the acceptor. And now the state of affairs is so far cleared up that the bank had, besides the right to come upon the indorsers, a right to come upon the security pledged to the bank by Samuel Collins Radford.

I think it is established by the case of *Deering v. Lord Winchelsea* (6), and the observations on that case by Lord Eldon in *Oraythorne v. Swinburne* (4), and Lord Redesdale in *Stirling v. Forester*, that where a creditor has a right to come upon more than one person or fund for the payment of a debt, there is an equity between the persons interested in the different funds that each shall bear no more than its due proportion. This is quite independent of any contract between the parties thus liable. Lord Eldon, in *Oraythorne v. Swinburne* (4), says of *Deering v. Lord Winchelsea* (6), "That case also established that though one person becomes a surety without the knowledge of another surety, that circumstance introduces no distinction." And Lord Redesdale, in *Stirling v. Forester*, says, "The principle established in the case of *Deering v. Lord Winchelsea* (6) is universal, that the right and duty of contribution is founded upon doctrines of equity; it does not depend upon contract. If several persons are indebted, and one makes the payment, the creditor is bound in con-

science (if not by contract) to give to the party paying the debt all his remedies against the other debtors. . . . He (the creditor) is bound seldom by contract, but always in conscience, as far as he is able, to put the party paying the debt upon the same footing with those who are equally bound. That was the principle of decision in *Deering v. Lord Winchelsea* (6), and in that case there was no evidence of contract." And this last principle, that the person making payment of more than his due proportion is entitled to have assigned to him all rights and securities of the creditor for the purpose of, by means thereof, obtaining contributions, is recognised and enacted by the 19 & 20 Vict. c. 97. s. 5.

I think that, though the indorser of a bill is not exactly a surety for the acceptor, or a co-surety with those who are sureties for the acceptor, yet he stands in a position sufficiently analogous to that of a surety to bring him within the principle of *Deering v. Lord Winchelsea* (6).

If this be correct, it seems to me that the question in the present case is reduced to this: What are the due proportions as between the indorsers and the security created by one of the acceptors on his separate estate? If a third person, not a member of the firm or liable for its engagements, had become surety or pledged his estate as security to the bank for the general balance due to it from the firm, it might be contended, at least plausibly, that he became only surety for the balance after all indorsers had paid, and was therefore entitled to say that, as between him and the indorser, the indorser should pay all before the surety paid anything. I do not express any opinion how that would be. But the owner of the pledged estate in this case was himself one of the firm and an acceptor of the bill, and as such liable to the indorser. And if the bank had applied the whole of the proceeds of the security, as far as they went, to the payment of these bills, it seems quite clear that Samuel Collins Radford could not have come on the indorsers to pay him part of the debt which he had thus paid. The answer would have been that he was, as between him and the indorsers, bound to

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pay the whole. And it follows, that if the bank comes upon the indorsers first, they must have the right to be recouped out of the security, unless the bank had an option to favour whichever set of those liable it pleased, which the reasoning of Lord Eldon seems to me to treat as manifestly inconsistent with the doctrine of equity.

I have, therefore, come to the conclusion that the decision below ought to be reversed.

I have not done so without some hesitation. For it is not to be denied that the result is that the indorsers of bills who happen to have discounted them with other banks are worse off than the appellants, who, by what as regards them is a lucky chance, have got the benefit of this security. I am afraid to question the justice of a rule approved by such great lawyers as Lords Eldon and Redesdale, though Lord Eldon does not seem at first to have approved of *Deering v. Lord Winchelsea* (6); but if it were *res integra*, I am by no means sure that it would not have been better to say that everyone should have the full extent of his rights given by contract express or implied, and no more. But I think the unbroken current of authority from *Deering v. Lord Winchelsea* (6), decided in 1787, very nearly a century since, renders it impossible now to indulge in such speculations.

I agree to the order as to costs which has been proposed by the noble and learned Lord on the woolsack.

LORD WATSON.—I shall endeavour very briefly to indicate the grounds upon which I agree with your Lordships in holding that the judgment of the Lords Justices ought to be reversed, and that of the Vice-Chancellor restored. I should have had difficulty in coming to that conclusion had it not been that in the present case there are certain special circumstances, and that there are authorities in the law of England applicable to these circumstances, which do not seem to have been taken into consideration by the Court of Appeal.

It does not appear to me that the broad proposition maintained by the appellants at the bar of the House and elsewhere, to

the effect that the indorser of a bill of exchange becomes entitled, in a question with the holder, to the same equities as if he had been a proper surety for the acceptor, has any foundation in law. To give these equities to an indorser before the bill falls due would, in my opinion, be inconsistent with the nature of a bill of exchange, and the rights and obligations which it creates in favour of and against the parties to it; and I entirely agree with the observations of the Master of the Rolls upon the grave inconveniences to which bankers and merchants would be exposed by the introduction of such a principle, so far as these observations apply to the period of the bill's currency.

The special circumstances which appear to me to be of vital importance to the decision of the present case are these: that at the time when the bills in question matured, the bankers had brought their dealings with the acceptors to a close, in consequence, apparently, of the insolvency of the latter, and that the bank then held securities sufficient, when realised, not only to pay off all other debts due by the acceptors, but also to cover, if not in whole, at least in great part, the liabilities of the acceptors upon these bills.

That the bankers had power, in terms of the memoranda of deposit by Samuel Collins Radford, to apply the balance of their securities in extinction of the indebtedness of the firm of Samuel Radford & Sons upon the bills in question, does not admit of doubt. Accordingly, the bank had a legal right to recover from the indorser, who became directly liable to them upon the failure of the acceptors to honour the bills, and had also a legal right under their arrangement with Samuel Collins Radford, a partner of the acceptor's firm, to obtain payment out of the free balance of the securities deposited by him. In a question with the bank the acceptors and the indorsers were alike principal debtors, but the bankers knew—at least it came to their knowledge before they had exacted payment from either—that, in a question with the indorsers the acceptors were, in reality, as well as *ex facie* of the bills, primarily liable. In these circumstances, it is

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obviously immaterial to the bankers from which source they obtain payment of their debt.

In the present case, Samuel Collins Radford cannot, in my opinion, plead that he did not intend to become liable for the dishonoured acceptances of his firm, discounted with the North and South Wales Bank; and seeing that the real conflict of interests lies between him and the indorsers, I think it would be inequitable to compel payment from the indorsers until the securities given by him to the bank have been exhausted. But I conceive that there is abundant authority in the law of England conclusive in favour of the indorsers' claim. I shall not refer in detail to the series of decisions which have been fully dealt with by your Lordships. They satisfy me that it has long been a settled rule of equity that, in circumstances analogous to those of the present case, the creditor is bound to take payment from that one of his debtors who is *inter eos* primarily liable for his debt.

I have only to add that, whilst it is my opinion that the indorser is not in the likeness, and therefore cannot claim the equities of a surety, so long as the bill is current, I am not prepared to hold that he becomes necessarily, and in all circumstances, entitled to these equities whenever the bill matures. It is possible that, after maturity, the holder of the bill may have such interest, arising from his relations with the acceptor, as will entitle him even then to deal with his securities without respect to the interests of the indorser. But the solution of these questions is unnecessary for the disposal of the present case.

Order appealed from reversed. Decree of the Vice-Chancellor of the County Palatins of Lancaster restored, with directions as to costs, and cause remitted.

Solicitors—G. L. P. Eyre & Co., agents for Garnett & Tarbet, Liverpool, for appellants; Gregory, Rowcliffes & Rawle, agents for Hill & Dickinson, Liverpool, for respondents.

HALL, V.C.
1881.
March 19.

In re ICKERINGILL.
HINSLEY v. ICKERINGILL.

Will—Construction—Power of Appointment—Execution of General Power—Lapse.

A testator by his will bequeathed a legacy of 770l. to M. I., in trust for the testator's daughter A. for her life, and after her decease in trust for such persons as she should by deed or will appoint, and in default of appointment in trust for M. I. A. by her will gave and bequeathed all her real and personal estate to her two sisters, M. and L., their heirs, executors, administrators and assigns in the shares following, namely, one-third to M. and two-thirds to L, and appointed L. sole executrix of her will, and charged her said property and effects with the payment of her debts and funeral and testamentary expenses. L. having predeceased A.,—Held, that A. had by her will shewn an intention to make the legacy of 770l. part of her property for all purposes, and that the two-thirds which had been appointed to L. passed therefore to the next-of-kin of A., and not to M. I. as in default of appointment.

In re Davies' Trusts (41 Law J. Rep. Chanc. 97; Law Rep. 13 Eq. 163) considered and distinguished.

Matthew Ickeringill the elder, by his will dated the 21st of July, 1860, gave the sum of 770l. unto his son Matthew Ickeringill the younger, his executors, administrators and assigns, upon trust to invest the same upon real or government or other eligible and safe security, and to pay the interest, dividends and proceeds unto and for the sole and separate use of the testator's daughter, Alice Ickeringill, during her life, and after her decease upon trust to pay and apply the said principal sum of 770l. and the interest thereof unto and for the use and benefit of such person or persons, and for such intents and purposes as his said daughter, whether covert or sole, should by deed or will appoint, and in default of any such direction or appointment upon trust for the said Matthew Ickeringill, to retain and apply the said principal and interest to his own use and

In re Ickeringill.

benefit; and the testator appointed his said son sole executor of his will. The testator died in the month of July, 1860.

Alice Ickeringill made her will, dated the 16th of June, 1866, in the words following:—

"I give and bequeath all my money and securities for money, wearing apparel, furniture, and all other my personal estate and effects and property whatsoever and wheresoever, and all my real estate (if any) unto my two sisters, Mary Hinsley and Lucy Carlile, their heirs, executors, administrators and assigns, according to the nature and tenure of the premises respectively, in the shares and proportions following—that is to say: one equal third part or share of all my said real and personal property and effects unto my said sister, Mary Hinsley, her heirs, executors, administrators and assigns; and two equal third parts or shares of all my said real and personal property and effects unto my said sister, Lucy Carlile, her heirs, executors, administrators and assigns. I appoint my said sister, Lucy Carlile, sole executrix of this my will, and I charge my said property and effects with the payment of my debts and funeral and testamentary expenses."

Lucy Carlile died on the 16th of October, 1868, and the testatrix, Alice Ickeringill, died a spinster on the 24th of February, 1880. At the time of her death she was not seised of any real estate, and she was not possessed of any personal estate other than the legacy of 770*l.*, subject to her power of appointment. The next-of-kin of Alice Ickeringill at the time of her death were her sister, the plaintiff Mary Hinsley, and her brothers, the defendants Matthew Ickeringill the younger and Robert Ickeringill, and another person, if living. This was an action for the administration of the personal estate of Alice Ickeringill, and the principal question for the decision of the Court was, whether the two-thirds of the sum of 770*l.*, which lapsed by reason of the death of Lucy Carlile in the lifetime of Alice Ickeringill, passed to the defendant, Matthew Ickeringill the younger, under the will of Matthew

Ickeringill the elder, or was distributable amongst the next-of-kin of Alice Ickeringill.

Mr. W. Pearson and Mr. Wigglesworth, for the plaintiff.—We submit that the testatrix, Alice Ickeringill, has by her will shown an intention to deal with the legacy of 770*l.* as if it were her own property, and that accordingly it must be treated as having become her property, not merely for the purpose of paying her debts, but for all purposes—see

The Attorney-General v. Brackenbury, 1 Hurl. & C. 782; 32 Law J. Rep. Exch. 108;

Brickenden v. Williams, 38 Law J. Rep. Chanc. 222; Law Rep. 7 Eq. 310;

Wilkinson v. Schneider, 39 Law J. Rep. Chanc. 410; Law Rep. 9 Eq. 423;

Wilday v. Barnett, Law Rep. 6 Eq. 193;

Laing v. Cowan, 24 Beav. 112;

In re Hoskin's Trusts, 46 Law J. Rep. Chanc. 274; Law Rep. 5 Ch. D. 229; on appeal, 46 Law J. Rep. Chanc. 817; Law Rep. 6 Ch. D. 281;

and

In re Van Hagen. Sperling v. Rochfort, 49 Law J. Rep. Chanc. 705; on appeal, *ante*, 1; Law Rep. 16 Ch. D. 18.

The only authority which can be cited against us is

In re Davies' Trusts (ubi supra), but that case cannot be reconciled with the more recent decision in

In re Pinedi's Settlement, 48 Law J. Rep. Chanc. 741; Law Rep. 12 Ch. D. 667,

which must, as we submit, prevail.

Mr. R. Norton, for the defendant Robert Ickeringill, adopted the same arguments.

Mr. Eddis and Mr. Bunting, for the defendant Matthew Ickeringill the younger.—The two-thirds of the legacy of 770*l.* which lapsed by reason of the death of Lucy Carlile in the lifetime of the testatrix, passed to the defendant, Matthew Ickeringill the younger, as in default of

In re Ickeringill.

appointment under the will of Matthew Ickeringill the elder. The case of

In re Davies' Trusts (*ubi supra*), which has never been overruled, is a distinct authority in our favour. The true distinction to be gathered from all the cases is that, where the donee of the power appoints to A in trust for B, there the appointed property becomes the property of the donee for all purposes and passes to the donee's next-of-kin if the trust fails, but that where there is not the interposition of a trustee the Court holds that the donee only intended to take the property out of the original instrument creating the power for the special purposes specified by the donee; and that so far as those purposes fail, the property, subject only to payment of the debts of the donee, devolves as in default of appointment. They referred, in addition to the cases already cited, to

Hoare v. Osborne, 10 Jur. N.S. 694;

33 Law J. Rep. Chanc. 586;

Fleming v. Buchanan, 3 De Gex, M. & G. 976; 22 Law J. Rep. Chanc. 886;

and

Theobald on Wills, p. 462.

Mr. W. Pearson, in reply.

HALL, V.C.—The question which I have to determine is, I think, one of considerable difficulty, having regard to the authorities. The difficulty which I feel arises out of the decision in *In re Davies' Trusts*. Having regard to that decision and to the subsequent cases, and in particular to the case of *In re Pinedi's Settlement*, before the Master of the Rolls, and to the rule adopted and stated both in that case and in *In re Van Hagen*; *Sperling v. Rochfort*, before the Court of Appeal, by reference to the Irish case of *In re De Lusi's Trusts* (1), the question which I have to determine is, "whether the donee of the power meant by the exercise of it to take the property dealt with out of the instrument creating the power for all purposes or only for the limited purpose of giving effect to the particular disposition expressed." This particular will deals with the property

which is thereby disposed of by a gift in the following terms. [His Lordship read the will as above set out, and continued:] Now the will in *In re Davies' Trusts* contained a gift of "all the rest, residue and remainder of my money in the funds, and all moneys due to me by mortgage or otherwise, and all my personal estate whatsoever and wheresoever of which I shall die possessed, or have any title to or interest in," unto the testatrix's two sisters and two brothers, by name, "equally to be divided between them." There is that difference between the two wills. The will in *In re Davies' Trusts* only disposed of personal estate, and the first direction there was to pay debts and certain legacies, and then followed a bequest of the residue of the personal estate. In the present case the disposition includes real estate. Whether or not the testatrix had any real estate is not material, in my opinion, for the purpose of construction, because the will would operate upon any real estate of which she might have been seised at the time of her death. The property is all given to her two sisters, Mary Ickeringill and Lucy Carlile. It is not disputed that the property in question, in the proportions mentioned, passed to one sister, and would have passed to the other if she had survived the testatrix. As I have observed, the testatrix speaks of what was intended to pass to them as "her real and personal property," and after appointing one sister sole executrix, she charges "her said property and effects with the payment of her debts and funeral and testamentary expenses." The appointees, whether as devisees or legatees, take the property of the testatrix charged with the payment of the debts and funeral and testamentary expenses. As regards the real estate, it would be for them to pay and satisfy the debts so charged thereon, so that, as I consider, they would in effect and substance take, subject to a trust for payment of the debts. There is therefore, at all events as regards real estate, a disposition to them clothed with a duty cast upon them to pay the debts and expenses out of it, if necessary. It seems to me upon the whole of this will, although the differences between it and the will in *In*

(1) 3 Ir. Law Rep. 232.

In re Ickeringill.

re Davies' Trusts may not be considered to be very prominent, that this testatrix has treated the property which was subject to her power of appointment as being her own property, and that it ought therefore to be treated for all purposes of ownership, beneficial and otherwise, as taken out of the original disposition by the donor of the power. In my opinion, by her will the testatrix in substance says this: "I am making a will; I am disposing of all the property which I can dispose of, and am dealing with it as my own." The result is, that that which was not effectually disposed of by reason of lapse must go in the way in which the testatrix by so making her will and so disposing of it shewed that she considered it would go—that is, as her own property, to those claiming under her, and not to those claiming under the original disposition by the donor of the power.

Solicitors—Ridsdale, Craddock & Ridsdale, agents for Weddall & Parker, Selby, Yorkshire, for plaintiff and defendant Robert Ickeringill; Learoyd & Co., agents for Bantoft & Son, Selby, for other defendant.

MALINS, V.C. }
1881. } SANDERS v. SANDERS.
Feb. 21. }

Statute of Limitations (3 & 4 Will. 4. c. 27) s. 34—Twenty Years' adverse Possession—Subsequent Acknowledgment.

An acknowledgment in writing will be sufficient to exclude the operation of the Statute of Limitations (3 & 4 Will. 4. c. 27), although not given until after the twenty years limited by the statute have expired.

Thomas Sanders, the father, by his will devised certain lands in Yorkshire to his wife, Ann Sanders, for life, with remainder to his sons, Thomas Sanders and John Sanders, as tenants in common in fee.

The testator died in 1813. His widow, Ann Sanders, died in 1833.

Thereupon Thomas Sanders entered into possession of the lands; and, until the year 1864, received all the rents and profits without paying or accounting for any part of the same to John Sanders.

On the 3rd of June, 1864, John Sanders mortgaged his moiety of the lands to the plaintiff, Elizabeth Weatherill, for 300*l.*; and thenceforward Thomas Sanders paid to Elizabeth Weatherill one moiety of the rents and profits up to the time of his death. He also, by a letter written in May, 1865, acknowledged the title of John Sanders to one moiety of the lands.

Thomas Sanders died in the year 1877, intestate, leaving the defendant Thomas Sanders his eldest son and heir-at-law, who entered into possession of the lands, and continued to pay one moiety of the rents and profits to Elizabeth Weatherill until November, 1878, when he refused to continue the payment.

John Sanders died in the year 1878, having by his will devised all his real estate to his son the plaintiff John Sanders absolutely.

In December, 1879, this action was brought by John Sanders and Elizabeth Weatherill against Thomas Sanders claiming a declaration that the plaintiffs were entitled, as tenants in common with the defendant, to one undivided moiety of the lands; and also claiming a sale (in lieu of partition) of the same premises, and a division of the proceeds of sale.

By his statement of defence the defendant alleged that his father, Thomas Sanders, had continued, for twenty years and upwards after the death of Ann Sanders, in possession of the entirety of the lands and receipt of the rents and profits thereof, and without accounting for such rents and profits or any part thereof during such period to John Sanders (the father of the plaintiff) or any persons claiming through him; and claimed the benefit of the Act 3 & 4 Will. 4. c. 27.

Mr. Glasse and Mr. G. Williamson, for the plaintiffs.—In the year 1865 Thomas Sanders, the father of the defendant, expressly acknowledged the title of John Sanders to one moiety of the lands. That acknowledgment was effectual,

Sanders v. Sanders.

though not made until after the expiration of twenty years—

Stansfield v. Hobson, 16 Beav. 236; affirmed on appeal, 3 De Gex, M. & G. 620; 22 Law J. Rep. Chanc. 457;

and therefore the defendant cannot now rely on section 34 of the Statute of Limitations (3 & 4 Will. 4. c. 27) as extinguishing the plaintiffs' right. Besides, one moiety of the rents has been duly paid to the plaintiffs for fourteen years—from 1864 to 1878.

Mr. Higgins and *Mr. Herbert Smith*, for the defendant.—At the end of the twenty years the right of the plaintiffs was extinguished and gone (section 34).

[MALINS, V.C., referred to

The Incorporated Society v. Richards, 1 Con. & L. 58.]

An acknowledgment, after the expiration of the twenty years, has no effect—see *per Thesiger, L.J.*, in

Markwick v. Hardingham, Law Rep. 15 Ch. D. 346.

They also referred to

Brassington v. Llewellyn, 27 Law J. Rep. Exch. 297.

Mr. Glasse was not called upon to reply.

MALINS, V.C.—From the year 1864 to the year 1878 these rents have been duly paid, and—this action being brought in 1879—it is now suggested that the right of the plaintiffs has been extinguished, because there has been adverse possession between 1833 and 1864. I am clearly of opinion that when the Statute of Limitations has run in favour of one person and against another, and the former chooses afterwards to acknowledge the right of the latter, that acknowledgment, given after the expiration of the twenty years, restores the right of the latter. The point seems to have been expressly decided, in *Stansfield v. Hobson*, in the case of a mortgagor. The clause as to a mortgagor is section 28. [His Lordship read it.] The clause on which the mortgagee in that case and the defendant in this case relies, is section 34, which provides that, “at the determination of the period limited by this Act to any person for making an entry or distress, or bringing

any writ of *quære impedit* or other action or suit, the right and title of such person to the land rent or advowson, for the recovery whereof such entry, distress, action or suit respectively might have been made or brought within such period, shall be extinguished.” But the meaning of that is, that the right and title shall be extinguished in favour of those who desire it to be so, but not as to others. And a right to make an entry comes under the same rules as a right to redeem. [His Lordship then read parts of the 2nd and 3rd sections.] And, in the case of a right to redeem, it was formally decided, in *Stansfield v. Hobson*, by the Master of the Rolls, and affirmed by the Court of Appeal, that an acknowledgment, after the end of the twenty years, took the case out of the statute. In that case the mortgagee might have declined to answer or to acknowledge the right of the mortgagor; but he chose to answer, and his answer was held to be a sufficient acknowledgment—that was the only question raised. In *Markwick v. Hardingham* a question was asked during the argument, by Lord Justice Thesiger, as to the effect of an acknowledgment after the mortgagee had been in possession more than twenty years; but he then expressed no opinion, and only asked whether there had been any decision on the subject, and he might have been told that *Stansfield v. Hobson* was such a case. Then *Mr. Herbert Smith* relied upon *Brassington v. Llewellyn*; but that case has no application, as it is clear that, there, there had been no acknowledgment.

There must, therefore, be the usual decree for sale; and the defendant must pay the costs of the action, so far as they have been increased by his contesting the right of the plaintiffs.

Solicitors—Williamson, Hill & Co., agents for J. C. & T. Sowerby, Stokesley, for plaintiffs; Gold & Son, agents for R. & E. P. Dale, York, for defendant.

HALL, V.C. }
 1881. }
 April 2. } *In re* BRETON.
 BRETON v. WOOLLVEN.

Declaration of Trust—Husband and Wife—Intended Gift by Husband to Wife.

The rule that words importing a present intention to give cannot be held to operate as a declaration of trust applies as much to the case of a gift by a husband to a wife as to that of a gift to a stranger.

A husband, shortly after his marriage, purchased for his wife certain furniture, plate and other articles, and signed and gave to her three written documents by which respectively he purported to "give" her part of the furniture "for her own use and benefit," to "make her a present" of the plate "for her sole use and benefit," and to "present her with" the rest of the furniture and other articles, the same "to be hers and hers only from that date." The furniture, plate and other articles were used in the joint residence of the husband and wife until his death:—

Held, that the husband had not constituted himself a trustee of the furniture, plate and other articles for his wife, and that they formed part of his estate.

Baddeley v. Baddeley (48 Law J. Rep. Chanc. 36; Law Rep. 9 Ch. D. 113) *not followed.* *Richards v. Delbridge* (43 Law J. Rep. Chanc. 459; Law Rep. 18 Eq. 11) *followed.*

This was an action by Agnes A. Breton (the widow of the testator, Frederick Breton), as plaintiff, claiming to have it ascertained and declared whether certain furniture, plate, plated and other articles and goods, or any and which of them belonged to the plaintiff or formed part of the testator's estate, and so far as necessary to have the personal estate of the testator administered, and the trusts of his will executed.

The testator intermarried with the plaintiff in January, 1868. Shortly after the marriage he purchased certain furniture, plate and plated articles, and on the 22nd of April and 1st of June, 1868, he executed the following documents referring thereto, which were wholly in his handwriting, and which he handed to the plaintiff:—

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"This is to certify that there being now at Messrs. Maple & Co., 145 Tottenham Court Road, 100l. worth of furniture belonging to me, I give the same to my dear wife, Agnes A. Breton, absolutely and unreservedly for her own use and benefit.

"Fredk. Breton.

"London, April 22, 1868."

"My dearest Wife,—I this day make you a present of the plate, &c., now at Mappin & Webb's, and which they are taking care of for me, for your sole use and benefit. The sum I paid for it is 59l. 7s. 10d.

"Ever your affectionate husband,
 "Fredk. Breton."

The testator and the plaintiff immediately after the date of the last-mentioned document went to live at a house which he had hired and to which the furniture, plate and plated articles were removed. Other furniture and household goods purchased by or belonging to the testator were also placed in the house, and on the 18th of June, 1868, when the testator and his wife commenced residing therein, he executed and handed to the plaintiff the following document wholly in his handwriting:—

"My dearest Wife,—Having previously made over to you for your sole use and benefit a certain amount of furniture, plate, &c., I now present you with everything—furniture, linen, &c., plate, china and glass, and all jewellery now belonging to me at No. 1 Dulwich Villas, &c. All this to be yours and yours only from this date, June 18, 1868. This gift from

"Your ever affectionate husband,
 "Fredk. Breton."

All the above-mentioned furniture, plate and plated articles and other goods were used in the ordinary way, and for the usual domestic purposes of a household in the residence of the testator and the plaintiff down to the time of the testator's decease, which took place on the 7th of June, 1880. During his life the testator constantly spoke of all such furniture, plate, plated and other articles and goods as being the sole property of the plaintiff, and often referred to the

In re Breton.

useful provision for her comfort which she would have by means thereof after his death.

The testator, by his will dated the 8th of August, 1878, appointed the defendants C. Woollven and T. H. Cruse his executors and trustees, and after bequeathing certain pecuniary legacies, and making a specific bequest to his brother's widow of a silver clock, a stuffed bittern, an oriental dagger and an Indian silver-worked cloth, and specifically devising certain real estate, bequeathed all the residue of his effects to his trustees upon trust for conversion and investment as therein mentioned, and upon further trust to permit the plaintiff to receive the annual income during her life, and after her death upon trust for his six nieces absolutely in equal shares.

Some of the nieces were infants, and one of them, who was of full age, was joined as a co-defendant with the trustees, and was at the hearing appointed by the Court to represent the interests of all the nieces.

Mr. W. Pearson and *Mr. Renshaw*, for the plaintiff.—The testator by these three documents constituted himself a trustee of the furniture, plate, &c., for the plaintiff for her separate use. There is a great difference between the case of a gift by a husband to a wife and that of a gift to a stranger. Where the gift is to a stranger there must be transmutation of the legal interest, and there you cannot from words of present gift infer a trust; but in the case of husband and wife it is otherwise, because, even if there be in form a complete gift to the wife, the legal interest would still remain in the husband. It must be presumed that the husband knew the law, and therefore he must be taken to have intended to effectuate his object in the only way in which he could effectuate it, namely, by constituting himself a trustee for his wife. In

Grant v. Grant, 34 Beav. 623; 34 Law J. Rep. Chanc. 641,

which was a case of husband and wife, it was laid down that it is not necessary to use any technical words, but any words which shew that the donor means at the time of the gift to divest himself of all

beneficial interest in the property are sufficient for the purpose of creating a trust. So in

Baddeley v. Baddeley (*ubi supra*), a voluntary deed by which a husband merely settled and assigned property to his wife as though she were a single woman was held by Malins, V.C., to operate as a valid declaration of trust, and

Fox v. Hawks, 49 Law J. Rep. Chanc. 579; Law Rep. 13 Ch. D. 822, is an authority to the same effect.

Richards v. Delbridge (*ubi supra*) is distinguishable. There the gift was to a stranger, and the words used were inconsistent with an intention to declare a trust.

Mr. Graham Hastings and *Mr. H. Greenwood*, for the defendant, the niece, were not called upon.

Mr. Cozens-Hardy, for the defendants, the trustees.

HALL, V.C.—I am unable to support this gift to the plaintiff, the wife, as a trust declared by her husband in her favour. I am very sorry for it, because it is a monstrous state of the law which prevents effect being given to such a gift. I think that the difficulty in the case is occasioned by two or three of the decisions which have been referred to, and which seem to favour the contention that these documents can be supported as a declaration of trust by the husband in favour of his wife. It was submitted that this testator must be taken to have intended, knowing what the law is, to constitute himself a trustee, that being the only way of giving effect to the documents—that is, as other trustees were not appointed he must be held to have constituted himself a trustee. That argument appears to me really to come to this, that in every case of an imperfect gift on the part of an intending donor, if such gift be not effectual by reason of an incomplete transmutation of property from the donor to the intended donee, or to some person who is to be a trustee for the intended donee, the Court must give effect to the donation by holding that the donor was a trustee, because it must be considered that he knew the law and

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that he effectuated his object in the one way in which it could be validly done. But in truth, in the one case, as well as in the other, whether the wife or a stranger be the object of the gift, it is manifest from the transaction, taken by itself, that the donor was mistaken as regards the proper and legal mode of effectuating that which he intended to do. It is plain that the husband was mistaken as to that, and it is impossible to say that, although we cannot but believe and feel satisfied he was mistaken, yet we must impute to him that he meant to do that in some other way. Looking at the documents, I think that they are a contradiction of any intention to do it in the other way. The case of *Grant v. Grant* was the case of a gift to a wife, and if the late Master of the Rolls had based his decision upon that ground, supporting it as being a special and peculiar case, and creating a different law as applicable to husband and wife in every case, I should have had nothing more to do than simply to follow that decision. But it is plain from the reasons given by him in support of his decision that it was meant to be applicable generally to every case, and not merely to that of husband and wife. No other cases of gifts by a husband to his wife have been referred to, excepting the two recent decisions of Vice-Chancellor Malins in *Baddley v. Baddley*, and of Vice-Chancellor Bacon in *Fox v. Hawks*. As to the former case, I observe that the Vice-Chancellor Malins said that the law was correctly stated in the case of *Grant v. Grant*, and that he "was not disposed to disagree with *Richardson v. Richardson* (1) and *Morgan v. Malleon* (2), notwithstanding the remarks of Sir G. Jessel in *Richards v. Delbridge*." There is, therefore, as the Vice-Chancellor seems to have meant there should be, a clear difference of opinion between him and the Master of the Rolls upon the question, because he adopted the decisions in the two cases of *Richardson v. Richardson* (1) and *Morgan v. Malleon* (2), the latter being one of the cases which was not

followed by the Master of the Rolls. That being so, I must look at all the authorities and endeavour to find a correct statement of the law on the subject. I consider that the principal authority in these cases is the case of *Milroy v. Lord* (3), where there is a very clear and elaborate statement of the law by the late Lord Justice Turner. A portion of that judgment was quoted by the Master of the Rolls in *Richards v. Delbridge*, but there is a great deal more in it which is applicable to a case like the present. The Lord Justice stated, "that under the circumstances of the case before him it would be difficult not to feel a strong disposition to give effect to the settlement to the fullest extent." [His Lordship read the judgment down to the words "but in order to render the settlement binding one or other of these modes"—that is, transfer of the property or declaration of a trust—"must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to perfect an imperfect gift," and continued:] What I am asked to do in this case is to read that sentence as having introduced into it the words, "except in the case of husband and wife." I am now asked to introduce that exception. The Lord Justice Turner also said, "The cases I think go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes." In order to give effect to this gift I must there again introduce the words, "except in the case of a wife." Then the Lord Justice proceeds: "If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust." I must there say, "except always in the case of a wife." The Lord Justice then goes on to state that it must be plainly shewn that it was the purpose of the settlement or the intention of the settlor to constitute himself a trustee. It is

(1) 36 Law J. Rep. Chanc. 653; Law Rep. 3 Eq. 686.

(2) 39 Law J. Rep. Chanc. 680; Law Rep. 10 Eq. 475.

(3) 4 De Gex, F. & J. 264; 31 Law J. Rep. Chanc. 798.

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clear in this case that it was not so intended. It was not the purpose or meaning of the husband in writing these letters to constitute himself a trustee for his wife. In fact, I can well understand in such a case a husband saying to his wife, "I mean to give you this as your own, but when you ask me to be a trustee for you I must respectfully decline. I do not want to be involved in a trust of that kind or in any trust." Therefore it appears to me, taking this to be the law, that notwithstanding the decisions referred to of Vice-Chancellor Malins and Vice-Chancellor Bacon (and I may here observe that the case before the Vice-Chancellor Bacon had many special circumstances in it which are not unlikely to have influenced his mind in arriving at the particular conclusion to which he came), I must, though very unwillingly, hold that the furniture, plate and other articles do not belong to the plaintiff, but that they form part of the husband's estate.

Solicitors—Clarke & Calkin, for all parties.

[IN THE COURT OF APPEAL.]

JAMES, L.J.	} ARKWRIGHT v. NEWBOLD.
COTTON, L.J.	
LUSH, L.J.	
1881.	
Feb. 25, 28.	

Action of Deceit—Prospectus—Fraudulent Misrepresentation—Promotion-Money—Formation Expenses—Contract—The Companies Act, 1867, s. 38.

The prospectus issued by the promoters of a projected company stated that the purchase-money to be paid by the company to the vendors was 32,500*l.*, of which 15,000*l.* was to be paid in 3,000 fully paid-up shares, and that "the remuneration of the directors will be paid by the shareholders, and it is proposed that they should be paid only by a commission on the profits made, no promotion-money whatever being paid to them by the company, and all formation expenses

being paid by the vendors." The 32,500*l.* was the real price originally agreed to be paid to the vendors. Shortly after the registration of the company the vendors, who were two of the first directors of the company, transferred 800 of their vendors' paid-up shares to their co-directors in pursuance of an understanding which existed at the time the prospectus was issued, but which was not disclosed. The shares were so transferred as promotion-money, and in order to induce them to continue directors.

In an action by a shareholder against the directors, claiming damages, on the ground that he had been induced to take his shares in the company by the fraudulent misrepresentations contained in the above paragraph of the prospectus, and on the faith of which he had taken his shares,—

Held (per FRY, J., and the Court of Appeal), that the understanding was not a contract within the 38th section of the Companies Act, 1867, and that the omission to state it in the prospectus did not make the latter fraudulent within the statute. Held also (but reversing the decision of FRY, J.), that although the transaction between the vendors and their co-directors might be ground for holding them liable in some other proceedings, it did not render the prospectus false or fraudulent, and that the action must be dismissed with costs.

"Formation expenses" necessarily include promotion-moneys paid to persons as commission for floating a company; and where a prospectus states that "no promotion-money will be paid by the company, and that the formation expenses will be paid by the vendors," it must be shewn, in order to prove such a statement false, that the purchase price agreed upon has been purposely and fraudulently increased for the purpose of making the company pay the promotion-money in addition to what was understood to be the real price between the parties.

This was an appeal from the decision of Fry, J. (reported 49 Law J. Rep. Chauc. 684), holding that although the omission to state in the prospectus the arrangement under which 800 shares were transferred did not make the prospectus fraudulent within the 38th section of the Companies Act, 1867, yet that the

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plaintiff had succeeded in shewing that the above paragraph in the prospectus was such a fraudulent misrepresentation as entitled him to the damages he claimed.

Mr. Kay, Mr. Addison and Mr. Turner, for the appellant.—We do not challenge the finding of Mr. Justice Fry that the prospectus was not fraudulent within the 38th section of the Companies Act, 1867, but we say that his judgment, so far as it awarded damages to the plaintiff, is based upon a misunderstanding of the terms of the prospectus. This is not an application under the 165th section of the Companies Act, 1862, in respect of a misfeasance. The company is a going concern, and *non constat* that it may yet make profits. This is an action of deceit, and a man who brings an action of deceit must not only prove the deceit as alleged, but he must prove active fraud, and that he was deceived by it—

Peck v. Gurney, 43 Law J. Rep. Chanc. 19; Law Rep. 6 E. & I. App. 337;

The New Brunswick Railway Company v. Conybeare, 9 H.L. Cas. 911; 31 Law J. Rep. Chanc. 297;

Davidson v. Tulloch, 3 Macq. H.L. 783;

Cargill v. Bower, 47 Law J. Rep. Chanc. 649; Law Rep. 10 Ch. D. 502.

Now the allegation in the statement of claim is that the real purchase price was 28,500*l.*, and that it was loaded with 4,000*l.* to enable the vendors to make this transfer of shares to the directors, but the plaintiff has failed to prove that allegation. These shares were not promotion-money paid "by the company." If the vendors chose to give away some of their shares, they were entitled to do so, but that does not make the statement in the prospectus, "that no promotion-money will be paid by the company," fraudulent or untrue. Further, the statement that the "remuneration of the directors will be paid by the company" is also strictly accurate. It refers to their salaries in conducting the business of the company, and is fixed by the articles of association. The plaintiff, therefore, having failed to

prove his case as alleged, is not entitled to the relief he claims.

Mr. North and Mr. H. A. Giffard, for the respondents.—We rely on the findings of fact by Mr. Justice Fry. The suppression of the "understanding" at the time the prospectus was issued rendered the statements in it untrue. The purchase-money was virtually loaded with the 4,000*l.*, and the company in paying the 32,500*l.* were really paying the 4,000*l.* promotion-money to the directors through the defendants, who then stood in a fiduciary position to the company. The *onus* is on the defendants to prove the innocence of the transaction, and they have failed to discharge that *onus*. The case is within the principle of

Peck v. Gurney (*ubi supra*);

Troycross v. Grant, 46 Law J. Rep. C.P. 636; Law Rep. 2 C.P. D. 469;

In re The West Jewell Tin Mining Company. Weston's Case, 48 Law J. Rep. Chanc. 425; Law Rep. 10 Ch. D. 579.

No reply was heard.

JAMES, L.J.—I am of opinion that the judgment of the learned Judge in this case cannot be sustained. With all deference to the learned Judge, it appears to me that there has been on his part a confusion of two different wrongs and two different remedies—a confusion between what is the result or what ought to be the result of a *mala praxis* between vendors and persons in a fiduciary relation to a purchaser and that of a *mala praxis* or misconduct which is sufficient to ground an action of deceit. There are a great number of purely equitable considerations which come before the Courts when they are dealing with actions to set aside contracts or conveyances which have been obtained by reason of not only misrepresentation of a fact, but by reason of any concealment or suppression of a fact which the Court may have thought ought to have been disclosed, and by reason of any mis-statement between the vendors and the persons acting in a fiduciary position for the purchaser which has deprived the purchaser of the benefit of the advice and assistance which he ought to have

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had. Those cases stand by themselves, and are entirely distinct from such a case as we have before us. The case we have before us is one in which it is merely an accident that the defendants are or were directors. It is mere accident that the other defendants are or were solicitors engaged in the transaction. The action would have been exactly the same if it had been brought against a financial agent who had been employed for a commission to float this company, and who had issued this prospectus of course with all the knowledge of all the facts which the directors and solicitors had. Assuming that that same amount of knowledge had been in any way acquired by a person such as I have described—that is, a person employed for a commission to promote the company—he would have been liable to this action. The defendants here are to be treated and made liable on the same grounds and to the same extent, and no other, as any such person employed to float the company would have been liable—that is, the case must be made out, as alleged, that the plaintiff was deceived by the false representation which he alleges was made by the person who prepared and issued the prospectus. Now I am of opinion that no such misrepresentation has been made. It has been conceded throughout the argument, and admitted by the Court, that there was misconduct—that is to say, improper dealing between the vendors and the persons whom they procured to become directors—a kind of transaction which the Courts have always very strongly set their faces against, and always will, as I hope. But then we have got to see whether there was, to use the words of Lord Cairns in *Peck v. Gurney*, that which must be proved, an actual mis-statement—no mere suppression will do—but an actual mis-statement in expression, or such a suppression of something as, being suppressed, makes that which is stated false; that is, supposing you state a thing partially, you may so state it as to make it a false statement as much as if you mis-stated it altogether. Every word may be true; but if you leave out something which absolutely qualifies it, you may make it a false statement.

For instance, if, pretending to set out a report of a surveyor, or something of that kind, you set out two passages of his report and leave out a third passage which completely qualifies it, that is as much a mis-statement as anything that can be conceived. The statement made must either be in terms, or by such an omission as I have described, an untrue statement, and no silence will ground the action of deceit. In my opinion there is in this case nothing that I can put my hand upon as amounting, according to my view of the case, to any mis-statement whatever. The price at which they agreed to buy the property is stated to be 32,500*l.*, part of which was to remain on mortgage for a certain time, and the residue for some time more. That was the price agreed to be given for it, and that is what the party who is invited to take shares is told; and then he is told this—which was the principal subject of argument in the Court below and before us—that the remuneration (and this is the only thing that I can find) of the directors will be fixed by the shareholders, and it is proposed that they shall be paid only by a commission on the profits made, no promotion-money whatever being paid to them by the company, and all formation expenses being paid by the vendors. To my mind every word in that statement is true. Nothing has been shewn to my mind to falsify any part of that statement. The articles provide that the remuneration of the directors shall be fixed by the shareholders, and, as far as I know, I suppose it was true that it was then the intention of the promoters that that remuneration, when it came before the shareholders, should not be by way of a fixed salary, but should be by way of a commission on the profits made; that is to say, the representation is—"You have directors who are not fixed on you by an enormous salary, but whose only remuneration will depend upon the profits they make for you, the shareholders." That is the proposition they state they intend to make, and there is no reason to suppose that they intended to make any other. Then it goes on to say, "No promotion-money being paid to them by the company, and all formation expenses

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being paid by the vendors." It is said that the words "no promotion-money being paid by the company" meant this: "We are selling you the property for 32,500*l.*; for that sum you have the concern freed from all charges and expenses; you will not have to pay any promotion-money to the directors; you will not have to pay any formation expenses of any kind; the vendors will do all that." And, in my opinion, when the vendors say they are going to pay all formation expenses that necessarily includes and implies all those expenses which are called promotion expenses. I am unable to say what promotion-money is other than an expense incurred in forming the company. It is the principal formation expense. There is the solicitor's work of preparing the documents and there are the stamps, and so on; but the principal expense in forming a joint-stock company is the money paid to the commission agents and others in promoting the company, the "promotion" of the company being really obtaining the shareholders and getting persons together who are willing to take shares.

It was said that the prospectus was false in this way—and this was the *gravamen* of the case presented to the Court on the pleadings and intended to be presented: "True it is that the price was 32,500*l.*, and you have said no promotion-money was to be paid to the directors by the company; but what you really did was this: you met together, you formed your scheme, you settled 28,500*l.* as the real price, and that was the real bargain made. You agreed to sell to somebody on behalf of the intended company for 28,500*l.*, and then, when you had made that agreement, by way of telling the story that the company was not going to pay promotion expenses to those people, you altered the price from 28,500*l.* to 32,500*l.*, for the purpose of getting the 4,000*l.* in shares as part of the purchase-money from the company to go as promotion-money." That was the case intended to be made by these pleadings, and which, in my opinion, entirely broke down, there being no evidence or reason to suspect that anything of the kind had taken place. Of

course every vendor necessarily, when he sells his property for a price, fixes the price at that which will cover him for the expenses which he knows he will have to pay. Nobody in this world was ever lucky enough to sell a property without having some considerable deduction made out of the gross price for which he was selling, there being such persons as auctioneers and solicitors to be paid, who take a considerable portion. There always is a deduction of that kind, which everybody must know, and therefore all that was included in the formation expenses. But in order to bring it to a case of promotion-money being paid by the company it must, in my opinion, amount to this at least, that when there has been a price settled or agreed upon, it was swollen and exaggerated purposely and fraudulently for the purpose of making the company pay that promotion-money in addition to what was understood to be the real purchase-money between the parties. That case has, to my mind, failed, and it seems to me that, having failed, it is utterly impossible to fall back on that which the Judge in the Court below has fallen back upon, namely, the fact which depends upon the construction given to that prospectus, that the vendors were paying to the directors a remuneration in addition to and beyond the remuneration which the directors were to look to from the company itself. I have not said anything about how the evidence presents itself to my mind. Even if I differed from the learned Judge in the Court below as to the weight to be given and the credibility to be attached to the evidence given by the several witnesses, of course, according to our fixed rule in this Court, we could not safely dissent from the conclusion arrived at by a Judge who had the opportunity of seeing the manner in which the different witnesses gave their evidence. Therefore I do not express or even hint any dissent from that; but there is one fact in the case when I come to consider it which does not strike me as so very extraordinary, namely, that so large a sum should be given to gentlemen undertaking the office of directors, especially when that sum was only given to them in shares, which

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would be of no value unless they made them valuable by their own exertions. I think it right to make that observation, and with regard to the rest I do not make any comment on the view the learned Judge took of the evidence.

COTTON, L.J.—I am entirely of the same opinion. A great deal of the argument, and a considerable portion of the judgment of Mr. Justice Fry, does not, in my opinion, draw a sufficient distinction between what this action is—an action of deceit—and an action or proceeding to set aside a purchase, or to make the directors of a company answerable for money received by them by reason of their being in a fiduciary position. An action of deceit must be decided on the same principles, whether brought in the Chancery Division or any other division. There is, in my opinion, no equitable action for deceit. It is a common law action to be decided, wherever brought, on common law principles. In such an action it is necessary to prove that a statement has been made which to the knowledge of the person making it was false, or which was made by a person with such recklessness as to make him liable just as if he knew it to be false, and that the plaintiff acted to his prejudice or damage on the statement made. Much has been said about omission, and of course I adopt what was said on this subject by Lord Cairns in *Peek v. Gurney*. It may be that in a prospectus or other document the omission of something may make the statements actually contained in the prospectus or document false—such as, for instance, the statement of a covenant without the statement of a release which has been made of that covenant. But mere omission, even where it would be a ground for setting aside a contract, is not, in my opinion, independently of its making and if it does not make the statements false, a sufficient ground for maintaining an action of deceit, which this action is. In actions to set aside contracts which have been obtained by misrepresentation the plaintiff may succeed, though the misrepresentation was innocent; but the representation necessary to found an action of deceit must

not be innocent; that is to say, it must be made either with knowledge of its falseness or with that which is not innocent—a reckless disregard whether the statement made is true or untrue. The difference which I have pointed out must be considered in determining whether the plaintiff in the present action is entitled to succeed. I agree with what was said by Lord Justice James as to our being bound by what Mr. Justice Fry found as regards the credit to be given to the witnesses who came before him. I adopt what he found in favour of the plaintiffs, that there was at least a proposal before the issue of the prospectus that these shares should be given to these directors. The learned Judge has also found that there was no bargain or contract prior to the issue of the prospectus, and no bargain or contract therefore before the contract for sale. I agree with this finding, and in my opinion all the circumstances are against the real purchase-money being 28,500*l.* and being loaded with the sum of 4,000*l.* in order to pay promotion-money. In my opinion the only conclusion at which we can properly arrive is that the sum of 32,500*l.* was the real purchase-money agreed upon between the Newbolds, the vendors, and the promoters, as the sum which was to be paid as the purchase-money of the property to them, without any agreement being made which could in any way bind them to deal with any portion of their purchase-money in any way in which they did not think fit. Generally the prospectus was this: it stated to those who were intending to become shareholders what sum had been paid or was to be paid by the company, and by the company only. That being the effect of the clause, it divides itself into two branches as regards the argument—first, as to promotion-money paid to the directors; and, secondly, as regards the sum paid to them, if it was so paid to them, to induce them to become permanent directors, or as payment for their services as directors. Before I go into the first of these branches I must observe that there is in this part of the prospectus nothing whatever said as to any payment to be made to the solicitors of the company;

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and as regards the payment to them I can see nothing which can be said to be falsified by that statement, "the formation expenses are to be paid by the vendors." It may be that this money was—I do not say that it was—paid to the solicitors under such circumstances as to give a ground for setting aside the contract or for enabling the money to be recovered from them. On that I give no opinion whatever. It is to the directors only that the prospectus refers, but I do not make any narrow distinction on that ground, but will deal with the whole case as if it were against the directors only. As to promotion-money, the statement is precise—"no promotion-money whatever being paid to them" (the directors) "by the company." It is desired to strike out the words "by the company." But is that right? It is true that a person who issues a statement is not only answerable for what he in his own mind intended to represent, but he is answerable for what anyone might reasonably suppose to be the meaning of the words he has put down on paper. Can you say that the plaintiff in this case could reasonably on reading this prospectus strike out the words "by the company" and consider it a statement that no promotion-money had been paid to them. If the prospectus were so stated that it could be reasonably looked upon as a statement, or could be taken as intended to persuade the intending shareholders that nothing would be paid by the vendors, of course the persons issuing the prospectus would have to take the consequences; but we must not put an unnatural and unreasonable interpretation on what persons say, and then if the statement so interpreted is untrue, hold them liable in an action of deceit. In my opinion, when once it is established that there was no bargain, before the contract of the 19th of April, by which the purchase-money was loaded, it can in no way be said that this promotion-money was paid by the company. That was felt by the plaintiff's pleader, who has alleged such an antecedent bargain, and loading of the alleged real purchase-money of 28,500*l.* to the extent of 4,000*l.*, and that, although the defendant alleged

no promotion-money was paid by the company, the promotion-money was paid to the directors out of the funds of the company; that is to say, that the sum of 4,000*l.* was never intended to go to the vendor, but was merely put in so that it might be paid out of the funds of the company to the vendors in order that they might hand it back to the directors. But that case has been negatived, and it has been found that there was no such antecedent bargain, and no addition to the real purchase-money to make these payments to the directors. It is impossible to say that this statement is deceitful or wrong. But then it is said that the sum of the 4,000*l.* was so paid to the directors and solicitors for their services, past or future, or both, as directors, and that that fact falsifies the other statement in the prospectus that the remuneration of the directors should be fixed by the shareholders, and that it was proposed that they should be paid only by a commission on the profits made. In my opinion, that refers to the provisions in the articles of association, under which there was not a fixed sum to be paid to the directors for their services, but it was to be determined by a general meeting what they were to have. As I understand the judgment of Mr. Justice Fry, he relied greatly on the word "proposed," and said that at least there was a proposal before the prospectus was issued that the directors should receive this sum from the vendors. If I am right in my construction, that reliance falls to the ground, for as a mere matter of construction I hold that that is not a statement, even taking it with the rest of the clause, that nothing shall be given the directors as such by anybody else, but only a statement that the company were not by the articles bound to give a fixed sum, but that that was left to the shareholders in meeting assembled, and that the proposal which would be brought before them would be that a commission on profits only should go out of the coffers of the company so as to make the remuneration payable by the company to depend entirely on the success of the company. In my opinion, therefore, there is no ground for reliance on that

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part of the prospectus for maintaining the action, and I may add that an action of deceit does not give the plaintiff a claim to relief simply because he shews that the defendants have been guilty of deceit; that is to say, that they have made a fraudulent statement. The gist is that the plaintiff was deceived by the statement, and acted on what he understood to be the truth, in consequence of that statement, to his prejudice. But in this case, although the plaintiff knew from their defence how the defendants put their case, he does not in his pleading rely on the allegations now made, that even according to the defendant's own case, the statement of the prospectus as to the remuneration of the directors was falsified. And the plaintiff does not even refer to that in his evidence. There was no reliance therefore on that which Mr. Justice Fry thought would entitle him to relief. No reliance on this statement as saying, "The directors shall get nothing except what they get from the shareholders, and that shall be a commission on the profits." In my opinion, it is not right in an action of deceit to give a plaintiff relief on the ground that a particular statement, on a construction put on it by the Court, is erroneous or false when the plaintiff does not in his evidence venture to swear that he understood the statement in the sense which the Court puts on it. If the plaintiff did not so understand it, even if that construction may have been falsified by the fact, he was not deceived, and was not induced to act as he did by having been deceived by any mis-statement of the defendants. On that ground alone I should have been prepared to dispose of this action; but, in my opinion, there was no ground for the construction put upon the prospectus by the learned Judge in the Court below. Then, as to two other matters of importance—first, how far the plaintiff could, under the circumstances, have obtained any relief in consequence of that statement in the prospectus being false, if it were so, to the knowledge of the directors before the contract had been completed; and, secondly, how far this is evidence of damage to entitle the plaintiff, if otherwise the

Court were in his favour, to any relief—I must not be considered as acceding to the view that the coming into existence of a fact which would make a statement in the prospectus untrue, if such fact existed when the prospectus was issued, would, in an action of deceit, entitle the plaintiff to relief.

LUSH, L.J.—I am of opinion that the learned Judge in the Court below allowed his mind to be diverted from the real question at issue in this case, which, together with the evidence bearing on it, lies, as it appears to me, in a very small compass. The plaintiff complains that he was deceived by false statements in a prospectus into taking shares in this paper company. To my mind there is no doubt what the meaning of the prospectus is. It tells those whom it invites to become shareholders that their capital will not be expended in promotion-money, but that it will be all applied to the purposes of the business; it tells them that the directors will not be entitled to any fixed salary for what they do, but that they will only be paid such a sum as the shareholders choose to award them; and it tells them that the directors intend to propose to the shareholders, when they meet them at a general meeting, that the payment shall be by a commission on the profits made, and by nothing else. The statement as to the remuneration being fixed by the shareholders is perfectly true, because it is only a statement of a provision contained in the articles of association. No fixed sum is to be paid to the directors, but the shareholders themselves are to determine what the directors are to have; and the directors say, "We intend to propose to the shareholders that the directors shall be paid by commission only;" which of course means that they are to give them a direct interest in making the concern a profitable one by limiting their remuneration to a given share of the profits. I confess it surprises me that any one should have read that prospectus in any other sense. Then it must be remembered that the plaintiff does not undertake to say in his evidence that he understood it in any different sense; but the case he makes is, "That prospectus deceived me,

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and in this way, that it stated that a sum of 32,500*l.* was paid for the property, and that that was to be the capital of the company, whereas in fact the purchase-money of the property was only 28,500*l.*; that is all the vendors meant to ask for the property, and by collusion between them and the two directors, or the directors who negotiated for the purchase on behalf of the intended company, it was arranged that 4,000*l.* should be added to that purchase-money in order that it should be distributed among the directors. Before the agreement for the purchase was made it was agreed between buyer and seller, the buyer being the agent on behalf of the company, that 4,000*l.* should be added to the purchase-money in order that it might be distributed and given back to the directors, and therefore the statement in the prospectus that no promotion-money was to be paid by the company was false, because the company would have had in that way indirectly to pay 4,000*l.* for promotion-money."

It is agreed on all hands, and the learned Judge below finds, that there was no bargain whatever made, before the contract for the sale of this estate, about any sum being added to the purchase-money; and to my mind the contrary is proved. The statement that 28,500*l.* was the purchase-money is entirely falsified. In fact, the learned Judge finds it was utterly disproved. To my mind that disposes of the action. It appeared that the sellers of the estate, who were two of the directors, did, in fact, after the allotment of shares, when these 3,000 shares had been allotted to them as part of their purchase-money, transfer 800 of those shares to be distributed in certain proportions among the directors. I quite agree with Lord Justice James that it was not an improbable or unreasonable bargain for the directors, the sellers of the estate, to make, when one considers that they were owners of very nearly half the shares in the company; that the residue of the purchase-money was on a mortgage on their estate; that they themselves did not feel confident that they were able to carry on the concern at a profit; and that two of the directors were well known in the paper trade. It strikes me as a very reasonable

thing that the company should have thought it worth their while to pay almost anything to secure the services of two such men, who had a large connection among paper consumers, for the purpose of inducing them to give their best services towards making this concern. The value of their shares depended entirely on the dividends and the profit the concern might make. The fact is that 800 shares were transferred out of the 3,000 which the vendors received, and distributed among the directors and solicitors. The 800 shares must have been given for services connected with the promotion of the company. Be it so. It remains as a fact that they were not agreed to be given before the contract for the sale of the estate, and therefore did not influence the purchase-money by any collusion between the parties; and, if they were given at all before the 6th of May, they were not given earlier than the 23rd of April, when the prospectus came out. Suppose they were given or agreed to be given on the 23rd of April as a remuneration—call it what you will—for the services they had rendered in getting up the concern, that does not prove the charge in this statement of claim, because the charge is that what they have received was agreed beforehand to be added to the purchase-money in order that the purchase-money should come out of the company's funds, instead of out of the funds of the vendors. Taking it in that view, you are just as far off proving the case of the plaintiff as before. It does not seem to me material when the agreement was made what it was for, because it is quite clear that the statement in the claim on which the whole action is based is entirely disproved. That seems to be enough to decide the case. It is an action for false and fraudulent misrepresentation, and in order to prove that, the party complaining must shew that there were false statements in the prospectus, and that by reason of these false statements he was induced to take the shares. I come to the conclusion that the statements in the prospectus complained of are true. A great many considerations have been let in and presented in argument which have no relation at all to the issue raised in this action. Acts were

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done which were not right to be done, but it does not at all affect the case made by the plaintiff, or any right he could have to complain of the conduct of the parties in an action of this kind.

Appeal accordingly allowed with costs.

Solicitors—Clarke, Woodcock & Rylands, agents for T. Dodds, Bury, for appellants; Phelps, Sidgwick & Biddle, agents for Sale, Seddon & Co., Manchester, for respondent.

[IN THE COURT OF APPEAL.]

JAMES, L.J.
BAGGALLAY, L.J.
COTTON, L.J. } *In re PEACOCK.*
1880.
Feb. 14.

In this case (reported 49 Law J. Rep. Chanc. 228) it should have been stated that some of the unauthorised securities consisted of bank shares to which unlimited liability attached, and that that was the reason why it was desired to dispose of them to purchasers without passing them through the names of the new trustees.

The order that was drawn up, after appointing a new trustee and reciting an undertaking by the new and continuing trustees to sell the property secured by investments not authorised by the settlement, ordered that the right to call for a transfer of, and to transfer into, their own names, or otherwise, to a purchaser or purchasers, the stocks and shares therein particularly mentioned (including the bank shares), should vest in the new and continuing trustees, together with the right to receive the dividends (if any) due and to accrue due thereon; and it was ordered that the proceeds of any sale of the securities thereinbefore mentioned to be made pursuant to the order and to the aforesaid undertaking should be held and applied by the trustees upon the subsisting trusts of the settlement.

[IN THE COURT OF APPEAL.]

JAMES, L.J.
COTTON, L.J.
LUSH, L.J. } *CHANDLER v. POCCOCK.*
1881.
Feb. 15.

Land sold under Power in a Settlement—Trust for Re-investment in Land—Investment of Proceeds of Sale in Consols—General Power of Appointment by Will—Equity to Reconversion—General Bequest, "all my personal estate"—Exercise of Power—Wills Act, 1837 (1 Vict. c. 26) ss. 1 and 27.

Land was settled to the use of such person or persons as A B should by will appoint. The settlement contained a power enabling the trustee to sell, with A B's consent, the proceeds of sale to be re-invested in land to be settled to like uses, and in the meantime to be invested in Government or real securities. The land was sold under the power, and the proceeds invested in consols, which were transferred, at A B's request, into her own name, before the date of the will, and remained in such state up to the time of her death.

By her will A B gave legacies to the amount of 30,000l., and bequeathed all the residus of her personal estate and effects, whatsoever and wheresoever, unto and equally between two persons named. Her own personal estate was under 6,000l. :—

Held (affirming the decision of JESSEL, M.R.), that under section 27 of the Wills Act the residuary bequest of all her personal estate operated as an execution of the power over real estate reserved to her by the will, and passed the consols representing the proceeds of sale of the land.

This was an appeal from a decision of Jessel, M.R., holding that a gift by a testatrix in her will of all the residue of her personal estate and effects whatsoever operated as an exercise of a general power of appointment by will reserved to her over land, which had been sold under a power in the settlement and the proceeds invested in consols, which had been since transferred into the name of the testatrix. The case is reported below in 49 Law J. Rep. Chanc. 442, where the facts are fully stated.

The plaintiff appealed.

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Mr. Ohitty and Mr. J. G. Wood, for the appellant, renewed the arguments used in the Court below, and cited, in addition to the cases mentioned in the former report,

Guidot v. Guidot, 3 Atk. 254;

Gillies v. Longlands, 4 De Gex & S.

372; 20 Law J. Rep. Chanc. 44,

and urged that the testatrix was, in fact, a trustee of the fund for the persons who were entitled to it when re-invested in land.

The real test was this: Assuming a devise of real estate to A and a bequest of personal estate to B, to whom would this fund have passed? and on the authorities cited it must have passed as real estate. If there had been any express reference, either to the power or to the consols, the case would have been different.

Mr. Rigby (with him *Mr. Davey*), for the respondents.—This was her personal estate, for she had got the funds transferred from the trustees of the settlement under the impression that they were her absolute property, but the appellant desires the Court to say that the words "personal estate," in spite of the interpretation clause, must be held not to include what at the death of the testatrix was actually personal estate.

Mr. Wood, in reply.

JAMES, L.J.—In this case I am of opinion that the decision of the Master of the Rolls ought to be affirmed.

The testatrix had a power over the fund in question under the will; that is to say, it was treated as being liable to be invested in land, and she had power to appoint it by an instrument properly executed.

Now what she did was this: Almost immediately before the execution of her will, there being this fund outstanding in the hands of trustees, the property being liable to be invested in land, she applied to have the fund transferred to her. I cannot attribute any object to her in asking for that transfer, or any object to the trustee in making the transfer to her, but an intention to reduce it into possession, to make it her own personal estate, which it would be, subject to any equity which might be

afterwards enforced against her representatives in case she died intestate; but she intended it to be her personal estate. She had made it her personal estate so far as she could. Then, by her will, she gives the whole of her personal estate and effects, whatsoever and wheresoever, to certain persons, subject to certain legacies and other purposes mentioned in her will.

The question then is, Was that gift by her liable to be defeated by a person who says, "You have not exercised a power of appointment over it, because it was real estate"? It was real estate in the hands of the trustees, liable to be recalled and made real estate by any person who had an equity under the original settlement paramount to her equity. But we must see whether she has done sufficient to destroy that equity—that is, the equity which could be enforced against her as a wrongdoer, treating her as having acted tortiously. What she did was this: She gave all her personal estate—and this was her personal estate—and she gives it under a power in the Wills Act which says that a bequest of personal estate of a testatrix shall be deemed to include any personal estate which she had power to appoint in any manner she pleased. Now beyond all question or doubt this was personal estate. It was existing as personal estate *de facto*. Whether you treat it as personal estate liable to be invested in land or not, the testatrix in this case had power to appoint it generally in any manner she thought fit. She does give it. It seems to me to be impossible to cut down the words of the will, so as to prevent the will having any operation over that which she had made her personal estate, so far as she could. She intended to give it, and did give it, as part of her personal estate, as far as she had power to do so, whether it was real or personal. In any character, she had power to deal with it, whether it was real or personal estate.

That being so, it seems to me that the decision of the Master of the Rolls is right.

COTTON, L.J.—I am of the same opinion. First, I think it better to dispose of an

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argument which was pressed upon us by Mr. Chitty to some extent, that the testatrix was a trustee of this fund. Now I often object to a name being used inappropriately, and an argument being founded upon an inappropriate and an improper use of a particular word. She was not trustee. She took the money out of the name of a trustee, having it afterwards transferred into her own name, with an express intention, as far as she could, to make it her own, and not to hold it as trustee. It is true that there was a trust attaching to this money, and that she was liable to be called upon to retransfer it to the trustee; and even if that was not done, unless she disposed of the property, those entitled under the settlement might make claim against her to make good the amount out of her estate. She was not trustee of it, and was not holding it as trustee, but she held it as far as she could as her own, subject to the rights in equity which those under the settlement might have; and therefore it is impossible to say that this can pass under the words contained in her will as a devise of her trust estate. It simply is a question, therefore, whether it passes under the previous part of her will.

Now really this is not a contest between two persons taking under her will as to which devise or bequest most aptly describes the matter in contest, but whether there has or has not, having regard to the statute, been an exercise of the power under the one and the only one clause of the will which can have that operation. When I look at the words of the Act of Parliament alone, I find it impossible to say that there has not been an exercise of the power as regards this fund, for it is personal estate; that is to say, it is property which, but for the effect of the will, would pass by law and devolve upon the executors or administrators. That being so, we have this: Although there was a trust which renders it liable to be laid out again in land, and it would therefore to some extent, in equity, be impressed with the character of land, it is personal estate within the words of the section, and the construction put upon it by the Act of Parliament.

When one comes to treat it as a question of construction and intention on the testatrix's part, we find that she had done all she could do, in my opinion, to make this her personal estate, and to take it out of the settlement; and having regard to the facts of the case, and to the expression of opinion on her part, independently of what there is in the will, I agree with the Master of the Rolls that we can see sufficient here to justify the Court, if it is a question of construction, in construing the words of her will as applying to the funds which she dealt with in the manner she did. She has not done it effectually, because if she had effectually withdrawn it from the settlement and the trust of it, it would have become absolutely personal estate; but she has done so sufficiently for the purpose of enabling us to construe the words of her will, and to see what she meant by personal estate.

Now it is not necessary to go through the cases which have been quoted. Two of them were cases where there was a contest between different appointees, but the case before Vice-Chancellor Knight-Bruce, of *Gillies v. Longlands*, I must just refer to, because he, in my opinion, expressly decided that case on the ground that there had been nothing done by the lady to show her wish or desire, as far as she could, that there should be a re-investment in land. He dealt first with it in this way: "Could she do it so effectually?" "No," he says; and then he says (at p. 379), "But, independently of this consideration, I can find no such act of the widow as shews that she intended to change the character of the fund; and we know that it is not the actual state of the fund, but the state in which it ought to be, that governs the case. Therefore this fund remained as it was immediately after the purchase in 1789." He assumes there (I have not read the other part) that she had no power effectually to put an end to the trust for investment in land, but he still considers whether there was anything on her part to shew an intention to treat the fund not as realty, but as personality. In this case, in my opinion, we have what shows an intention, although I agree it is

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not a power absolutely to do it. Therefore, that decision of Vice-Chancellor Knight-Bruce cannot, in my opinion, having regard to what he says, be considered as in any way being an expression of opinion opposed to our judgment in this case, the facts and the circumstances of this case differing on a very material point.

LUSH, L.J.—I am of the same opinion.

Solicitors—Rogerson & Ford, agents for J. Ricketts, Bath, for appellant; Crowdy, Son & Tarry, for respondents.

BACON, V.C. } *In re LORD DE LA WARR'S*
1881. } SETTLED ESTATES.
Jan. 29. }

Costs—Settled Estates—Tenant-for-Life
—*Actions for the Benefit of the Inheritance*
—*Lord St. Leonards' Act, 1859, s. 30—*
Settled Estates Act, 1877, s. 17.

Order made, upon a petition by trustees of settled estates, under section 30 of Lord St. Leonards' Act, 1859, sanctioning the payment by them, out of money in their hands applicable to the purchase of real estate to be held upon the uses of the settlement, of costs incurred by the tenant-for-life for the benefit of the inheritance in actions brought by him to repel claims of rights of common over the settled property.

Semble, such an order might be made under section 17 of the Settled Estates Act, 1877, although the sanction of the Court be not obtained before commencing proceedings.

Lord de la Warr was tenant-for-life under a settlement, with remainder to his first and other sons in tail male, with divers remainders over, of certain hereditaments in Sussex, including part of Ashdown Forest. In order to protect the settled estate from various claims of rights of common upon them, he had brought seventeen actions against persons claiming to be commoners. Of these, six were selected as test actions; in five, judgment went

for the plaintiff by default, but only one of the defendants in these actions was able to pay costs; in the sixth (*Earl de la Warr v. Miles*, the hearing of which occupied many days before Bacon, V.C.), judgment was given for the plaintiff with costs, and an appeal was now pending (1). In the last-mentioned action, although the plaintiff was successful, he would have to bear the difference between his party and party costs and solicitor and client costs, which would be very large. There was also another action pending (*Hale v. Earl de la Warr*) with reference to a similar claim.

The trustees of the settlement had in their hands a sum of 780*l.*, proceeds of sale of real estate comprised in the settlement, and sold under the power of sale therein contained. Under the trusts of the settlement this money was applicable to the purchase of real estate to be conveyed to the uses of the settlement.

The trustees now presented a petition under Lord St. Leonards' Act, 1859, asking the opinion of the Court whether they might employ the 780*l.* in paying Lord de la Warr's costs now or hereafter to be incurred in respect of the above-mentioned actions.

Sir H. M. Jackson and Mr. Elton, for the petitioners.—If we had asked leave before taking these proceedings we might have made the application under the Settled Estates Act, 1877, s. 17, but thinking that Act required the consent of the Court to be obtained previous to commencing proceedings, we apply under section 30 of Lord St. Leonards' Act, 1859. We understand that Vice-Chancellor Malins has made several similar orders (unreported) with reference to the costs incurred by Lord Rivers in the action of

Lord Rivers v. Adams, 48 Law J. Rep.

Exch. 47; Law Rep. 3 Ex. D. 361.

Mr. Cope, for Lord de la Warr, consented.

BACON, V.C.—It appears to me that if the petition were amended and instituted under the Settled Estates Act, 1877, the

(1) This judgment was afterwards reversed by the Court of Appeal.

In re Lord de la Warr's Settled Estates.

order might be made under that Act. [His Lordship read section 17.] The first part of that section certainly does appear to contemplate the sanction of the Court being obtained previously to the proceedings being taken, but further on the Court is empowered to order the costs and expenses in relation to, *inter alia*, "other proceedings appearing to the Court necessary for the protection of the estate," to be raised and paid. Does not that refer to the costs of any proceedings which the Court shall deem to have been necessary? However, as Sir Henry Jackson prefers to take it so, I will follow the orders made by Vice-Chancellor Malins under Lord St. Leonards' Act, and therefore the questions will be answered in the affirmative.

Solicitors—Cope & Co., for the petitioners.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.	} <i>In re BOWIE; ex parte BREULL.</i>
JAMES, L.J.	
COTTON, L.J.	
LUSH, L.J.	
1880.	
Dec. 9.	

Bankruptcy—Debtor's Summons—Jurisdiction of Court—"Residence"—"Carrying on Business"—Bankruptcy Rules, 1870, rule 17.

A clerk engaged at a fixed salary in a bank whose office was in the city of London, was held to carry on business within the district of the London Bankruptcy Court within the meaning of the 17th of the Bankruptcy Rules, 1870, so as to give that Court jurisdiction to issue a debtor's summons against him; JAMES, L.J., also considering that he "resided" within the district within the meaning of the same rule, although the house in which he lived and slept was outside the district.

The alleged debtor Bowie was a clerk in a bank which carried on business in the district within the jurisdiction of the

London Bankruptcy Court. It appeared that he lived, and had been living for ten years, with his mother in a house at Beckenham, outside the district of the London Bankruptcy Court, and paid part of the domestic and household expenses.

Breull, a creditor for a sum of 147l. 16s. 3d., issued a debtor's summons out of the London Bankruptcy Court, and served it on the debtor at the bank's office, which was in the summons stated to be his address.

The debtor, on the 12th of November, 1880, moved before Mr. Registrar Murray, sitting as Chief Judge, for an order that the summons be dismissed; and an order was made in the following terms: "And it appearing that at the date of the issuing of the summons Bowie did not reside within the district or jurisdiction of the London Bankruptcy Court, this Court doth order that the said summons be, and the same is hereby, dismissed for irregularity."

Breull appealed.

Mr. Winslow and Mr. Bigham, for the appellant.—The debtor may be fairly described as carrying on business within the meaning of the 17th rule of Bankruptcy Rules, 1870 (1), when he is carrying on business for some one else, and to reside where he is pursuing his daily avocations.

[JAMES, L.J., referred to
In re Williams, 42 Law J. Rep. Bankr. 28; Law Rep. 8 Chanc. 690.]

In the case of

Ablett v. Basham, 5 E. & B. 1019; 25 Law J. Rep. Q.B. 239, a man was held to be sufficiently described as "residing" at a place where he carried on his business, though he did not sleep there, within the meaning of the Common Law Procedure Act, 1852, s. 61, sched. A. No. 1. In that case

(1) Rule 17: "A debtor's summons . . . may be granted by the London Bankruptcy Court if the debtor resides or carries on business within the district of that Court; and when the debtor neither resides nor carries on business within the district of that Court, it may be granted by the Court within the district of which the debtor resides or carries on business."

In re Bowie; *ex parte Breull* (App.), Bankr.

Lord Campbell relied on a previous decision of

Yardley v. Jones, 4 Dowl. P.C. 45; and for a similar description of "residence" sufficient to meet the requirements of the Bills of Sale Act, 1854, s. 1, see

Blackwell v. England, 8 E. & B. 541; 27 Law J. Rep. Q.B. 124.

The meaning of the words in a particular section or rule must be ascertained by seeing the object of the Act, and what the object of the 17th rule, and the 59th section of the Bankruptcy Act, 1869, is, is pointed out by Mellish, L.J., in

Ex parte Pascal; *in re Myer*, 45 Law J. Rep. Bankr. 81; Law Rep. 1 Ch. D. 509, 513;

that is, merely to determine in what Court a man who is liable is to be sued.

It is for the convenience of the debtor, and it would be inconvenient if he could be dragged off to a Court of a district different from that in which he is usually engaged.

By section 80, sub-section 6, all the Bankruptcy Courts are branches of one Court.

Mr. McIntyre and *Mr. G. A. Vennell*, for the debtor.—The debtor has no business in the city of London, and his residence must clearly be where he lives and sleeps.

The case referred to under the Bills of Sale Act does not apply here, for there the words are "residence and occupation," and in that case it is clear that the occupation of the solicitor's clerk was at the Temple; but here the words are "resides or carries on business." A banker's clerk cannot be said to carry on business: the words must mean where a man is carrying on his own business as a principal—

Ex parte Charles; *in re Charles*, 41 Law J. Rep. Bankr. 43; Law Rep. 13 Eq. 638.

The question under the Bills of Sale Act is not one of jurisdiction, but of identification—

Maybury v. Mudie, 5 Com. B. Rep. 283; 5 Dowl. & L. P.C. 360; 17 Law J. Rep. O.P. 95.

The words must be construed strictly.

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A railway company has been held to "carry on business" within the jurisdiction of the Mayor's Court—within the meaning of the 12th section of the Mayor's Court Extension Act, 1857—only at its principal station, although it had a station within the jurisdiction—

Le Tailleur v. The South Eastern Railway Company, Law Rep. 3 C.P. D. 18;

and see

Brown v. The London and North Western Railway Company, 4 B. & S. 326; 32 Law J. Rep. Q.B. 318 (under the Act 9 & 10 Vict. c. 95. s. 60) (2);

Shiels v. The Great Northern Railway Company, 30 Law J. Rep. Q.B. 331.

JAMES, L.J.—I am of opinion that this appeal ought to succeed. There are cases in which it has been decided, and rightly decided, that these words "residence" and "business" have no technical meaning, but must be construed in every case in accordance with the object of the Act in which they are found. What is the object of the Act and the rule with reference to the distribution of business between the London Court of Bankruptcy and the provincial Courts? The only object which, as it appears to me, can be predicated, is that the bankrupt or debtor against whom the proceeding is taken, is to be sued in what may be called his natural forum; that he is not to be removed from that forum, which is convenient to him, to a place with which neither he nor his creditors have any connection. That is the sole object for which the distribution is made.

Having regard to that object, and the fact that "residence" and "business" are elastic words, and that it is only necessary that the case should be brought within one of the two alternatives, I am of opinion that a man may fairly be said to reside, within the meaning of the rule, where he is to be found daily. Certainly this would be so if he had no fixed sleeping place, and he does not less reside

(2) "Act for the More Easy Recovery of Small Debts and Demands in England."

In re Bowie; ex parte Breull (App.), Bankr.

there because he happens to sleep at his mother's or a friend's house elsewhere. It is not, however, necessary to dwell on that point, because I cannot doubt that for all commercial purposes, in the language of commercial men, this debtor does carry on business in the city of London. His business or occupation in life is that of a banking clerk, and he receives a salary for it. It is not the less "carrying on business" because he receives a fixed salary for it. No distinction can be drawn between the two classes of business, one on his own account, and the other for and in the service of a principal. He is really and truly for all commercial purposes carrying on business in the city of London. I am not sorry that this case has arisen for decision, for I think that any other construction of the words would create great inconvenience and mischief, whereas no mischief can be done to any person by the construction we are now putting upon them.

COTTON, L.J.—I agree that the words "residence" and "carrying on business" must receive a construction in accordance with the provisions of the Act in which they occur. "Residence" certainly, and "carrying on business" probably, are ambiguous words, and may receive a different meaning according to the position in which they are found. I prefer to base my decision on the ground that the debtor carried on business in the district of the London Court. I do not decide that he does not reside there, but I can understand there being a doubt on that point. I am, however, clearly of opinion that he "carries on business" there. But it is said that carrying on business must mean carrying it on as a principal. In ordinary language a man is said to carry on business, whether he be a principal or not. Here the business is that of banking clerk. If we had to decide whether "business" or "occupation" were the more proper term, I might think that the latter would be so. But all we have to decide is whether this debtor's employment comes within the term "business," which is the more comprehensive term, and I think that it does.

LUSH, L.J.—I am of the same opinion. The words under this rule are susceptible of a wider or narrower interpretation, and in order to interpret them we must have regard to the object and intent of the rule. The object and intent was this, that the debtor should not be put to needless expense and inconvenience by being carried away to a Court at some distant place when there is a Court within his own district to which he and his creditors can resort. Every branch of the Court of Bankruptcy has the same jurisdiction; and the question is, Which is the most convenient? It cannot, I think, be intended to confine the words "carrying on business" to the case of a person who carries on business on his own account as a principal. In that case many persons liable to the bankrupt law would be omitted. I think that a man carries on business where he is to be found in the business hours of the day. Here the employment of a banker's clerk is the business of the debtor's life. He is found in the bank every working day, that bank is in the city of London, and the London Bankruptcy Court is his natural forum although he may reside out of London.

The cases relating to railway companies which have been cited have no reference to the present case. All they decided was, that a railway company carries on business where it has its principal seat of business, and not at every station along its line. It carries on its business at the place where a creditor would go who wants to get his debt paid—the place where the persons who manage its business are to be found.

The appeal was allowed on the ground that there was jurisdiction. The case was remitted to the Registrar to be heard on the merits.

Solicitors—W. W. Wynne & Son, for appellant;
F. Clift, for debtor.

[IN THE COURT OF APPEAL.]

JAMES, L.J.
COTTON, L.J. } *In re* THE DEONFIELD SILK-
LUSH, L.J. } STONE COAL COMPANY
1880. (LIMITED); *ex parte* WARD.
Dec. 20, 21. }

Winding-up—Purchase by Company of its Shares—Power in Articles—Surrender of Shares—Reduction of Capital—Companies Acts, 1862 to 1877—Table A.

A company incorporated under the Companies Act, 1862, was empowered by its memorandum to acquire a particular colliery business and carry on the trade of coal miners, and to do all things conducive to the attainment of the above object. One of the articles of association empowered the directors from time to time to purchase for the company any shares in the company at such price as they should think reasonable. . . . Shares so purchased might be dealt with by the directors as if they had never before been issued. The purchase-money payable by the company for any shares so purchased might be paid out of any assets of the company, and such shares might be transferred to the company, or to such person as they should determine. Any profit arising on the re-issuing or subsequent sale of any shares purchased for the company were to be considered as profits of the year in which such shares should be re-issued or sold for the company. The memorandum contained no power to purchase the shares.

An arrangement was made in 1872 under which the directors purchased the shares of W., who executed a transfer of them to the company, which afterwards appeared in the register sent to the Registrar of Joint-stock Companies as the holder. Such arrangement was admitted to be bona fide, and was approved by the shareholders at a special meeting.

In 1879 the company was ordered to be wound up.

Upon an application by the liquidator to put W. on the list of contributories in respect of the shares so purchased of him,—

Held (reversing the decision of JESSEL, M.R.), that the purchase being authorised by the article was valid, notwithstanding that it might amount to a reduction of capital, and that W. having by that transaction got rid of his shares, and

having ceased to be a member for more than twelve months before the winding-up, could not be put upon the list of contributories.

The fact that the article was in terms wide enough to authorise a trafficking in its shares constituted no reason for impeaching a transaction effected under it, which was confined within legal limits.

The only right of a creditor of a company is to proceed against every present member and every past member who was a member within twelve months before the commencement of the winding-up, and who were such members must be tried in the same way as if there were no winding-up.

The company was formed and registered in 1867 as a limited company, with a nominal capital of 40,000*l.* in 1,600 shares of 25*l.* each.

One of the objects mentioned in the memorandum of association was the taking over of a colliery business formerly carried on by F. Ward and James Addy, as lessees in co-partnership, and the carrying on of the trades or businesses of coal-miners, &c. By the 12th sub-section of the 3rd clause the company was authorised "to do all things whatsoever" which it considered to be in any way connected with the trades, businesses or purposes aforesaid, or any of them, or otherwise conducive to the attainment of the above objects or any of them.

The memorandum contained no power specifically authorising the purchase by the company of its own shares.

The 10th clause of the articles of association was as follows:—

"The directors may from time to time purchase for the company any shares in the company at such price as the directors think reasonable, and may postpone the issue of any shares in the company, whether original shares or shares to be hereafter created for such time, and from time to time as the directors think fit. Shares so purchased may from time to time, and at any time or times, be by the directors dealt with in the same way as if they had never been before issued. And this article, so far as it relates to the purchase of shares and subsequent dealing therewith, shall apply as well to forfeited shares as to shares not forfeited. The

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purchase-money payable by the company for any shares so purchased may be paid out of any assets of the company, and such shares may be transferred to the company, or to such person or persons as the directors shall determine. Any profit arising in the re-issuing or subsequent sale of any shares purchased for the company shall be considered as profits of the year, in which such shares shall be re-issued or sold for the company. Any person to whom any shares purchased for the company shall be transferred as a trustee for or on behalf of the company shall be indemnified and held harmless by the company against all claims and demands arising by the use of his name as such trustee."

Five hundred shares in the company were allotted to Ward, and a like number to Addy. Ward subsequently acquired forty-nine other shares, making his total holding 549. All the shares were allotted.

Ward and Addy on the 9th of September, 1867, granted a sub-lease of their beds of coal to the company, reserving a profit rent.

Ward and Addy and a Mr. Wake were appointed the first and only directors of the company. Subsequently, in 1871, a Mr. Batt was added.

Disputes arose between Ward and the other directors as to the mode of carrying on the company's business, and the directors being of opinion that it would be to the benefit of the company to purchase Ward's shares and to buy up Ward's and Addy's interests in the coal-mines, after considerable negotiation ultimately came to an arrangement with Ward, and also with Ward and Addy, as follows:—

The company to purchase from Ward for 10,000*l.* his shares in the company and his interest as a lessee in the leases granted to him and Addy of the premises afterwards sub-let by them to the company, the company to purchase from Addy for 5,000*l.* his interest under the same leases, the purchase-money to be considered as payable on the 25th of March, 1872. That Ward should lend the company 8,000*l.* to be secured by a mortgage, and

by the acceptances of the company to bills of exchange drawn by him on the company for the sum and interest at five per cent. per annum, the 8,000*l.* being repayable by four equal annual instalments, and the interest by half-yearly payment. That Addy should lend the company 4,000*l.* on the same terms. That Ward and Addy should, in addition to the security of the acceptances and mortgage, have a primary charge (subject to a then existing charge of 5,000*l.* to other parties) upon the then uncalled capital, Ward's charge to have priority over Addy's.

These terms the directors resolved to submit to an extraordinary general meeting of the shareholders, to be held on the 25th of March, 1872. The meeting was attended by all the shareholders except three, who held only eleven out of the 1,600 shares.

The report of the directors laid before the meeting stated that it was called for the purpose of considering, and, if so determined upon, adopting and authorising the carrying out of the above arrangement, stating the terms already set forth.

The meeting passed and signed resolutions that the report be approved, adopted and entered on the company's minutes and carried out, and authorising the directors to affix the company's seal to and perfect and carry out the necessary indentures and documents for the purpose of carrying into effect the said arrangement (specifying six instruments which had been prepared, including the two indentures of transfer by Ward), and authorising the directors to do all acts necessary or advisable, or which by the board for the time being should be deemed to be necessary or advisable, for carrying out the several arrangements.

Ward accordingly, by an indenture dated the 25th of March, 1872, between himself of the one part and the company of the other, transferred his 549 shares to the company for 5,000*l.*, and by another indenture of the same date Ward and Addy, in consideration of 10,000*l.* expressed to be paid by the company, assigned their interests in the leaseholds. The other documents were executed, and the arrangement fully carried into effect.

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The transfer of Ward's shares to the company was duly registered in the company's books shortly after its execution, and from that time the company were entered in the share register as owners of the 549 shares, and returned as such owners in all the subsequent returns filed with the Registrar of Joint-stock Companies.

The company was carried on with considerable success for some time, but it afterwards fell into difficulties, and on the 22nd of March, 1879, an order was made for winding it up.

In the winding-up an application was made by the liquidator to restore Mr. Ward's name to the list of contributors.

Jessel, M.R., granted the application, being of opinion that the article authorised a trafficking in shares, and that it was illegal, as its exercise would cause a reduction of the capital of the company, and that the purchase was invalid.

Ward appealed.

Mr. Davey and Mr. Macnaghten (Mr. G. C. Price with them), for the appellant.—The Master of the Rolls was influenced by two considerations—one, that the 10th article would authorise a general trafficking in shares; the other, that there being no power given in the memorandum of association to purchase shares, the purchase was *ultra vires*, and that the case came within

Hope v. The International Financial Society, 46 Law J. Rep. Chanc. 200; Law Rep. 4 Ch. D. 327.

But what was done here is not really against the decision in that case.

This power to purchase shares is fairly covered by the memorandum of association, if that were necessary, but even if it be not, it is a power which is ancillary to the purposes of the company, a valid power, only invalid if exercised for improper purposes. No doubt a power to accept a surrender of shares could not be exercised for the purpose of relieving a shareholder from liability; but it has been frequently held that such a power can be properly exercised by way of compromise of a dispute with an individual shareholder, as was the case here, though the

effect may be to relieve that shareholder. The company obtained an advantage by the purchase, and it is impossible to restore Ward to his former position.

The liquidator can be in no better position than the company would have been in if it were a going concern, and the company could not, having taken the benefits and the profits for the successful years after the purchase (in which Ward took no share), now after this long delay turn round and make him liable.

Not one of the present creditors of the company was a creditor at the time of this purchase, except the mortgagees, who concurred at the time, and still concur in that transaction. The object of sending the names of the members to the Registrar is to enable creditors and persons who give credit to the company to see who form the company when they give credit.

The case of

Hope v. The International Financial Society (ubi supra)

only shews that a company cannot give itself power to buy its shares for the purpose for which that company was doing it, which was, according to the view of the Court, to carry out a scheme whereby half of the shareholders would be relieved from liability to the creditors.

Teasdale's Case, 43 Law J. Rep. Chanc. 578; Law Rep. 9 Chanc. 54;

Snell's Case, Law Rep. 5 Chanc. 22; *Hall's Case*, 39 Law J. Rep. Chanc. 730; Law Rep. 5 Chanc. 707;

Marshall v. The Glamorgan Iron and Coal Company, 38 Law J. Rep. Chanc. 69; Law Rep. 7 Eq. 129,

also support our contention.

In none of these cases is there any suggestion that a power to accept a surrender or forfeiture of shares, or of cancellation of shares is required to be comprised in the memorandum; it is throughout assumed that a power in the articles is sufficient.

The marginal note of

Zulueta's Claim, 39 Law J. Rep. Chanc. 361, 598; Law Rep. 9 Eq. 270; *ibid.* 5 Chanc. 444,

is not justified by the judgment. In that case the company sent a man into the

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market to make purchases of its own shares, and that is a very different transaction from the present.

The cases of

Marshall v. The Glamorgan Iron and Coal Company (ubi supra);

and

The Peruvian Railway Company v. The Thames and Mersey Marine Insurance Company, 36 Law J. Rep. Chanc. 864; Law Rep. 2 Chanc. 617,

are authorities as to the power of the directors to do all acts which they consider conducive to the carrying out of the principal object.

So in

Wright's Case, Law Rep. 12 Eq. 331, where the company had power under the articles to accept surrenders of shares, the Court of Appeal held that a cancellation of the allotment of shares to Wright was valid, as being tantamount to a surrender within the articles.

And it is clear from reading the judgments of the two Lords Justices in that case, and the subsequent judgment of Vice-Chancellor Wickens in the same case (on a further hearing), that none of those Judges doubted but that if there was a power in the articles to accept a surrender of shares from or make a compromise with a shareholder, although it might have the effect of relieving him from a liability, an exercise of that power was valid. In that case what was done was held to be not a destruction of the shares, but the execution by the company of a power which it possessed to waive a contract and to allot the shares to others.

Re St. James's Bank. Colville's Case, 48 Law J. Rep. Chanc. 633,

is an authority in my favour, in which case Fry, J., held that a power given to directors by the articles "to accept a surrender of shares on such terms as they might think fit," was a valid power, and that it was not prohibited by the 25th section of the Act of 1867.

The difference between "surrender" and "purchase" is merely nominal; if possible the power "to accept a surrender on such terms," &c., is a wider power.

We do not contend for such an indis-

criminate dealing in shares by the company as would amount to a trafficking in shares. That would require a distinct power to be inserted in the memorandum—

The Ashbury Railway, &c. Company v. Riche, 44 Law J. Rep. Exch. 185; Law Rep. 7 E. & I. App. 653;

but the possibility of the article being abused does not invalidate a proper use of it.

The case of

The Phosphate of Lime Company v. Green, Law Rep. 7 C.P. 43,

shows that the subsequent acquiescence of the shareholders in an act which was *ultra vires* the directors, as being in direct contravention of one of the articles, validates that act. That such is the decision is clear, for the judgment of Willes, J., was based upon the assumption of the transaction being a purchase of shares, which directors were prohibited from making. The acquiescence of the shareholders constituted a new article. The purchase of the shares was an act *intra vires* the company, although *extra vires* the directors, and the subsequent sanction of the company in the act done was equivalent to a resolution of the company authorising the doing of the act. That was the view of Lord Cairns of that case in his speech in

The Ashbury Railway, &c. Company v. Riche (ubi supra).

As to the reduction of capital. The word "capital" is an ambiguous term—first, the nominal or issuable; second, the issued; and third, under the Act of 1877, the trading capital, the amount actually employed in the business.

There is no direct prohibition in any of the Acts of Parliament against reduction of capital. The only provision at all amounting to a prohibition is the 12th section of the Act of 1862. The nominal capital is that which by section 8 must be introduced into the memorandum, and that nominal capital it is that a limited company may not alter. There is nothing in the Act of 1867 which attaches a different meaning to capital.

But really there is here no reduction of capital. Nor was it a purchase of shares; it was a surrender to the company as part of a compromise made by

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the directors under their power of compromising disputes between the company and the shareholders which is incident to their position.

Mr. Chitty and Mr. Kekewich (Mr. H. B. Buckley with them), for the liquidator.—A shareholder has no way of getting rid of his shares except by transfer or transmission, or in limited cases by forfeiture, when he is a defaulting shareholder. There is nothing in the Act or Table A authorising surrender; but a limited right of surrender has been held good, as in

Snell's Case (ubi supra);

and where there is such right to surrender on terms, a company has a clear right to compromise a claim which it may have against a person alleged to be a shareholder, but who disputes his liability.

But this is not a case of compromise, but a purchase of shares under the authority of the 10th article, and that is so wide in its terms as to authorise a trafficking in shares, but there is no power to do that contained in the memorandum, which is the charter of incorporation of the company. The articles only regulate the management of the internal affairs of the company—

The Ashbury Railway, &c. Company v. Riche (ubi supra).

There is no power to modify the memorandum so as to insert any provision as to the reduction of capital under section 12. For this power, if exercised, would result in the reduction of the capital of the company. A resolution by all the shareholders to return one-half of the capital would be invalid—

The National Funds Assurance Company, 48 Law J. Rep. Chanc. 163; Law Rep. 10 Ch. D. 118.

In that case there was a payment of interest out of capital by the directors, with the consent of the shareholders; the directors, who made the payment, were held liable to repay the sums paid, not on the ground of any prohibition contained in the Act, but as being a reduction of capital.

The liability of a shareholder is a statutory liability, and can only be got rid of in the ways pointed out by the statute.

It cannot be said that a company, while

it may not alter its nominal capital, may alter its real capital.

To enable a company to reduce its nominal capital the Act of 1867 was passed—see sections 9, 10, 11—and that reduction was only effected by the extinguishment of its unpaid capital, and a further statutory enactment (namely, the Act of 1877, ss. 3 and 5) was required to enable a company to write off as lost its paid-up capital; and even the Act does not allow the cancellation of shares which have been taken or agreed to be taken.

So far as the creditors of this company are concerned these shares are cancelled.

The buying by a company of its own shares is not carrying on business; and Lord O'Hagan in

Cree v. Somervail, 4 App. Cas. 648 (at p. 662) speaks of the "legal incapacity of a company to purchase its own shares, unless the purchase was authorised by the memorandum and articles of association."

The attention of Giffard, L.J., was not drawn to this point in

Snell's Case (ubi supra).

The case of

The Peruvian Railways Company v.

The Thames and Mersey Marine

Insurance Company (ubi supra)

was different from this, and so was that of

The Phosphate of Lime Company v.

Green (ubi supra).

The question in the latter was whether the body of shareholders had released an individual shareholder, which was merely a question between partners, who could, if they all agreed, of course release another partner, but there was no question there as to any liability to creditors.

COTTON, L.J.—This is an appeal from a decision of the Master of the Rolls on an application to remove Mr. Ward from the list of contributories. At the time when the winding-up order was made Mr. Ward was not, and for seven years had not been, on the register of shareholders, but if he ought to have been there the Court has power to treat him as if he had been there and put him on the list of contributories. The liquidator

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who represents creditors as well as shareholders contends that he ought to be on the list. Now what are the rights of the creditors? To make every present and past member of the company liable to the debts and liabilities of the company, and the expenses of winding-up subject to the limitations in the 38th section of the Companies Act, 1862. The rights of the creditors are only against members or persons who have been members within twelve months, and who are members depends upon the memorandum, the articles and the general law. We have then to decide whether Mr. Ward, by the arrangement of 1872 effectually got rid of his shares, and ceased to be a member. It is admitted that the arrangement by which his shares were transferred to the company was entered into *bona fide*. This was not a transfer of the same nature as a transfer to a person who becomes a shareholder, but was a transfer to the company for all the other members in the same way as if the shares had been surrendered. It was no part of the arrangement that the shares should be cancelled: they were given up to the company so that they could be re-issued. We have to determine whether this was valid. The appellant contends that it was authorised by sub-section 12 of clause 3 of the memorandum, which authorises the doing of all things which the company may consider conducive to the attainment of the objects for which it was established. I do not think that this provision can safely be relied on for the present purpose; a surrender of shares can hardly be considered conducive to the carrying on the business of the company, and I think the case must turn on the 10th clause of the articles. It is contended on behalf of the official liquidator that this clause authorises a trafficking in shares, and is therefore illegal as sanctioning a fresh business not authorised by the memorandum. Now I agree with the Master of the Rolls that nothing contained in the articles can make a trafficking in shares legal if the memorandum does not authorise it. Whether it would be legal if the memorandum did authorise it, I do not think it necessary to give any opinion. The question is, whether what has been

done is within the terms of the article, and is a thing which in that case can legally be done. I am of opinion that what was done was within the terms of the article, and was not prohibited by law. I think that upon the true construction of the article it was not intended to authorise trafficking in shares—not intended to authorise the buying them with a view to making profit by reselling them, but to authorise the purchase of them if it was thought to be for the benefit of the company that a particular person should cease to be a member. Of course profit might result from the transaction; and the article goes on to provide what is to be done with the profit (if any), but that does not on a fair construction point at a purchase for the purpose of reselling at a profit, or amount to sanctioning a new business. Profit might incidentally arise, but profit was not the object. What was done then comes within the terms of the article, is not a trafficking in shares and does not go beyond the objects of the memorandum, and, independently of the further arguments which I shall proceed to consider, was, as I have said, legal.

The principal argument of the respondent against the validity of the transaction was that it was a reduction of the capital of the company. If this transaction is to be held invalid on that ground, I do not see how a surrender or forfeiture of shares is ever to be supported. No doubt a company cannot restore capital to its members, for if they were to receive back what they had paid on their shares they would be in the same position as if they had not paid it, and would be liable to calls. Again, if a company were by purchase of shares to make itself unable to carry on its business the transaction would be invalid, as being inconsistent with the objects of the company; and if, as in *Hope v. The International Financial Society*, we could see that the arrangement in the present case was a scheme for restoring capital to the members, the case would stand very differently. We have nothing of that kind here, nor was there any such purchase as to interfere with the business. The company went on for some time prosperously, and but for sub-

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sequent events might have continued to do so.

It may be said that the article allows a purchase of shares to an unlimited extent. It is true that in terms it is unlimited, but that is no reason for holding everything done under it invalid so long as what is done is within legal limits.

It is urged that what has been done is contrary to the spirit of the Acts of 1867 and 1877. I leave out of consideration the Act of 1877, for it only removes the doubt as to the construction of the Act of 1867. The Act of 1867, in my opinion, does not bear on the case. The Act of 1862, s. 12, allowed the memorandum to be altered by increasing the capital, and in certain other particulars there mentioned, and prohibited its being otherwise altered. If, then, it was wished to alter the memorandum by decreasing the capital, statutory power for that purpose was wanted, and the Act of 1867 gives power to make such alteration on certain conditions.

Here what has been done is not prohibited by section 12. There has been no reduction of the capital as fixed by the memorandum; there has merely been a purchase of shares which remain the same and can be re-issued.

It cannot be said that because the Acts of 1867 and 1877 have authorised certain alterations in the memorandum therefore a transaction which does not require any alterations in the memorandum is forbidden by them. I say this with all respect to the Master of the Rolls, who thought that there was here such a reduction of capital as was contrary to the intention of the Legislature.

It was urged that the Act of 1862 provided no mode by which a shareholder could get rid of liability except a transfer; but Mr. Kekewich himself answered this argument by the admission that a partner, with the consent of all the other partners, could retire. Here a consent is given by the articles to a partner retiring in a certain way, and unless what has been done is forbidden by the Act we ought not to hold that the company, when authorised by the articles, cannot do it.

I am aware that the power given by the 10th article is a dangerous one. An

attempt might be made to use it for the purpose of enabling a shareholder to escape liability, or to use it to such an extent as to prevent the company from going on; but it is enough to say that, if it were used in that way for improper objects, the exercise of it would be invalid.

I am of opinion, then, that the 10th article cannot be held to be forbidden by law, and that by the steps taken under it Mr. Ward ceased to be a member. There are authorities which, though none of them decide the precise point, are in favour of the appellant. The opinion of Lord Justice Giffard in *Snell's Case* evidently was, that a power in the articles to accept a surrender of shares was valid, though there was nothing in the memorandum pointing to it. The decision of the Master of the Rolls therefore must be reversed.

JAMES, L.J.—I also am unable to concur in the decision of the Master of the Rolls. It appears to me that there is a fallacy at the bottom of his judgment and also of the argument, that there is some peculiar right in the creditors of the company. I am of opinion that the creditor *qua* creditor has no right except according to the statute and within the limits prescribed by the statute. He has a right to proceed against every present member and against every past member who was a member within twelve months before the commencement of the winding-up—that is the extent of his right. Creditors know, or have means of knowing, who are the shareholders in a company, and the limit of twelve months was fixed because a creditor may be presumed to go on trusting a company on the faith of the persons who were shareholders when his debt was contracted, until he has means of knowing that a change of shareholders has taken place. A creditor, I say, as such, has no rights except as against members, and who are members must be tried just in the same way as if there was no winding-up; in the same way as if this company, being a going concern, had applied to have Mr. Ward put on the register. There would have been an abundant answer to such an application. A clause in the articles, to

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which all the shareholders were parties, expressly authorised the company to buy its own shares. The company accordingly bought Mr. Ward's shares. It is replied, Yes; but that clause is so large as to allow the company to traffic in shares, which is a business not authorised by the memorandum of association, and being so large it is bad *in toto*. There is a fallacy in that argument. The memorandum limits the objects of the company, and so prevents trafficking in shares. Such trafficking would therefore be illegal, and if the directors spent money of the company in it the company could hold them liable if it took steps for that purpose within a reasonable time. But, apart from that, the dealing in the shares would be effectual. The purchasers who took them could not get rid of them, and the company could not claim them back from the purchasers; the only result of the illegality would be that the directors would be personally liable for any loss. Here the purchase was authorised by the articles and was assented to by a meeting of the shareholders, and I am prepared to adopt the view that, even if there had been anything questionable in the transaction as between the directors and Mr. Ward, still the matter being a mere domestic matter—a question whether a particular shareholder should or should not retire—if the transaction was *ultra vires* the directors, it was not *ultra vires* the company; and having been confirmed by the company, and the company having acquiesced in it and taken the benefit of it, it could not now be questioned by the company. If the company could not question it, neither can a creditor, for he can obtain nothing but what the company can get from the shareholders. The liability of the shareholders is to the company and to no one else, except as regards the provisions relating to the liability of past members.

LUSH, L.J.—I am of the same opinion, and do not think that I can usefully add anything.

Solicitors—Emmet, Son & Co., agents for Wavell & Co., Halifax, for the company; Pilgrim & Phillips, agents for Watson, Esam & Barber, Sheffield, for Mr. Ward.

[IN THE COURT OF APPEAL]

JAMES, L.J.
BRETT, L.J.
COTTON, L.J.
1881.

March 26.

PIKE v. FITZGIBBON.

Married Woman—Covenant—Separate Estate—After-acquired Property—Restraint on Anticipation.

The general engagements of a married woman are payable out of the separate estate she had at the time the engagement was entered into or so much of it as remains when the judgment is recovered against her. The liability does not extend to her after-acquired separate property, nor to any separate property which during the coverture she was restrained from anticipating.

When judgment is recovered against a married woman in respect of her general engagements made during coverture, the proper enquiry is, what was the separate estate which the married woman had at the time of contracting the debt, and whether that separate estate or any part of it still remains capable of being reached by the judgment and execution of the Court.

This was an appeal from the decision of Malins, V.C., reported 49 Law J. Rep. Chanc. 493.

In January and June, 1875, the defendant, a married woman, having at the time separate property, not subject to a restraint on anticipation, by deeds covenanted to pay to the plaintiffs 5,000*l.* and interest. In January, 1880, her husband died. The plaintiffs then brought this action to enforce payment out of her separate estate of the moneys due to them under the covenant.

The Vice-Chancellor, in giving judgment for the plaintiffs, held that all the separate property of the defendant, which immediately before the death of her husband was vested in her or in any person in trust for her, including any separate estate, which during coverture she was restrained from anticipating, was chargeable with the payment of the debt and interest.

The defendant appealed against so much of the judgment of the Vice-Chancellor as declared that her separate

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estate, which during coverture she was restrained from anticipating, was chargeable with the payment of the debt in question.

Mr. Glasse, Mr. Davey and Mr. Ingle Joyce, for the appellant.—Restraint on anticipation is a personal disability imposed on a married woman, which prevents her from doing anything by which the property so settled to her separate use can be alienated. We submit it is settled law that contracts or engagements made by a married woman with a view to bind her separate estate, which she is restrained from anticipating, are void and do not affect the property when the restraint ceases—

Johnson v. Gallagher, 3 De Gex, F. & G. 495; 30 Law J. Rep. Chanc. 298;

The London Chartered Bank of Australia v. Lempriere, 42 Law J. Rep. Chanc. 49; Law Rep. 4 P.C. 572;

Roberts v. Watkins, 46 Law J. Rep. Q.B. 552;

In re Sykes' Trusts, 2 Jo. & H. 415.

Mr. Higgins and Mr. Begg, for the respondents.—We say that not only is the separate property which a married woman had at the time she contracted the debt, but whatever separate property she subsequently acquired and may have at the date when judgment is recovered against her, is liable to make good the debt; and that this principle applies to property which she is restrained from anticipating, because the moment the coverture ceases, the restraint on anticipation also ceases, and then all that which was her separate estate becomes liable to make good the engagements she entered into whilst covert—

Picard v. Hine, Law Rep. 5 Chanc. App. 274;

Collett v. Dickenson, Law Rep. 11 Ch. D. 687;

Davies v. Jenkins, Law Rep. 6 Ch. D. 728;

Mayd v. Field, 45 Law J. Rep. Chanc. 699; Law Rep. 3 Ch. D. 587;

McHenry v. Davies, 39 Law J. Rep. Chanc. 866; Law Rep. 10 Eq. 88;

Hulme v. Tenant, 1 Bro. C.C. 16;
Johnson v. Gallagher (ubi supra);
Olive v. Carew, 1 Jo. & H. 199; 28

Law J. Rep. Chanc. 685;

Vaughan v. Vanderstegen, 2 Drew. 165, 363; 23 Law J. Rep. Chanc. 793;

Wright v. Churd, 4 Drew. 673, 702; 1 De Gex, F. & J. 567; 29 Law J. Rep. Chanc. 415;

Re Harvey's Estate. Godfrey v. Harben, 49 Law J. Rep. Chanc. 3; Law Rep. 13 Ch. D. 216.

Mr. Beddall, for the trustees.

JAMES, L.J.—In this case, had it not been for the elaborate judgment of the Vice-Chancellor, and the very elaborate and ingenious arguments which have been for so many hours addressed to us in this Court, I should have thought that the question was absolutely free from doubt and incapable of effectual argument in respect of that which is the real and substantial matter of the appeal—that is, whether there can be any charge against the estate of which the lady was tenant-for-life with a restraint upon anticipation; for, twist it in any way you like, say anything you like as to the number of steps by which you arrive at the conclusion, the conclusion at which the Vice-Chancellor in the Court below arrived at is, that a person restrained from anticipation can anticipate. That is the simple result if it is put in plain English; because, whether it is done by deed, or whether it is done by letter, or whether it is done by the creation of a debt which in the result operates to charge the property, it is an alienation of the property. It is an anticipation of it by which the lady making the deed, or signing the letter, or contracting the debt, does deprive herself at the time of something which she would otherwise receive. That would seem to me to be too plain a proposition to be seriously contested.

The case has been put before us upon a matter which it is necessary also we should dispose of, because it has arisen as it seems to me from a misapprehension of some of the cases. It is said that the married woman having the separate

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estate has a power, not of contracting a debt to be paid out of that separate estate, but a sort of equitable *status*—I really do not know how to express it—or capacity to contract a debt not only in respect of that separate estate, but in respect of any separate estate she may thereafter in any way acquire, because equity enables her, having such an estate, to charge that estate and to contract debts payable out of that estate, so that she is released altogether in the contemplation of equity from the disability of coverture, and is enabled in a Court of equity to contract debts to be paid and satisfied out of any estate settled to her separate use. Of course, logically following it out, it is out of any property which may afterwards come to her. In my opinion there is no authority for that; and the supposed authority seems to me to arise entirely from a misapprehension of the case of *Picard v. Hine*, and one or two other cases which follow it, in which the point was never suggested or started, and the language of the decree merely followed that which gave the plaintiff a charge upon the separate estate remaining; but that was based upon not an affirmative but a negative of the rule which has been laid down in other cases; that is to say, you have a charge on the estate, but not so as to prevent the operation of any intermediate alienation, and therefore the enquiry was directed of what separate estate remained—but, of course, always meaning what part of that separate estate remained in respect of which she had at the time of contracting the debt a *jus disponendi*, and in respect of which, therefore, she had the power of making her debt a charge. That is evidently what was before the Court. No such point was ever suggested as that she had acquired the universal and general power of contracting debts to be paid out of any separate estate she might afterwards acquire. Therefore it appears to me that the misconception in this case has arisen from not attending to what the facts in those cases were in which that enquiry was directed. I desire to have it distinctly understood, as my opinion and the opinion of my colleagues, and therefore

the decision of this Court, that in any future case the proper enquiry to be inserted in terms is, what was the separate estate which the married woman had at the time of contracting the debt or engagement, and whether that separate estate or any part of it still remains capable of being reached by the judgment and execution of the Court. That is the only remedy, and that is all that is chargeable, and all that the Court can charge. That is really what the decision was in *Johnson v. Gallagher*; that is to say, the debt of the married woman, although she had separate estate, did not prevent her disposing of the separate estate which she had at the time of contracting the debt any more than it prevented a man from disposing of any part of his estate. I am of opinion, therefore, that the judgment of the Court below must be varied by striking out the word "including," and substituting for it the word "excluding." It is sufficient to state as a warning in any future case that the only separate property which can be reached is the separate property or the residue of the separate property that a married woman had at the time of contracting the engagement as to which a Court of equity allows her to contract.

BRETT, L.J.—I am of the same opinion. I think it right to state with deference the reasons which have actuated my opinion. Now at common law, for reasons of high social policy, a married woman is not allowed to make any contract binding upon herself or upon any property of hers. In fact the common law did not recognise that she had any property or could do any act binding herself. It seems to me, after having read all these cases and listened to the arguments, that it is not true to say that under any circumstances equity has recognised or invented a *status* of a married woman to make contracts. Neither does it seem to me that equity has ever said or alleged that that which is now called a contract is a binding contract at all in any sense upon a married woman. What equity seems to me to have done is this: It has recognised a peculiar settlement as put-

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ting a married woman into the position of having what is called a separate estate. Equity has invented that estate, or recognised it, and has attached certain liabilities, not to the woman at all, but to the estate. It seems to me that the decisions come to this: that certain promises—I use the word “promises” in order to shew that, in my opinion, they are not contracts—when made, and some acts when done, by a married woman during coverture, with reference to, or perhaps, to go further, in consequence of the fact known to the person dealing with her of her being possessed at the time of making such promise or doing such act of a separate estate, will be enforced against such separate estate as she was possessed of at that time, or so much of it as remains at the time of judgment recovered in respect of the promise or act, whether such judgment be recovered during or after the cessation of the coverture. That proposition so stated does not apply to separate estate coming into existence after the promise or act which it is attempted to enforce.

It was suggested or argued by Mr. Higgins that if the law as it exists up to this time did not affect such other estate—that is, an estate coming into existence after the promise or act—the Court ought now to hold that it does, and so make new law. That is a proposition to which I have the strongest objection. It seems to me that the days are at an end when any Court in this country ought intentionally to “make new judicial legislation.” I entirely object to that. Therefore, the decisions which seem to me to support the proposition which I have stated do not apply to any other estate than that which I have described in that proposition. I should therefore venture to differ, and I think it necessary to differ, from so much of the judgment of the Vice-Chancellor as says that the proposition would apply to separate property coming into existence (even although there was no other fetter upon it) after the time of the contract. I say I think it is necessary to decide it, because, if that proposition were true, it would go a great way to determine the final proposition

which we have to deal with. With regard to that final proposition, it seems to me a different estate from the other, and no decision of the Court of equity which recognises that estate has ever held that the doctrine which is applicable to the other estate should be applied to this; and I should decline myself, unless obliged, to go further in that direction. Moreover, it seems to me that the terms of this new estate—that is, where there is no power of anticipation—would take the case, even if we might go further, entirely out of the principle of the other; and that to hold that such an estate was liable to these liabilities would be, in fact, to strike out of the estate the words “without power of anticipation.” No case seems to me to have gone that length. The case before Mr. Justice Lush of *Sykes' Trusts* seems to me to be a decision adverse to it, and with that decision I entirely agree.

COTTON, L.J.—In this case the Vice-Chancellor directed an enquiry as to property held to the separate use of the lady, whether she was entitled to it at the time the contracts relied on by the plaintiffs were entered into or not, including in such enquiry property which was settled to her separate use without power of anticipation. The only part of the judgment against which there is an appeal is that part of it which declares that the plaintiffs are entitled to have their debts paid out of that portion of the separate estate as to which there is a restraint on anticipation; and although I agree it is right to correct the form of the order as to the other part, the question does not arise on the appeal, except as regards this, that the principle involved in the declaration, which, in fact, the Vice-Chancellor made, that the claim of the plaintiffs applied to separate estate to which she is at the time of the judgment entitled, although not at the time of contract, has a material bearing upon the other part of the judgment against which there is an appeal.

Now it would be most strange, certainly, if, as regards the property really in question here, the plaintiff could

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prevail. I put it to Mr. Higgins, in the course of the argument, whether his contention did not amount to this, that, although a married woman entitled to separate estate, with a restraint on anticipation, was prevented from doing any act which would prevent her from enjoying during the coverture the income of the property, yet she could do acts even during coverture which might intercept the income of the property after the death of her husband. Now the express terms of the trust are these—"that she shall have no power while under coverture to dispose of the same by way of anticipation;" and does she not anticipate just as much, although the disposition may not arise by way of anticipation and is not to take effect till after the death of the husband, as if it were to take place the year after the act which disposes of the income? Really it is almost a *reductio ad absurdum* to say that although she could not by any act charging, and in that way disposing of, the property do so, yet she could, by contracting a debt not a charge upon the property, dispose of it by way of anticipation even although the contract relied upon, not directly charging the property, but giving the plaintiffs a right to claim the property, was an act during coverture.

I really think that the argument, ingenious and able, on the part of the respondents, has proceeded on one or two fallacies in the use of language. As I understand their argument, it is this, that a Court of equity deals with a married woman who has separate estate as if she were a *feme sole*. Now is that correct? That is the point. First of all, there is one clear and absolute distinction. Can a *feme sole*, or can a man, be restrained from anticipating or disposing by way of anticipation of any property to which he is entitled? No. But a married woman under coverture can. But how and when? Simply as regards property which she is entitled to for her separate use. So that is one instance how entirely the position of a married woman having separate property differs from that of a *feme sole* as regards her property, and as regards her rights and powers of disposition over it. Now

is it true that she is regarded as a *feme sole*? She is regarded as a *feme sole* to a certain extent, but not as a *feme sole* absolutely, and that is the fallacy. In my opinion she is regarded as a *feme sole* only as regards property which under the trust she is entitled to deal with, as if she were a *feme sole* as to property which she is restrained from anticipating she is not, as regards persons other than her husband, in the position of a *feme sole*. As regards her husband, no doubt, she is as regards property settled to her separate use, whether there is restraint upon anticipation or not, treated as a *feme sole*—that is to say, she, and not her husband, is the person who alone can receive and give a discharge for the money, and her husband is absolutely excluded; but as regards the outside world, no, because, as I pointed out, if there was a restraint upon anticipation as against a *feme sole*, during the *non coverture* the restraint on anticipation entirely fails and is inoperative. What is it really? I apprehend that the passage in the judgment of Lord Justice Turner in *Johnson v. Gallagher* really shews what the doctrine and principle is, namely, that as regards property settled to her separate use, and which she has the power of dealing with as a *feme sole*, she is treated for the purposes of assignment or for the purposes of the result of her contracts entered into or general engagements, as if she were a *feme sole*, but as regards that property only. He says (p. 509), "Courts of equity, on the other hand, have, through the medium of trusts, created for married women rights and interests in property both real and personal separate from and independent of their husbands. To the extent of the rights and interests thus created, whether absolute or limited, a married woman has in Courts of equity power to alienate, to contract and to enjoy; in fact, to use the language of all the cases, from the earliest to the latest, she is considered in a Court of equity as a *feme sole* in respect of property thus settled or secured to her separate use." That is to say, as regards property which under the trust she can dispose of and alienate, she is considered as a *feme sole*. Then as re-

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guards that, it is limited at once to the property which is so limited and settled; and that must of necessity mean the property to which at the time of entering into her contracts she is so situated. As regards any future property, who can tell whether she will ever have any? Who can tell how the separate use will be limited or restricted? Therefore, looking to those words in the judgment which clearly apply only to property on which there is no restraint on anticipation, and looking at the terms of the concluding sentence, it is not that a married woman having separate estate is treated as a *feme sole*, but that only as regards her power of dealing with the property, and as regards the consequences on that property of her general dealings she is to be considered as if she were a *feme sole*. That, I think, gets rid of the argument of the respondents, for I can hardly see how, if a married woman having separate property is to be considered as a *feme sole*, so that her engagements can be made available, not only as against the separate property she has at the time of the engagement, but at the time when the judgment is sought to be enforced, all general property which when she was *discovert*, she then has, if held in trust, is not to be made available in a Court of equity. Now there is one other point which one ought to deal with. It is said that here is an equitable execution, and there being equitable execution, that ought to apply to everything the Court of equity can reach at the time. The answer to that is, that the engagement of a married woman is one which the Court of equity treats her as having power to make solely as against the property which at the time was settled to her separate use with no restraint on anticipation, and, as regards any property subsequently coming in, although it might be reached by the Court of equity by way of equitable execution, it is property which before the contract in question was not so; and therefore not property to be made available in a Court of equity in respect of an engagement which, as against that property, is no contract at all, and nothing that a Court of equity can enforce. That, I think, disposes of the

general argument on behalf of the respondents. In my opinion, therefore, it is impossible to say that here there is any right to claim, after the coverture, property which was settled at the time to her separate use with a restraint upon anticipation; and, in my opinion, there is no ground for saying that the property subsequently acquired by her for her separate use, without restriction as to anticipation, can be made available in answering her general engagements any more than it could her specific engagements entered into when she had some separate property, although not the property in question. It is right that I should say one word as to the cases cited. As regards the case of *Godfrey v. Harben*, before Vice-Chancellor Hall, which was pressed upon us, that to some extent favours the contention of the respondent. I think it better not to give my opinion on the express point decided there until it comes to the Court of Appeal; but that went very much further than the case it was supposed to follow. His decision, as I understand it, was that the power of appointment connected with the separate life estate when exercised made it separate property. In *The London Chartered Bank of Australia v. Lempriere* there was power to appoint by deed or will, which makes a great difference between that case and the case before Vice-Chancellor Hall. However, I express no opinion upon that case except to point out that distinction distinctly, leaving the case entirely free if and when it comes before the Court of Appeal.

Solicitors—Harting & Son, for appellant; Duffield & Bruty and Stevens & Co., for respondents.

JESSEL, M.R. }
 1881. } *In re* THE MUTUAL SOCIETY.
 March 14. }

Company—Contributory Summons in Winding-up—Representative Case—Costs.

The costs of a representative contributory summons in the winding up of a company are not to be allowed as between solicitor and client.

Part's Case (Law Rep. 10 Eq. 622) not followed on this point.

This was a summons by a contributory of the above-named company, now in course of winding up, and had been selected as a representative case. The facts do not appear to call for a report, but on the question of costs

Mr. Davey and Mr. Whitehorne, for the contributory, submitted that he ought to have his costs out of the assets of the company, and that they should be allowed him as between solicitor and client. They cited

Part's Case (ubi supra), in which the Vice-Chancellor Bacon, after deciding the case, said that as it was a representative case the costs of both parties, as between solicitor and client, would come out of the estate.

Mr. Chitty and Mr. Buckley appeared for the liquidator.

THE MASTER OF THE ROLLS.—I am rather alarmed at that. I am not inclined to establish that rule. He may take his costs out of the assets, but only as between party and party. If a shareholder is suing on behalf of himself and all the other shareholders, or a creditor is suing on behalf of himself and all the other creditors, he does not get costs as between solicitor and client. I shall not establish any such rule. It is entirely contrary to the whole practice of the old Court of Chancery.

Solicitors—Munns & Longden, for contributory;
 Linklater & Co., for liquidator.

[IN THE COURT OF APPEAL]

BANKRUPTCY.

JAMES, L.J.

BRETT, L.J.

COTTON, L.J.

1881.

JAN. 21.

Ex parte HALL; *in re* ALVEN.

Bankruptcy—Time for Appeal—Twenty-one Days—Appeal from County Court to Chief Judge—From Chief Judge to Court of Appeal—Rules of Court, 1875, rule 143—Bankruptcy Order of the 26th of May, 1878.

In appeals in bankruptcy from the County Court to the Chief Judge the old bankruptcy rule still applies, and therefore, in the computation of the twenty-one days within which, by rule 143 of Bankruptcy Rules, 1870, an appeal must be entered with the Registrar, Sundays are still excluded.

Secus, in appeals from Chief Judge to the Court of Appeal.

The County Court Judge gave his decision in the matter of the bankruptcy on the 6th of May, 1880.

On the 31st of May, 1880, notice of appeal to the Chief Judge was given, so that if the Sundays that occurred in that interval were held to be included the appeal would have been too late.

Upon opening the appeal before the Chief Judge an objection was raised to that effect, but was overruled.

If the Sundays were held to be included the appeal would have been too late.

Mr. Townsend (Mr. Ince with him) appealed.—The 143rd rule of the Bankruptcy Rules of 1870, providing that an appeal against a decision of the County Court Judge shall be entered with the Registrar not later than twenty-one days from the decision, has been held to be varied by rules 9 and 15 of Order LVIII., and the twenty-one days to date not, as has been held in bankruptcy, from the date of the pronouncing but of the signing of the order—

Ex parte Garrard; in re Lower, 46 Law J. Rep. Bankr. 70; Law Rep. 5 Ch. D. 61.

The question is, whether the new Rules of Court have varied the old bankruptcy

Ex parte Hall; in *re Alven* (App.), Bankr.

rule in appeals, not only to the Court of Appeal from the Chief Judge, but also from the County Court Judge to the Chief Judge. In

Ex parte Viney; in *re Gilbert*, 46 Law J. Rep. Bankr. 80; Law Rep. 4 Ch. D. 794,

it was held, overruling the Bankruptcy Order of the 26th of May, 1873, by which Sundays are excluded in the computation of the twenty-one days for appeal, that the Sundays are now to be included.

By Order LVII. rule 2, Sundays are to be excluded when the limited time is less than six days.

We say the new rules now prevail, both as regards appeals from the County Court Judge to the Chief Judge, and also from the Chief Judge to the Court of Appeal.

Mr. Winslow and *Mr. De Castro* were not heard.

JAMES, L.J.—This appeal must be dismissed. As between the Chief Judge and this Court the Judicature Act applies, but as regards appeals from the County Court to the Chief Judge that Act does not apply, and the old rule in bankruptcy still prevails.

BRETT, L.J., concurred.

COTTON, L.J.—*Ex parte Viney* came by way of appeal to this Court; and the rules under the Judicature Act applying to all appeals to this Court, we held that they would apply in that case, and not the old rule in bankruptcy. Here the appeal is an appeal in bankruptcy and the bankruptcy rule must apply.

Solicitors—George Presswell, for appellant;
Clarke, Rawlins & Clarke, for respondent.

FRY, J.
1881.
Feb. 24, 25, 26.
March 8. } BEDDALL v. MAITLAND.

Pleading—Order XIX. rule 3—Counter-claim—Jurisdiction—Landlord and Tenant—Tenant-at-will—Forcible Entry—5 Rich. 2. c. 8—Damages.

A counter-claim may be brought in respect of a cause of action arising after the issue of the writ in the original action.

A tenant-at-will holding over after notice to quit cannot recover damages against his landlord for forcible entry and eviction, but he can recover in respect of collateral injury to furniture.

Newton v. Harland (1 Man. & G. 644; 1 Sc. N.R. 474) followed.

This was the trial of an action and counter-claim brought in consequence of disputes which arose in respect of an agreement between Charles Beddall, one of the plaintiffs, and the defendant, Wm. L. Maitland, for the carrying on the business of nurserymen at Merton, which was entered into in January, 1877.

The statement of claim alleged that the effect of the agreement was to constitute the defendant a servant and manager of the business. That on the 8th of November, 1878, the plaintiff Beddall assigned his interest in the premises and the business and stock-in-trade to his co-plaintiff, H. T. Poulton. That after that date notice was given to the defendant to determine his employment as manager and to give up possession of a dwelling-house on the premises which he occupied as manager. The plaintiffs claimed a declaration of title to the nursery, an injunction restraining the defendant from interfering with the business and certain consequential relief.

The defendant alleged that the agreement constituted a partnership. He put in a counter-claim by which he claimed damages for breach of contract and for injuries alleged to have been done to him by the plaintiffs, and account and a lien on the premises.

Part of the wrongful acts alleged by the counter-claim consisted of forcible ejectment at a date subsequent to the

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issue of the writ. The counter-claim alleged that the plaintiff H. T. Poulton, aided and abetted therein by the plaintiff Charles Beddall, on the 5th of January, 1880, unlawfully and by force ejected the defendant from the house occupied by him, violently put him and his family out of the said house and also violently and recklessly put and threw out and unlawfully took possession of and damaged his goods and effects, and by such unlawful acts caused him loss to the extent of 1,000*l.* and upwards.

Mr. Cookson and *Mr. E. S. Ford* argued the plaintiffs' case on the action.

Mr. Beaumont argued for the defence, and was opening the counter-claim when objection was taken by *Mr. Cookson* to jurisdiction in a counter-claim in respect of a cause of action which arose since the issue of the writ in the original action. He relied on

The Original Hartlepool Collieries Company v. Gibb, 46 Law J. Rep. Chanc. 311; Law Rep. 5 Ch. D. 713;

Vavasseur v. Krupp, Law Rep. 15 Ch. D. 474.

Mr. Beaumont, *contra*, contended that a counter-claim was in the nature of a fresh action, and relief could be given upon it in respect of any cause of action accrued before the counter-claim was put in—

Child v. Stenning, 47 Law J. Rep. Chanc. 371; 48 *ibid.* 392; Law Rep. 7 Ch. D. 413; *ibid.* 11 Ch. D. 82;

Fritz v. Hobson, 49 Law J. Rep. Chanc. 321; Law Rep. 14 Ch. D. 542;

Chatfield v. Sedgwick, Law Rep. 4 C.P. D. 459;

Neale v. Clarke, Law Rep. 4 Ex. D. 286.

Mr. Cookson referred to

Stooks v. Taylor, 49 Law J. Rep. Q.B. 857; Law Rep. 5 Q.B. D. 569;

Winterfield v. Bradnum, 47 Law J. Rep. Q.B. 270,

as throwing light on the meaning of a cross action and counter-claim.

Fry, J., said—The point which now arises for my determination is one upon

which the Master of the Rolls has in the case of *The Original Hartlepool Collieries Company v. Gibb* expressed a decided opinion. He has held that the damages claimed by the counter-claim must be limited to the date when the writ in the original action was issued. The result of that of course is that a counter-claim can never extend to any right of action subsequent to the date of the original writ. The point is one of very great importance in regulating the proceedings under the Judicature Act, and as I have the misfortune to differ in opinion from the Master of the Rolls, I desire to encourage an application to the Court of Appeal in order that the question may be finally determined. I need not say that in differing as I do from the Master of the Rolls I differ from him with the greatest deference and the greatest doubt of the correctness of my own opinion; but having as it happens a strong opinion of my own upon this matter, I think it desirable and right to express it.

The provision of the Act of Parliament which creates the power to make a counter-claim is section 24, sub-section 3 of the Judicature Act of 1873, and that provides that, "The said Courts respectively and every Judge thereof shall also have power to grant to any defendant in respect of any equitable estate or right or other matter of equity, and also in respect of any legal estate, right or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleadings, and as the Courts respectively or any Judge thereof might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner." These words are of the utmost generality, and appear to me to give an independent right to the defendant to commence an independent action against the plaintiff; and I find nothing whatever in them either in letter or in spirit which confines the right of the defendant to some cause of action or dispute vested when the plaintiff commenced his original action. Then when I turn to the rules and forms of pleading appended to the Act, I find nothing in them which seems to me to interfere with

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the generality of those words. The 3rd rule of Order XIX. provides that "a defendant in an action may set off, or set up, by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action, both in the original and on the cross claim." It is to my mind evident, then, that there is no intention to confine the claim made by the counter-claimant to damages, or to an action of the same nature as the original action; and therefore, when it is said that the defendant may set up against the claims of the plaintiff a claim of his own, it does not mean necessarily that that is a claim *ejusdem generis*, because it says expressly "whether such set-off or counter-claim sound in damages or not." The plaintiffs' right may be in damages, the defendant's right may be to an injunction or to any other equitable relief not sounding in damages, and therefore there is nothing to limit the nature of set-off or setting up against the claim, so as merely to counteract the claim, or which confines the right of the defendant. It is quite true that in Order XX. provision is made for enabling the defence to be brought down to a date later than the commencement of the action, and the Master of the Rolls has inferred from thence that the counter-claim not being mentioned cannot extend down to the same date as the defence. It so happens that I read the rule in a very different way. I think that the rule introduces this liberty with regard to defence only, because the liberty existed with regard to counter-claim by the statute, and therefore it was not necessary for the rule to have any reference to the counter-claim.

I cannot help observing that the construction of the Master of the Rolls appears to me to be open to this very serious objection, that it requires the defendant, who has separate causes of action beginning before and after the date of the original writ, to separate those causes of action; the one which goes

down to the date of the original writ he may ventilate by means of a cross claim; in respect of the other he must issue an independent writ. Now I think that the general spirit of the Judicature Acts is especially to prevent multiplicity of procedure, and to enable the parties to settle as far as may be, by one hearing and one judgment, all questions in controversy between them. If I confine the ambit of the counter-claim to causes of action before the original writ, I should interfere in many cases with the power of the defendant to obtain by one single adjudication the settlement of all rights between him and the plaintiff. But I am very much confirmed in the view which I take by the case of *Stooke v. Taylor*, to which Mr. Cookson has called my attention. Now, there I find a reference to the earlier case of *Winterfield v. Bradnum*, where the Lord Justice Brett said this: "A counter-claim is sometimes a mere set-off; sometimes it is in the nature of a cross action; sometimes it is in respect of a wholly independent transaction. I think the true mode of considering the claim and counter-claim is, that they are wholly independent suits, which for convenience of procedure are combined in one action." Now I take the liberty of saying that I concur entirely in that view. It seems to me to be the sound expression of the result of the Judicature Acts. The late Lord Chief Justice also, in the case of *Stooke v. Taylor*, said this: "The law as to the difference between set-off and counter-claim is correctly stated by Mr. Pitt Lewis in his very useful work on *County Court Practice* (p. 321). 'A set-off,' he says, 'would seem to be of a different nature from a defence, inasmuch as a set-off appears to shew a debt balancing the debt claimed by the plaintiff, and thus leaving nothing due to him; while a counter-claim, it would seem, consists of a cross claim, not necessarily extinguishing or destroying the plaintiff's demand.' In other words, a set-off appears to consist of a defence to the original claim of the plaintiff. A counter-claim is the assertion of a separate and independent demand, which does not answer or destroy the original claim of the plaintiff. The right to rely on a set-off has long

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existed. The right to set up a counter-claim was first given by the Judicature Acts."

I will refer to another passage in the judgment of the Lord Chief Justice at an earlier page. "This reasoning" (that is, the reasoning which he has referred to) "does not apply to a counter-claim, the effect of which, as distinguished from a mere set-off, is altogether different. It is, as I have already pointed out, to all intents and purposes an action by the defendant against the plaintiff. It is not confined to debts or liquidated damages. It is not even necessary that the claim should be analogous to that of the plaintiff. A claim founded on tort may be opposed to one founded on contract, or *vice versa*. But the most striking difference is, that the counter-claim operates not merely as a defence, as does the set-off, but in all respects as an independent action by the defendant against the plaintiff." In that view I again take the liberty of saying I entirely concur.

The Master of the Rolls in the case of *Vavasour v. Krupp*; to which my attention has been called, held that the counter-claim fails or falls to the ground with the original cause of action. If the view of the late Lord Chief Justice of England and of Lord Justice Brett, and also, I may add, of Mr. Justice Manisty, in the same case of *Stooke v. Taylor*, be the correct one, that the counter-claim constitutes a wholly independent suit, it would seem, to say the least, doubtful whether the decision of *Vavasour v. Krupp* is correct; and I only refer to that for the purpose of adding, that it appears to me that the decision in that case is one of great inconvenience, because the result is this, that if a defendant chooses to bring an independent action, he goes on with it whether the plaintiff proceeds with his action or not; whereas if he states the same cause of action by counter-claim, the defendant's right to recover in that action is defeated, however great may have been the expense in preparing for it, by the plaintiff simply dropping his original action. I express no other opinion upon it than to say that I do not feel I ought, on the ground of that decision of the Master of the Rolls, to do

other than express the opinion I have with regard to this case. I am very anxious, I repeat, that the matter should be decided by the Court of Appeal; but meanwhile I think it my duty, considering it is a matter of general and public interest and one in which the Courts appear to me to differ, to act on my own opinion. Therefore I shall allow Mr. Beaumont to proceed with that part of his case.

Mr. Beaumont, in continuing his argument, contended that even in the view that the defendant was a mere tenant-at-will, his original possession being lawful, the plaintiffs, by force of 5 Rich. 2. c. 8, were wrongdoers in forcibly entering and evicting him, and were liable in damages in respect of that wrongful conduct. At the very least they were liable for injury to his furniture and family—

Newton v. Harland (ubi supra);

Hillary v. Gay, 6 Car. & P. 284.

Mr. Cookson replied on the action, and in defence to the counter-claim, said—If

Newton v. Harland (ubi supra)

were good law, it was distinguishable in that the plaintiff Poulton had been let into possession peaceably, and was afterwards locked out before he took forcible possession. The possession of the defendant had not a lawful origin, and the plaintiff Poulton was justified in using force to turn out a mere trespasser—

Lows v. Telford, 45 Law J. Rep.

Exch. 613; Law Rep. 1 App. Cas. 414.

But

Newton v. Harland (ubi supra)

is not a binding authority; and as matter of law the defendant at highest was a mere tenant-at-will, holding over, notwithstanding notice to quit, and, being himself a wrongdoer in the matter, had no civil remedy and could recover no damages—

Jones v. Chapman, 2 Exch. Rep. 603; 18 Law J. Rep. Exch. 456;

Harvey v. Brydges, 14 Mees. & W. 437; 14 Law J. Rep. Exch. 272;

Davis v. Burrell, 10 Com. B. Rep. 821;

Pollen v. Brewer, 7 Com. B. Rep. N.S. 371.

Fry, J., gave judgment for the plaintiffs

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on the action and part of the counter-claim, and reserved his judgment on that part which related to damages to the furniture.

Fry, J. (on March 8), stated the nature of the counter-claim, and said that claim divided itself into two—one for entry and eviction, the other for injury done to the furniture and effects of the defendant. Separate considerations arise, in my opinion, in respect of the two claims. According to the evidence, the defendant was a manager, and was not in exclusive possession of the nursery; but as to the house, he was in possession as tenant-at-will; and I have come to the conclusion that the plaintiff Poulton did make forcible entry into the house. There are two accounts before me of what happened. According to the evidence of one witness, the plaintiff Poulton originally got into the house peaceably, and on going out was locked out, and afterwards effected forcible entry. The defendant's account is different. In my opinion it is immaterial which version is true, and I hold that the whole result was a forcible entry by the plaintiff Poulton.

The questions which arise in that state of circumstances are complicated by the fact that the possession of the defendant was unlawful, and the entry was also unlawful, the taint of unlawfulness affecting the acts of both parties. The unlawfulness of the entry arises from the statute of 5 Rich. 2. c. 8, which enacts, "That none from henceforth make any entry into lands and tenements but in cases where entry is given by the law, and in such case not with strong hand nor with multitude of people, but only in peaceable and easy manner." That statute creates one of the greatest differences which exists in our law between being in and out of possession, which is familiarly expressed by the saying, "that possession is nine-tenths of the law." The result is, that where a man is lawfully in possession he may use such force as is necessary to keep his possession. But if a trespasser has obtained possession lawfully, the owner may not have recourse to force, but must have recourse to the civil Court to turn out the trespasser. The result

seems to be that, inasmuch as his possession was unlawful, the defendant can recover no damages for the wrongful entry. The statute which makes the forcible entry unlawful provides a penalty, but gives no civil remedy. With respect, however, to injury to furniture, a right of action does arise, because the defendant in such an action cannot allege that his possession, which was contrary to the statute, was lawful, therefore his plea of lawful possession fails.

That appears to me to be the result of the cases. The leading authority on the point undoubtedly is the case of *Newton v. Harland*. That case evoked a great difference of opinion among the Judges. It was tried no less than three times, and must, in my judgment, be considered as expressing the law on the subject. In that case, upon the pleading the plaintiff and his wife declared for an assault on the wife and forcing her into the street, and the defendants justified by reason of the landlord being in the lawful possession of the house, and the wife of the tenant being unlawfully therein. Chief Justice Tindal considered that if the landlord in making his entry upon the tenant had been guilty either of a breach of positive statute or of an offence against the common law, such violation of the law in making the entry caused the possession thereby obtained to be illegal, and that the allegation in the case that one of the defendants was lawfully in possession at the time the assault was committed was rejected; on the other hand, where the cause of action laid is simply for eviction, no such cause of action exists. That such is the law is abundantly shewn by the case of *Pollen v. Brewer*, to which my attention was very much called; and is also the result of other cases not cited in Court. One of the cases in which *Newton v. Harland* was cited is that of *Harvey v. Brydges*, where undoubtedly the learned Barons Parke and Alderson expressed their dissatisfaction with it; but they were the learned Judges who had respectively tried the case on the two occasions, after which a new trial was directed. Again, the case of *Davison v. Wilson* (1)

(1) 11 Q.B. Rep. 890; 17 Law J. Rep. Q.B. 196

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turned on the question whether to an allegation of force, and also that the entry "was against the form of the statute," a plea that the freehold was in one of the defendants was good; and it was held that the plea went to the whole averment—in other words, that the gist of the action was the entry, and that the words "*manu forti*," and "against the form of the statute," were mere aggravation. *Meriton v. Coombes* (2) also turned on the form of the pleading. It was held that the plea of *liberum tenementum* justified expulsion as well as entering and breaking and seizing goods averred by the declaration.

There is only one other case to which I will refer—the case of *Lous v. Telford*, which was an action for malicious prosecution, in which it was held that there was reasonable cause for the prosecution, as the facts shewed that the persons prosecuted were, at the time of the expulsion of the prosecutor, disturbing a possession that had been lawfully acquired by him. I think those cases in no way conflict with the law as laid down in *Newton v. Harland*, and that establishes that in respect of the forcible entry the defendant cannot maintain his counter-claim, but he can in respect of the damages and his furniture. The result is that I shall direct an enquiry to ascertain the amount of those damages.

There remains the question of costs. In respect of the greater part of the counter-claim, I dismissed it at the hearing. I am giving relief in respect of a small part of it. I should be obliged to do one of two things—either to apportion the costs, or to take what I think under the circumstances the better course, to give relief without costs.

Solicitors—F. C. Tudor, for plaintiffs; E. Johnson, for defendant.

[IN THE COURT OF APPEAL]

JESSEL, M.R.
JAMES, L.J.
COTTON, L.J. } THE PLATING COMPANY
1881. (LIMITED) v. FARQUHAR-
SON.

March 23.

Contempt of Court—Issue of Advertisements—Motion to Commit.

Pending an appeal from a judgment pronouncing in favour of the validity of a patent owned by the plaintiffs, advertisements were issued in a newspaper—one asking for funds to carry on the appeal on the ground that the action was a test action in which the trade generally were interested, and the other offering a reward of 100l. to anyone who could produce documentary evidence that the art of nickel plating was carried on before a certain date.

Motion to commit the printers of the newspaper for contempt of Court was dismissed with costs.

Pool v. Sacheverel (1 P. Wms. 675) questioned.

Motions to commit, when there is no intention to ask for committal, but merely for an apology and costs, will be discouraged, and no costs of such motions will be given.

This was an application by the plaintiff company for the committal of John Jaffray and John Feeny (trading as Jaffray, Feeny & Co.), printers and publishers of the *Birmingham Daily Post*, for contempt of Court in publishing advertisements having reference to the above action and the appeal then pending, and tending to prejudice the plaintiffs in the prosecution of the said action and appeal, and the hearing of the said appeal.

On the 17th of February, 1881, judgment was given by Bacon, V.C., in the action of *The Plating Company (Lim.) v. Farquharson*, in favour of the plaintiff company, declaring the validity of Adam's or Brooke's patent, of which they were the owners, established.

The defendants, on the 26th of February, served notice of appeal from the judgment of Bacon, V.C.

The advertisements complained of were inserted in the *Birmingham Daily Post* of Tuesday, March 1, 1881. The first was as follows:—

"Important notice to nickel platers

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and manufacturers.—*The Plating Company (Lim.) v. Farquharson and Others (trading as 'The Nickel Plating Company')*.—Judgment having been given against the defendants for an alleged infringement of Adam's patent process for nickel plating, it is proposed to carry the case into the Court of Appeal, provided the trade will come forward and subscribe the necessary funds for doing so.

"The defendants have been put to very great expense in defending this action, which has lasted several days, and which is really a test action, and if the verdict is not reversed it will deter any firm from practising the art of nickel plating by any process whatever, except the plaintiffs and their licensees.

"The matter being of urgent and vital importance to all nickel platers, your subscription is earnestly solicited, and the defendants venture to hope that this appeal will meet with a hearty response from all interested. Several influential firms have already come forward and volunteered to pay their share of the expenses, and the defendants hope that their example will be followed by all in the trade."

Immediately above this advertisement was one issued by the plaintiff company headed "Caution to electro nickel platers and dealers in electro nickel plated articles." It then stated that the Chancery Division of the High Court had in the judgment in the action "fully established the exclusive right of the plaintiffs under their patent, and gave notice that the plaintiffs would take legal proceedings against infringers of their patent rights, but would be prepared to entertain applications for licences for persons desirous of using the invention."

In the same paper, on the same day, another advertisement appeared, which was as follows:—

"Nickel plating.—100*l.* reward to any one who can produce documentary evidence that nickel plating was done previous to 1869. Address P., *Daily Post*."

The solicitor of the plaintiffs on observing the advertisement wrote to the publishers asking for information of the name of the person who had inserted the

advertisement. They denied all knowledge, and stated that it was paid for over the counter and brought in the form of a circular, and by their affidavit in answer to the motion denied all knowledge of any impropriety of the advertisements, or that either of them were in any way calculated to interfere directly or indirectly, or were capable of being regarded as an endeavour to interfere with the due course of justice; and proceeded:—

"We have not nor has either of us any interest whatever, direct or indirect, in the subject-matter of the action, and we are not nor is either of us acting in collusion in any way either directly or indirectly with the above-named defendants or persons interested with them."

The plaintiff company now moved to commit the printers for contempt.

Mr. Aston and Mr. Seward Brice appeared for the company.—The advertisements are improper—the second particularly so—which can only have the object of gathering evidence which the defendants failed to produce in the Court below. They have seen what pressed against them in the action there, and now they are advertising for evidence, and offering money which may not improbably tend to induce persons to forge documents.

The case of

Pool v. Sacheverel (ubi supra)

is an authority in favour of this application, where Parker, L.O., held an advertisement issued by the plaintiff in the action offering a sum of money for evidence to disprove a marriage was a contempt of Court, as tending to subornation of perjury.

That case was referred to as an undoubted authority by Cottenham, L.C., in

Mr. Lechmere Charlton's Case, 2 Myl. & Cr. 316, 349; 6 Law J. Rep. Chanc. 185.

We do not, however, ask for a committal, but shall be contented with an apology and the payment of the costs of the motion.

Mr. Davey and Mr. Phipson Beale, for the printers, were not called upon.

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JESSEL, M.R.—This is an application to commit printers for contempt of Court for inserting two advertisements in a newspaper. These advertisements they inserted in the ordinary course of business, and had no more intention of interfering with the administration of justice than the boy who carried out the newspapers. To justify an order for committal it must be shewn that the advertisements on their face would convey to the mind of a person of ordinary intelligence that they would tend to interfere with the administration of justice. Not only was there nothing of the kind here, but, in my opinion, no ground for impeaching the propriety of the advertisements has been shewn. [His Lordship here read the plaintiffs' advertisement.] The plaintiffs do not appear to have been very careful themselves, for it is perhaps not quite correct to say after the notice of appeal had been given that their rights had been "fully established" by the judgment of the Chancery Division. Now the defendants inserted the following advertisement—[Reads it]. The first part of it states a fact; the second part states a matter of opinion. It was the defendants' opinion that the judgment would deter any firm from practising the art of nickel plating by any process. I am utterly at a loss to see what there is improper in that advertisement. All the trade were interested in freeing the trade from a monopoly, whether by a patent or otherwise. It is customary for all the traders who are interested in opposing a patent to combine for that purpose, in the same way that persons who claim rights of common combine to defend them. When there is a common interest the persons entitled to it may combine to defend it, otherwise traders might be attacked in detail, and might each fail though the patent was a bad one. There is nothing wrong in the advertisement, and certainly nothing in it to inform the printers that it was improper. The other advertisement is this—[Reads it]. It was said that it would induce persons to forge documents. But in the first place 100*l.* is not a very large sum, and in the next place documentary evidence is not easily forged. The whole notion is a wild one,

and not grounded on any reasonable construction of this advertisement. It is in a very common form. It is the constant practice to advertise offering a reward for the discovery of a lost deed or will or certificate of marriage. That is a matter of course, and I have never heard it suggested that it is illegal.

In my opinion the whole notion of making motions like these against editors and printers of newspapers ought to be discouraged. They add considerably to the amount of the costs and expenses of legal proceedings. Unless the Court is satisfied that the action is a contempt it should not interfere.

The case of *Pool v. Sacheverel* has been cited as an authority in favour of the present application. I do not profess to understand that case as reported. The advertisement in that case seems to have been one offering a reward for oral evidence to disprove a marriage which had been already pronounced good in the Court of Delegates, and found good in a trial at bar in the Common Pleas; and this was treated by Lord Chancellor Parker as being a direct inducement to subornation of perjury. The motion to commit was made against a party to the cause. Upon the facts stated in the report I should not have come to the same conclusion. Of course if any attempt were made to suborn witnesses that would be a contempt of Court. But an advertisement for evidence to prove something not in the knowledge of the advertiser, but which he believes to be true, could not be treated as a subornation of perjury. Therefore that case does not apply to the present. But I should, if necessary, feel myself at liberty to disregard that case.

JAMES, L.J.—I am of the same opinion. If this motion had been made against the defendants themselves it must have failed. As made against the printers it is idle, extravagant and to be discouraged. As regards the case which has been referred to, it appears to me to be inconsistent with the practice of the government of this country offering rewards for the conviction of offenders.

COTTON, L.J.—I have arrived at the

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same conclusion. I entirely disapprove of motions to commit being made when there is no real ground for committal, and no intention of asking for a committal, but only for an apology and payment of the costs of the motion. In such cases I think no costs ought to be given of the motion.

JESSEL, M.R.—I desire to express my entire concurrence with what Lord Justice Cotton has said.

JAMES, L.J.—So do I. I think the motions are themselves a contempt of Court.

Motion refused with costs.

Solicitors—W. Foster, for the company; Spencer Whitehead, agent for Whateley, Milward & Co., Birmingham, for the printers.

[IN THE COURT OF APPEAL.]

JAMES, L.J.	} THE METROPOLITAN BOARD OF WORKS v. THE LONDON AND NORTH WESTERN RAILWAY COMPANY.
COTTON, L.J.	
LUSH, L.J.	
1881.	
March 7, 8.	

Metropolis Local Management Act, 1862 (25 & 26 Vict. c. 102), s. 61—*Metropolitan Main Drain—Drainage from Property outside the Area—Injunction.*

By the Metropolis Management Act, 1862, s. 61, no person shall make any sewer or drain, or make any opening into any sewer vested in the Metropolitan Board of Works without the previous consent in writing of such Board; provided that it shall be lawful for any person with such consent, at his own expense, to make any drain into any sewer vested in such Board in such manner as the Board shall direct.

The defendants were the owners of land situated immediately outside the metropolitan drainage area, and abutting on to a certain brook. There were four cottages on the land, and the surface drainage of the land and the sewage of the four cottages were discharged into the brook by an eighteen-

inch barrel drain. The brook was by the Metropolis Management Act, 1862, vested in the Metropolitan Board of Works as a sewer and part of the metropolitan drainage system. In 1871 the Board under their statutory powers covered in the brook as a sewer, and made a drain-eye connecting the eighteen-inch barrel drain with the sewer, by means of which the drainage from the defendants' land and four cottages was discharged into the sewer as theretofore. The defendants subsequently erected additional cottages on their land, and claimed to drain such new buildings into the sewer through the eighteen-inch barrel drain. In an action by the Board to restrain them from so doing,—

Held, that the defendants not having proved any prescriptive right of drainage in respect of the additional cottages, and not having obtained the written consent of the Board under section 61 of the Act of 1862, were not entitled to use the eighteen-inch barrel drain for any other purpose than the drainage of the four old cottages and of the surface land as theretofore; and, therefore, that the plaintiffs were entitled to an injunction.

This was an appeal by the defendants from a decision of Hall, V.C., reported 49 Law J. Rep. Chanc. 355; Law Rep. 14 Ch. D. 521, granting an injunction restraining the defendants, who were owners of property situated outside, but adjoining the boundary of, the area to which the Metropolitan Local Management Acts apply, from pouring the sewage from certain cottages erected by them on their property into the metropolitan main drain within the area.

Mr. Davey and Mr. Speed, for the appellants.—The question is confined to the additional cottages that have been built on the land. We do not place our case on contract, although the company did pay a large sum towards covering in Stamford Brook; but we say that we are entitled to use this eighteen-inch barrel drain for all purposes either as riparian proprietors or under section 61 of the Act of 1862. We are owners of the land abutting on the brook, and are entitled to the whole, or, at any rate, one-half of the

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bed of the brook. Therefore as riparian proprietors we have a right to use the brook for all purposes so long as we do not commit a nuisance against other riparian proprietors or the public. Having that right at the time the brook was by section 135 of the Act of 1855 vested in the Metropolitan Board of Works as a common sewer, we do not lose that right because it was so vested in them, but are entitled to use the eighteen-inch barrel drain up to its full capacity for the discharge of sewage. The question of nuisance does not arise, because the brook had become a common sewer at the time it was vested in the Board, and was vested in them because it was a common sewer. Further, we say that we are entitled under section 61 of the Act of 1862 to use the eighteen-inch barrel drain for all purposes. "Any person" in that section means "any person" including corporations, and is not restricted to persons residing within the metropolitan area. The Board having consented to the drain eye being made to connect our drain with the sewer cannot now prevent our using it to its full capacity, nor restrict our user of it, except under section 135 of the Act of 1855, which empowers them to close unnecessary sewers, which this is not.

Mr. W. Pearson and Mr. Everitt, for the Board.—We say that the defendants are limited to the drainage that existed at the time the drain-eye was made. They cannot enlarge the burden originally cast upon us without our consent, and no such consent has been given. The connection was made only for surface water of the land and the surplus sewage from the four cottages. "Any person" in section 61 of the Act of 1862 must be restricted to any person residing within the metropolitan area. To understand the section it must be read with section 77 of the Act of 1855 (which it repeals), and sections 72–77 of that Act, from which it is evident that the words "any person" must be confined to the person mentioned in the previous sections—that is, persons residing within the metropolitan area. The powers of the Board of Works are limited to the purposes for which they were created by the Legislature, and they have no power, and it would be *ultra*

vires for them, to give leave to persons residing outside the metropolitan area to drain sewage into the metropolitan sewers. Nothing has been done under section 61 of the Act of 1862 by the Board to give the defendants any right to drain these additional cottages into this sewer.

They were stopped.

[JAMES, L.J.—Mr. Davey, what prescriptive right do you allege? Have you alleged any prescriptive right at all?]

In terms we have not. We admit when we launched our case we thought we could prove a contract.

[JAMES, L.J.—Really there is no contract proved. There is no prescriptive right, and no application was made to the plaintiffs under the 61st section of the Act.]

All that the section says is that the drain is to be made with consent in writing.

[LUSH, L.J.—You have not obtained that.]

We have their consent, because they made the drain-eye for the purpose of connecting our drain with the sewer, and they wrote us a letter to that effect.

[LUSH, L.J.—You have no title under the Act.]

If your Lordships think so, we cannot carry the case any further.

Mr. Yate Lee watched the case for the Willesden Local Board.

JAMES, L.J.—This appeal must be dismissed with costs. On the facts it is quite clear there are no such prescriptive rights as have been alleged. If a man has an artificial drain or sewer by which he drains either water or sewage into his neighbour's land he cannot use that drain so as to drain another close or another house. It seems to me impossible to suppose that there is anything in the English law to say that a man has as much right to as much sewage and water as can come from anywhere, limited only by the size of the particular drain.

COTTON, L.J.—I am of the same opinion. It would have been a different question if the opening into the sewer, so as to let in whatever comes to this eighteen-inch cul-

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vert, had been made under section 61 of the Act. A very different consideration would have applied, because under that section it seems when permission has been given for any opening to be made into the sewer of the Metropolitan Board of Works the only limit apparently is then the size of the opening so made, or of the drain which is so introduced. But the Act is entirely out of the question, because all that was done was this: When this water-course was turned from an open into a covered sewer then the Board of Works made an opening for the then existing drain to find its way, as it had previously done, into this sewer. Then one comes to the rights of the parties entirely independent of the Act with one exception. Under the Act of Parliament this stream is the sewer for a certain district—that is, for the metropolitan district. But the railway company are outside that. Therefore as regards the railway company they cannot allege that it is a sewer constituted by the Act for the purpose of their district. As between them and the Metropolitan Board of Works it must be looked on as if it were no sewer at all, but simply a stream, the property of the Metropolitan Board of Works. Then comes the question, How can the railway company justify increasing the burden which their drain throws into that stream? It is clear on the evidence what they propose to do will increase the burden which the stream bears in consequence of the communication. That being so, they cannot possibly do that. There is no authority given by the Act to do it, and according to the general law they have no right to add to any burden of their neighbour unless by contract with that neighbour, which in this case does not exist, or by long user—that is to say, by prescription—which also does not exist here. In my opinion the plaintiffs are right, and the appeal must be dismissed.

LUSH, L.J.—I am entirely of the same opinion, and upon the same grounds.

Solicitors—R. F. Roberts, for the railway company; R. Ward, for the Metropolitan Board of Works.

[IN THE HOUSE OF LORDS.]

1880.	}	DAHL v. NELSON, DONKIN AND COMPANY.
Nov. 16,		
17, 23, 24.		
1881.		
Jan. 13.		

Charter-party—Construction—“So near thereunto as she may safely get”—Block in Dock named in Charter-party.

A ship was chartered to proceed to “London Surrey Commercial Docks or so near thereunto as she may safely get and lie always afloat.” On arrival outside the dock admittance could not be obtained owing to the dock being already full. The master then went to Deptford Buys, the nearest place where the ship could lie with safety, and called upon the charterer to take delivery there. On the charterer refusing to do so, the master discharged the goods by lighters on the wharves of the Surrey Commercial Docks.

In an action by the shipowner for demurrage and charges,—

Held, first, that the place of discharge being named by both parties in the charter-party, neither was bound to provide for the admittance of the ship or liable for its exclusion; secondly, that the ship had not completed its primary contract to proceed to London Surrey Commercial Docks by merely arriving outside the dock gates; but, thirdly, that it had carried out the alternative contract to go as near thereunto as it could safely get, and that the charterer was therefore liable for demurrage.

This was an appeal from a decision of the Court of Appeal reversing one of Jessel, M.R. (reported Law Rep. 12 Ch. D. 568).

The facts fully appear in the judgments.

Mr. Charles Russell and Mr. A. L. Smith (Mr. R. T. Reid with them), for the appellants.—The question is as to the meaning of the words in the charter-party “or so near thereunto as she may safely get.” There is no case in which these words have been held to refer to other than physical difficulties. They are common form, not used with reference to any particular dock; no argument, therefore, arises from the fact that there could be no

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physical difficulty here. The additional words, "and lie always afloat," shew that physical difficulties are meant. No reference is intended to a block in the docks. In such a case the vessel must wait till she can get in; and the ordinary rule is that the shipowner is liable for delay in getting into dock, the charterer for delay in dock—

Tapscott v. Balfour, 42 Law J. Rep. C.P. 16; Law Rep. 8 C.P. 46;

Davies v. McVeagh, 48 Law J. Rep. Exch. 686; Law Rep. 4 Ex. D. 265.

The parties shewed what they themselves thought was the true construction of the words. They are put in for the protection of the shipowners; yet the respondents never contended for the construction adopted by the Court of Appeal. The correspondence shews that they took two grounds—first, that the vessel had been into dock; secondly, that it was the charterers' duty to make arrangements for her admission into dock. The statement of claim does not allege that the ship was lying as near as she could safely get. It is alleged that she was very unsafe, though in the alternative it is alleged that she was as near as she could get with any degree of safety.

James, L.J., was the first to suggest the view of the contract adopted by the Court of Appeal.

The following cases were referred to:—

Shield v. Wilkins, 5 Exch. Rep. 304;

19 Law J. Rep. Exch. 238;

Schilizzi v. Derry, 4 E. & B. 873;

24 Law J. Rep. Q.B. 193;

Blight v. Page, 3 Bos. & P. 295 n.

Parker v. Winlo, 7 E. & B. 942;

27 Law J. Rep. Q.B. 49;

Metcalfe v. The Britannia Ironworks Company, 45 Law J. Rep. Q.B. 837; 46 *ibid.* 443; Law Rep.

1 Q.B.D. 613; *ibid.* 2 Q.B.D. 423.

Mr. Benjamin and Mr. Cohen (Mr. Rigby with them), for the respondents.—The ship did "proceed to London Surrey Commercial Docks," though she could not get inside.

[LORD BLACKBURN referred to

Stewart v. The Greenock Marine Insurance Company, 2 H.L. Cas. 159.]

At all events she went as near there-

unto as she could safely get and lie always afloat.

Postlethwaite v. Freeland, 49 Law J.

Rep. Exch. 630; Law Rep. 5 App.

Cas. 599,

shews that a ship has finished her voyage and fulfilled the contract as to navigation when it has arrived at the dock, though from some obstacle from land it cannot get in. Then comes the contract as to delivery. Here it was the duty of the charterer to provide berth.

[LORD BLACKBURN.—That is not made out. You do not allege that a custom is proved.]

No; we must rely upon the construction of the contract and the general law—

Capper v. Wallace, 49 Law J. Rep.

Q.B. 350; Law Rep. 5 Q.B.D. 163.

In

Schilizzi v. Derry (ubi supra)

there was nothing to shew from day to day that the water would not rise sufficiently next day to enable the ship to go into the harbour, but she abandoned the voyage and went to Odessa. The fact that the water did not rise till an unusually late period could make no difference.

[THE LORD CHANCELLOR.—She did wait a month.]

The decision in

Jackson v. The Union Marine Insurance Company, 42 Law J. Rep. C.P.

284; 44 *ibid.* 27; Law Rep. 8

C.P. 572; *ibid.* 10 C.P. 125,

is in principle strictly analogous; for it was contended that the freight was not lost by peril of the sea, that the shipowners had a right to repair, and then insist on the charterer loading, and that if they did not, the freight was lost by their own act. But it was held that the time occupied in repairing would have been so long that it would be unreasonable for the charterer to wait—

Geipel v. Smith, 41 Law J. Rep. Q.B. 153; Law Rep. 7 Q.B. 404.

Then as to the construction of the words "so near thereunto as she may safely get," suppose the word "safely" omitted, the question would be, whether the ship could enter within a reasonable time. Here admittedly it could not. The word "safely" is added for the protection

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of the shipowner, and ought not to increase his liability—

Ogden v. Graham, 1 B. & S. 778; 31 Law J. Rep. Q.B. 26.

But if there had been no such clause, still the appellants ought to fail. It was admitted in the Court below that if the ship once got into dock—there being here no lay days—the discharge was to commence at once. Lay days begin immediately on entry into dock, although the charterers might order the ship into a particular berth, and the discharge could not really begin till she arrived there.

Tapscott v. Balfour (ubi supra);

Ashcroft v. The Crow Orchard Colliery Company, 43 Law J. Rep. Q.B. 194; Law Rep. 9 Q.B. 540;

Davies v. McVeagh (ubi supra);

Randall v. Lynch, 2 Campb. 356;

Ford v. Oatesworth, 38 Law J. Rep. Q.B. 52; 39 *ibid.* 188; Law Rep. 4 Q.B. 127; *ibid.* 5 Q.B. 544.

[LORD BLACKBURN.—Where there were no lay days, Lord Tenterden ruled the other way—

Rogers v. Hunter, Moo. & M. 63.]

The principle is that the dock company are the agents of the charterer, and he is responsible for their delay. If the dock company had no lighters, the charterer would be responsible.

[LORD BLACKBURN.—

Postlethwaite v. Freeland (ubi supra), in this House, decided otherwise.]

The decision there went on the contract that the cargo should “be discharged with all despatch, according to the custom of the port.”

[LORD BLACKBURN.—

Burmester v. Hodgson, 2 Campb. 488,

seems similar, and is against that contention.]

Hill v. Idle, 4 Campb. 327.

There is no difference between a ship in dock, and there detained because the charterer is not ready to discharge, and a ship unable to enter the dock because the charterer is not ready to discharge. See the observations of Bramwell, L.J., in

Davies v. McVeagh (ubi supra).

The ship was, to all intents and purposes, at the end of her voyage, and was

detained owing to the charterer's inability to perform his part of the contract.

Mr. A. L. Smith, in reply.

Our. adv. vult.

LORD BLACKBURN.—The question in this case is, whether the defendants have broken the contract into which they have entered with the plaintiffs; and the first matter to be considered is, what was that contract?

It is contained in a charter-party, dated on the 21st of June, 1877, in a printed form filled up in writing, made between the plaintiffs, owners of the *Euzine* steamship, and the defendants, by which it is agreed that the *Euzine* should proceed to a port named, and there load from the defendants a full cargo of deals. This was done, and there is no dispute about that part of the contract. The charter-party then proceeds, that the *Euzine* “being so loaded shall therewith proceed to London Surrey Commercial Docks, or so near thereunto as she may safely get and lie always afloat, and deliver the same on being paid freight” at a specified rate, certain perils mentioned always excepted. The other provisions, which are material, are as follows: “The cargo to be supplied to the steamer at port of loading as fast as she can take the same on board—Sundays and legal holidays excepted—and to be received at port of discharge as fast as steamer can deliver as above. And ten days on demurrage, over and above the said laying days, at thirty pounds per day, payable day by day, it being agreed upon, that for the payment of all freight, dead freight and demurrage, the owner shall have absolute charge in lien on said cargo. The cargo to be brought to, and taken from alongside, the ship at merchants' risk and expense.”

The *Euzine* was not delayed or hindered by any of the excepted perils, and arrived at the entrance of the Surrey Commercial Docks. It was refused admittance to the docks, under circumstances which I shall state more fully afterwards.

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The plaintiffs tried to prove that there was a custom in London as regards this trade, such as to be tacitly incorporated in the written contract. In this they failed, and consequently the liabilities which the parties have by the contract taken upon themselves must depend on what is the true construction of the charter-party.

The plaintiffs contended in the Court below that by such a charter-party as this the merchant undertakes to procure the ship admission into the docks. Neither the Master of the Rolls nor the Judges in the Court of Appeal took this view of the charter-party, and it was not much urged at your Lordships' bar. I think it is clear that it is untenable. The legal effect of the contract, in my opinion, as far as regards the shipowner, is, that he binds himself that his ship shall (unless prevented by some of the excepted perils) proceed to the discharging place agreed on in the charter-party. This is, in this case, the Surrey Commercial Docks (which must, I think, mean inside the docks), with an alternative, "or so near thereunto as she may safely get and lie always afloat."

The legal effect, as regards the obligation on the merchant, is, I think, that he binds himself, on the ship arriving at the place where it is to deliver, to take the cargo from alongside, and for that purpose to provide the proper appliances for taking delivery there. If, as both parties wished and expected, it got to a discharging berth within the dock, the merchant was, by himself, or the dock company as his agents, to provide proper means for landing the cargo on the quay. If the ship may not get safely farther than the entrance of the docks, and is entitled to require the merchant to take delivery in the river (which is what, it is said by the plaintiffs, has happened in this case), the merchant must provide lighters or other craft to take the cargo from alongside, unless it is arranged by the parties that, instead, it should go into some other dock.

If the ship had been permitted to get into the docks and lie there, but had been unable to get to a discharging berth, the merchant might have brought

lighters to it and taken delivery in the middle of the docks. Whether he was bound to do so or not, I do not say, for it is not necessary to decide what would have been the rights and liabilities of the parties if the ship had been admitted inside the dock gate, as this did not, in fact, happen. I will only observe that—though in the printed form it is said "and ten days on demurrage over and above the said laying days"—there are no laying days provided in this charter-party in the sense in which I understand these words, and the ten days on demurrage can only begin after the ship has been at the place where the merchant ought to have taken delivery long enough for the merchant to be in default for not having completed the discharge. There is no period specified in this charter-party within which the merchant has engaged that the ship shall, at all events, be discharged, which is what I understand by laying days. I think, therefore, that the cases, such as *Brown v. Johnson* (1), deciding when lay days commence, have no direct bearing on such a charter-party as this. Both parties agreed in naming the Surrey Commercial Docks in the charter-party as the docks to which the steamer was to go. I can see nothing amounting to a contract, either on the one side or the other, to procure the ship admittance, nor has any authority been cited to the effect that such a contract is implied. If the charter-party had left it free to the merchant to select a dock, it may well be that he was bound to select one into which admittance could be procured. *Ogden v. Graham* is an authority in favour of that position. And in *Samuel v. The Royal Exchange Assurance Company* (2), where the merchant directed the shipowner to proceed to the King's Dock at Deptford, and the ship arrived near the dock gates whilst there was much ice, but the merchant was not able to procure an order to admit it for some days, Lord Tenterden ruled that if the ship remained there waiting for an order

(1) 10 Mees. & W. 331; 11 Law J. Rep. Exch. 373.

(2) 8 B. & C. 119; 6 Law J. Rep. (o.s.) K.B. 315.

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to admit, it was an unreasonable delay, which would discharge the underwriters, but otherwise if the delay was on account of the ice. That authority seems to point the same way. I do not, however, pronounce any decision on this, as it is not the case now before the House. I only mention it to prevent it being said that what I now say would be applicable to such a case.

But where, as in this case, the dock is named from the beginning by both parties, I think the refusal of the dock authorities to let the ship inside the dock gates is the fault of neither party. They ought to have foreseen that it might happen that the dock company would, owing to the exigencies of their traffic, refuse to admit a steamer for some time; in fact, it appears from the evidence that before the charter-party was made both parties knew that the number of timber-laden steamers was so unusually great at this time that it was very likely to happen that they would refuse for a long time. They might have made any new provision on which they could agree. If they had in terms said that, in the event of something for which neither party was responsible rendering it impossible to get into the dock at all, or without a delay so great as to render it unreasonable to wait, the shipowner would, unless excused by some of the excepted perils, bring his ship to a discharging place in London, as near as might be to the dock, and deliver there; and that the merchant should take the cargo there and pay the freight, I think they would have come to as prudent an arrangement as could well be devised. They preferred to keep unaltered the old form—"or so near thereunto as she may safely get"—and be bound by whatever the legal effect of that might be.

Before proceeding further I think it convenient to see what, on the evidence, were the facts on this part of the case.

The practice of the Surrey Commercial Docks was to give orders for the admission of steamers to their docks to discharge there, which were, in practice generally, on the application of the charterer or his representative, made either before or after the arrival of the

steamer. By giving such an order the dock company agreed to admit the steamer, and on the production of the order, after the arrival of the steamer, it was, as soon as practicable, admitted into the docks. The company, in practice, limited the number of the orders to so many steamers as they at the time thought they could accommodate with discharging berths.

On the 16th of July, Messrs. Dahl, having probably heard by telegraph that the *Euzine* was about to start, applied for an order for the admission of the *Euzine*. The superintendent of the docks, Mr. Ross (who died before the trial), wrote the two following letters:—

"July 19, 1877.

"Gentlemen,—Referring to the enclosed orders for the steamships *Euzine* and *Ohatsworth*, I beg to inform you that, on looking over the list of Gravesend orders I have accepted, I fear I have rather exceeded the number of steamers for which I can safely provide accommodation during the months of July and August. Under these circumstances you may, perhaps, think it advisable in your interest to arrange for the vessels to be discharged elsewhere."

"July 25, 1877.

"Gentlemen,—I much regret to be again compelled to return the indorsed order for the *Euzine* (ss.) from Söderhamn, but on going round the docks today I find my position is even worse than I anticipated. The quays are so loaded with goods that it will be impossible for me to afford the vessel anything like the usual steamboat despatch."

On the arrival of the *Euzine* the ship's agents applied to the dock company to take the vessel, but were refused. It appears, on the evidence, that there was plenty of room inside the dock for the *Euzine* to lie afloat, but that the company would not admit any steamer until there was a prospect of being able, within a reasonable time, to give it a discharging berth. The legal advisers of the defendant thought (whether correctly or not it is not necessary to decide) that if once admitted within the dock gate the mer-

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chants would be answerable for all subsequent delay, and the defendant pressed Mr. Griffin, the secretary of the dock company, not to let the *Euxine* enter the docks until they could give her a discharging berth. The secretary, to relieve his mind, on the 7th of August sent a telegram to the superintendent in these terms: "Can you give *Euxine* immediate discharging berth? If not, on no account admit steamer into dock."

This was relied on by the plaintiffs as proving that the defendant hindered the steamer from entering the dock. But it is clear, from the evidence of Mr. Griffin (the dock secretary), that the dock authorities, in their discretion, refused to admit any steamers other than those they had already engaged for (though there was plenty of room for them to lie without discharging) until there was a prospect of giving them a discharging berth, and that he refused to admit the *Euxine*, on the 7th of August, because he could not then give the steamer a discharge berth, and not on account of the defendant's request; and, on being asked the question expressly, he says that he had no prospect of being able to give a berth after a short delay, or within any reasonable time. The dock authorities, it seems to me, acted very properly and prudently in what they did, but even if they were wrong, the defendant was not responsible for this.

Though the secretary must, at the time he gave his evidence, have known when, as it really turned out, a steamer arriving on the 7th of August could have had a discharging berth, neither side asked that question. He does say that, if it had been admitted into the dock to lie afloat, it would, in the then state of traffic, have been five weeks before the ship could have been discharged into lighters there, from which it would seem that it would have been longer before it could have got a discharging berth, and, as demurrage was at 30*l.* a day, it is obvious that the consequences of the delay would have been serious. I may observe that the anxious desire of the defendant that the steamer should not be admitted within the dock gate, when he believed (whether rightly or wrongly) that the doing so would fix him with the

cost of the delay, is evidence that he believed the delay would be important.

The plaintiffs' legal advisers wrote to the defendant the following letter, and received the following answer:—

"August 7, 1877.

"We are instructed to inform you that the ship *Euxine*, chartered by you, is in this port ready to discharge. The Surrey Commercial Docks Company have declined to allow the vessel to enter their dock, as they, we learn, intimated to you several days ago. The ship's lay days begin to-morrow. Should she not be discharged by you with the usual despatch, you will be held answerable for demurrage. Your lighters should be alongside, as you have been already informed, by the first thing to-morrow morning. The cargo would be discharged in two or three days. This notice is given you that you may take such steps as you think right to expedite the unloading of the ship."

"*Re Euxine*, August 8, 1877.

"Our legal advisers tell us to say, in reply to your favour of yesterday, that—the ship is chartered for the Surrey Commercial Docks, and that when the vessel is there, we will be prepared to fulfil your client's contract with us, and take delivery of the cargo. The notice given by you is one which you have no power to give, and which we are not called upon to obey. If the captain enters into a contract to go to a particular dock, he must go there, and it is no business of the receivers that the dock at the time of his arrival is full and cannot take him in. He must wait till there is room."

Some attempts were made to come to an amicable settlement, which unfortunately failed, and both parties stand on their legal rights.

It is perfectly plain to my mind that the ship did not fulfil the primary engagement in the charter-party to proceed to the Surrey Commercial Docks, by merely proceeding to the gate of that dock; but if, under the circumstances, the ship had, on the 7th of August, fulfilled the alternative of proceeding "so

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near thereunto as she may safely get," the merchant was, by his agreement, to take the cargo from alongside at his risk and expense; and there is no reason why he should not have to bear all the damage occasioned by his refusal to comply with the request contained in the letter of the 7th of August to send lighters alongside, which, on the assumption that she had got as near thereto as she could safely get, was what he had undertaken to do.

Two questions arose on these points: First, whether the *Eurine* could have got into the dock without such a delay as would have been unreasonable, taking into account the nature of the transaction and the interests of both parties. That was one of fact, to be determined on the evidence. Second, whether, supposing that fact to be found in favour of the plaintiffs, the *Eurine* had got as near thereto as she might safely get, within the meaning of the contract. That was a question of law depending on the construction of the written contract.

As far as regards the question of law, it is not material when or by whom the question was first raised, your Lordships having to decide it according to law. But as regards the question of fact depending on the evidence, it might be material when it was raised, for if the point had not been raised at all by the plaintiffs it would have been possible enough that the defendants refrained from calling farther evidence which would have altered the case.

But, in fact, it appears by the shorthand writer's note that Mr. Chitty, in his opening, distinctly stated this as part of the plaintiffs' case; and it was brought to the mind of the Master of the Rolls, for he afterwards asks Mr. Russell what he said was the meaning of the words "so near thereunto as she may safely get." A considerable argument ensued, Mr. Russell contending then, as he did afterwards, that the prevention must be physical, from something endangering the safety of the ship, and that it must be permanent; and when pressed he said that though the cause of obstruction was a physical one and one which would last a year, the steamer must wait a year. The Master of the Rolls said, as I think

he well might, "To suppose that two commercial men should enter into a contract to charter a steamer to go to a dock, or as near thereto as she may safely get, that that means that she is to wait outside for a year because the dock is out of repair, is to my mind absurd.—*Mr. Russell*: If the proposition looks nonsensical, if your Lordship pleases, instead of being a year, suppose it is a month.—*The Master of the Rolls*: I do not know that it is.—*Mr. Russell*: Or a fortnight."

So that there was ample to call on the defendant to produce whatever evidence he could to shew that the delay in the present case would not have been unreasonable.

The expressions of the Master of the Rolls seem to indicate that at that moment he was not inclined to look with favour on this contention of the defendant. If such was his then opinion, he changed it, for in delivering judgment a few days afterwards he says, "I do not see any answer to the suggestion that the contract was to take the cargo there, and that the shipowner must wait until he could get into the dock. It makes no difference whether the cause of prevention was the dock being full of vessels, or some other accident. It might have been stress of weather, or that the vessel drew more water than there was over the sill of the dock at one time, assuming the water to flow in more at one period than at another, or it might have been an accident to the dock gates which prevented the vessel going in for a period of time longer or shorter, as the case might be. The shipowner takes the risk of accident; so does the charterer, because in this case the charterer has to wait for his cargo. There is a risk on both sides, and the risks in some cases depend very much on the nature of the vessel. In the case of a steamer, probably, the risk is larger on the side of the shipowner, but not necessarily so. There may be perishable cargoes, the value of which is very variable, as the price may depend on the speed with which they are delivered on arrival at the port of discharge. Therefore both parties to the charter-party take their chance of the vessel being able to get into the dock on arrival

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at the place of discharge within the usual or reasonable time."

I certainly understand from this that the Master of the Rolls thought it quite immaterial whether the incapacity to get into the dock was produced by a matter threatening the safety of the ship or some other matter. In this the Judges of the Court of Appeal all agreed with him, and so do I. But he thought it immaterial whether the delay was long or short, if it would at some time come to an end. In this the Judges of the Court of Appeal differ from him. I think it far the most difficult question in this cause, but I agree with the Judges of Appeal. It is to be observed that the Master of the Rolls gives no answer to his own forcible remark which I have before quoted.

Had the words in the charter-party been "as near thereto as she may get," it would have been open to a charterer to contend that the ship must get as far as it was possible, however dangerous it might be. I do not think it could have been successfully so contended, but those who originally framed this clause prevented the possibility of such a contention by inserting the word "safely." In the absence of authority, and construing the words in their ordinary sense, I think that is the only effect of the introduction of the word "safely." I think if the ship cannot get at all, it cannot get safely. And there is no authority putting any other construction upon the words. It is singular enough, considering how long this has been a common form, that there is not, as far as I can learn, anything said about its construction, either in the text-books, or in any decision in our reports, before *Shield v. Wilkins*, as late as 1850. It would seem that in practice no difficulty had been found in putting a sensible meaning on this clause so as to avoid disputes. Since 1850 there have been a few cases, all of which, I believe, were cited during the argument.

The decision in *Shield v. Wilkins* had no bearing on this case.

In *Schilizzi v. Derry*, the ship, under the charter-party, was bound to proceed to Galatz or Ibrail, or so near thereto as she may safely get and load a cargo of grain. The ship having arrived at the

Sulina mouth of the Danube, which is ninety miles below Galatz, and still farther from Ibrail, the master finding the water on the bar unusually low, so that he could not safely cross the bar till it rose, gave notice that he required the merchant to load his cargo there, a place where it was neither customary nor reasonable to load cargo. The decision, as far as regards this point, was that, as Lord Campbell says, "The meaning of the charter-party must be that the ship is to get within the ambit of the port, though she may not reach the actual harbour. Now could it be said that the vessel, if she was obstructed in entering the Dardanelles, had completed her voyage to Galatz?"

In *Metcalf v. The Britannia Ironworks Company* it was actually contended that the shipowner, who had contracted that his ship would go to Taganrog or so near thereto as she could safely get, and there deliver the cargo, was entitled to require the merchant to take delivery at Kertch, 300 miles from Taganrog, and that the ship had completed her voyage because she was obstructed in entering the sea of Azof, but the Court, both below and in the Court of Error, agreed with the prior decision in *Schilizzi v. Derry*. I think it plain that neither of those decisions touches the present case. Whether the language which Lord Campbell uses is quite the most accurate to express his idea may be doubted, but in the case at bar it was both reasonable and customary to unload ships in that part of the river to which the *Busine* had come and the docks adjoining.

In *Parker v. Winlo and Bastifell v. Lloyd* (3), where the charter-party was to proceed to a wharf in a tidal harbour (which could not be reached during the neap tides), or as near as she might safely get, it was held that the ship arriving during the low tides, the master was bound to wait for the higher tides, on the ground that his contract was to go to the wharf if, in the ordinary course of navigation, it could be reached, and that the shipowner took on himself the risk of delay from the ordinary course of navi-

(3) 1 Hurl. & C. 388; 31 Law J. Rep. Exch. 413.

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gation. The delay in the case at bar was not in the ordinary course of navigation.

Hillaton v. Gibson (4), in Scotland, and *Copper v. Wallace* were cases where the ship could get to her primary destination if she discharged a part of her cargo so as to lighten her. The majority of the Court of Session thought that as the quantity of cargo which the ship would have had to discharge to enable her to lie always afloat at Glasgow was small, it was reasonable to do so, and she was bound to do so. Nothing in that case was decided as to the alternative. The Court of Queen's Bench in the latter case held that whether the ship might insist on the whole cargo being taken at the spot where it was necessary to lighten her as being the nearest to which she could safely get, or was bound to go farther, depended on whether it was reasonable under all the circumstances to lighten her to the necessary extent, which they thought was not the case.

These are all the cases which were cited on the argument, and, as far as I know, all the cases which exist, in which anything has been said as to the construction of this clause. And I do not think any of them is an authority for putting a different meaning on the words from that which they would bear in their natural sense, which, I think, is that which I have already expressed.

But the question whether a prevention causing delay for any time, however long, but which would terminate, would amount to a prevention within the meaning of the clause is, I think, a much more difficult question. There is no authority bearing directly on the construction of this clause, except *Copper v. Wallace*, and as that case was decided after the decision of the Court of Appeal in the present case, which was binding on the Court of Queen's Bench, and which it appears was cited on the argument, it may be said that it adds no weight to it. But I think that there are decisions so far analogous, that they establish the principle on which the Judges of Appeal acted, and which I think they applied rightly.

It is quite true that the words of the

(4) 8 Sess. Cas. 3rd ser. 463.

contract are "as she may safely get," and nothing is said expressly about getting without unreasonable delay; but in *Moss v. Smith* (5), Mr. Justice Maule, speaking of what constitutes a total loss of a ship as against an underwriter, after stating that the shipowner must repair the ship if possible, says, "It may be physically possible to repair the ship, but at an enormous cost, and then also the loss would be total; for in matters of business, a thing is said to be impossible where it is not practicable, and a thing is impracticable when it can only be done at an excessive or unreasonable cost." "If a ship sustains such extensive damage that it would not be reasonably practicable to repair her, seeing that the expense of repairs would be such that no man of common sense would incur the outlay, the ship is said to be totally lost." Though the particular case was a policy of insurance, Mr. Justice Maule speaks generally of mercantile contracts. And on this principle it was held in *Geipel v. Smith*, by the whole Court, and in *Jackson v. The Union Marine Insurance Company* by a majority in the Common Pleas, and in the same case in error, by a majority of the Court of Exchequer Chamber, that a delay in carrying out a charter-party, caused by something for which neither party was responsible, if so great and long as to make it unreasonable to require the parties to go on with the adventure, entitled either of them, at least while the contract was executory, to consider it at an end.

I said in *Geipel v. Smith*, "Very different considerations arise where the cargo is already on board, or, as in *Hadley v. Clarke* (6), is already on the voyage; but while the contract still remains executory I think time is so far of the essence of the contract, as that matter which arises to cause unavoidable but unreasonable delay, is sufficient excuse for refusing to perform it." I still think that there is a distinction between the cases, for when the shipowner has got the merchant's cargo on board he cannot simply put an end to his contract; he must do something with

(5) 9 Com. B. Rep. 94; 19 Law J. Rep. C.P. 225.

(6) 8 Term Rep. 259.

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the cargo. But in this case, the parties have provided for what is to be done with it. If the ship cannot get into dock she is to go as near as she may safely get, and there deliver. It certainly seems to me that any cause which would excuse the ship from going into the dock, if the contract was wholly executory, must be sufficient to excuse her, and so bring the alternative into operation when the cargo is on board. There was a dissenting minority in *Jackson v. The Union Marine Insurance Company*, and some previous authorities are perhaps not quite consistent with the decision. It is no doubt competent to your Lordships to reconsider that case, and decide contrary to it. I think it was rightly decided, but I can only refer your Lordships to the judgment delivered by Baron Bramwell in that case, in the reasoning of which I then concurred, and still concur, and to which I have nothing to add.

The only remaining question is, whether the evidence in this case is such as to lead your Lordships to concur in the finding of fact by all the Judges in the Court of Appeal that the delay would have been in this case so great as to make it unreasonable to call on the shipowner to wait. The shipowner would, I think, be bound to go into the dock if he could do so by waiting a reasonable time, but not if he could only do so by waiting an unreasonable time. It is quite true that a question of "reasonable or unreasonable" must always be a question of more or less, and therefore of uncertainty, but that, I think, cannot be helped. I do not pretend to lay down any precise rule as to what is reasonable or what is not. I think the main elements to be considered are, what would be the effect on the object of the contract, and the damage to each party caused by the delay; and if the result be to lead those who have to decide the question to think (to adopt the language of the Master of the Rolls) that it is absurd to suppose that two commercial men entering into a contract to charter a steamer to go to a dock, or as near thereto as she may safely get, should mean that she was to wait outside so long, they ought to find it unreasonable.

In the present case, it was agreed in

the written contract that the cargo was to be received as fast as steamer can deliver. And though I do not agree with what is suggested by Lord Justice Cotton, that this cast the duty on the merchant of discharging the vessel as quickly as if she had obtained admission to the Surrey Commercial Docks, it certainly shewed that both parties knew that a prompt despatch was of great consequence to the steamer, and, 30*l.* per day being mentioned as demurrage, it was known to each that the loss by a day's delay would be at least that sum, so as to shew that a prompt despatch was to a great extent the object of the contract. It does not appear (at least not so far as I can find) distinctly how long it would have taken to unload the steamer into lighters in the river, nor what it would have cost the merchant, but it does appear that the steamer was willing to go into the Millwall Dock, and there she could have been discharged at the same cost as in the Surrey Dock in about the same time. The defendant refused to assent to this, and I do not think he was bound to assent. He refused because he thought, not that the cargo would be worse, but that the value of it would be diminished so as to make him a loser by about 120*l.* Assuming this to be so, he required the steamer to wait for a period uncertain in its length, but certainly exceeding five weeks; and five weeks at 30*l.* a day would represent a loss to the shipowner of more than 1,000*l.* I cannot think that reasonable.

The result is that I come to the conclusion that the judgment should be affirmed, and the appeal dismissed with costs.

LORD WATSON.—This is a case of importance, seeing it involves the construction of a clause which has long been of common occurrence in contracts of affreightment. By a charter-party, dated the 21st of June, 1877, it was *inter alia* agreed that the steamship *Euxine*, after taking on board a cargo of timber in the Baltic, "being so loaded shall therewith proceed to London Surrey Commercial Docks, or so near thereunto as she may safely get and lie always afloat, and

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deliver the same," &c. No lay days proper were stipulated in the charter-party, although it was agreed that there should be ten days on demurrage, "over and above the said laying days," the apparent inconsistency being due to the fact that the charter-party consists of a printed form, partly filled up in writing. It was provided that the cargo was to be received at the port of discharge "as fast as steamer can deliver." Sundays and legal holidays excepted, and also that it was to be brought to and taken from alongside the ship at merchant's risk and expense.

The *Euzine* reached the port of London with her cargo in safety; and, on the 4th of August, 1877, having been refused admittance to the Surrey Commercial Docks was moored at the Deptford Buoys, outside the dock entrance.

It appears from evidence laid before the Master of the Rolls that the Surrey Dock is used exclusively for the purposes of the timber trade, that in it steam vessels are unloaded at discharging berths alongside the quays, and that the dock authorities do not permit any steamer to enter until there is a vacant berth to receive her. Accordingly they refused to admit the *Euzine*, not on account of there being no room for her to lie in the dock, but because the discharging berths for steamers were then full and were engaged for some time to come.

The 5th of August was a Sunday, and the 6th a legal holiday; but on the 7th the shipowners intimated to the charterers that the *Euzine* was ready to discharge her cargo, and requested that lighters should be sent alongside for that purpose. Upon the 8th of August the charterers refused to take delivery as required, the ground of their refusal being that the *Euzine* was bound to wait at owner's risk until there was room for her to discharge in the Surrey Commercial Docks. At this time, as appears from the evidence, the dock authorities were unable to specify within what period they could give the *Euzine* a berth for discharge.

After the refusal of the charterers to accept delivery, the owners landed the cargo by means of lighters, and placed it in the custody of the Surrey Docks Com-

pany, and thereafter raised the present case against the charterers for freight, demurrage and other charges and expenses incurred by them in discharging and landing the cargo. The charterers, besides denying liability, preferred a counter-claim of damages for breach of contract.

The Master of the Rolls, on the 23rd of May, 1878, gave judgment, dismissing the action, with costs, on the charterers undertaking to pay the freight and landing charges; but on the 8th of August, 1879, the Court of Appeal reversed that judgment, and declared "that the voyage of the *Euzine* ended and the lay days began to run from the time when the ship took up her position at the Deptford Buoys, and was ready to deliver cargo." And it was ordered that the freight and what damages they had sustained by reason of the detention of the ship and the delay and increased expense of delivery be paid to the owners. The present appeal has been brought by the charterers against the judgment and order of the Court of Appeal.

I have made no reference to the communications which passed between the law agents of the parties subsequent to the 8th of August, because these appear to me to have no bearing upon the case as presented to the House. Various questions were argued in the Courts below, but the only issue raised between the parties in this appeal is, whether the *Euzine* on the 7th of August, 1877, had, as was found by the Court of Appeal, completed her voyage in terms of the charter-party.

It is not maintained by the respondents, the owners of the *Euzine*, that the vessel had proceeded to the Surrey Commercial Docks. On the contrary, their contention is, that it had become impossible, in the sense of the charter-party, for her to obtain admission to the dock, and consequently that the *Euzine* must be held to have completed her voyage whenever she reached her moorings at the Deptford Buoys, seeing that she was then as near to the dock as she could safely get and lie afloat. The appellants, on the other hand, contend that by the conditions of the charter-party, the *Euzine* was bound

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to proceed to her primary destination, unless prevented by some permanent physical obstacle. They further maintain that the circumstances which occasioned the exclusion of the *Euxine* did not constitute an obstacle either of a physical or of a permanent character, and that the vessel was therefore bound to wait, at owner's risk, until the obstruction was removed, and then to enter the dock for the purpose of discharge.

Both parties seemed to concede, and I think it may be taken as settled law, that when, by the terms of a charter-party, a loaded ship is destined to a particular dock, or as near thereto as she may safely get, the first of these alternatives constitutes a primary obligation; and, in order to complete her voyage, the vessel must proceed to and into the dock named, unless it has become, in some sense, "impossible" to do so. It is only in the case of her entrance into the dock being barred by such "impossibility" that the owners can require the charterers to take delivery of her cargo to a place outside the dock. When a vessel in the course of her voyage is stopped by an impediment occurring at a distance from the primary place of discharge, it has been decided that she cannot be held to have got "as near therunto as she could safely get," and therefore cannot claim to have completed the voyage in terms of the second alternative—*Schilizzi v. Derry*, also *Metcalf v. The Britannia Ironworks Company*. It was observed by Lord Chief Justice Campbell in *Schilizzi v. Derry* that the meaning of these words in the charter-party, "so near the port of landing as the ship may safely get, must be that she should get within the ambit of the port, though she may not be able to enter it." In the present case it does not admit of dispute that the *Euxine* when lying at the Deptford Buys was as near to the Surrey Commercial Docks as she could safely get, if it be assumed that it had become within the meaning of the charter-party impossible for her to get into the dock.

The appellants maintained that there can be no impossibility within the meaning of the contract unless the vessel is stopped by an impediment which is both

physical and permanent; but I greatly doubt whether, in any fair construction of the charter-party, it is necessary that the obstruction should be of a purely physical character, and I also doubt whether there be any foundation in fact for the appellants' contention. The exclusion of the *Euxine* from the Surrey Docks in August, 1877, was owing to a rule made by the statutory authorities entrusted with the administration and control of the dock. It is not suggested that the rule was in excess of their powers, or that it was not capable of being legally enforced. And I am of opinion that an order emanating from the proper authority, which, if disregarded, would lead either to the dock gates being shut against the vessel or to her being turned summarily out of the dock if she did get into it, does in reality constitute a physical obstacle.

The controversy between the parties appears to me, accordingly, to be narrowed to this issue—whether the obstacle which the *Euxine* encountered was of such permanency as to render it impossible, within the meaning of the charter-party, for her to get into the Surrey Commercial Docks.

In providing alternative destinations, the charter-party does not express the condition upon which the second alternative becomes substituted for the first. It does not in terms express any distinction between the alternatives; and that the first is to be regarded as the primary destination to which the chartered vessel must, if possible, proceed, is, I apprehend, an inference based upon what is known to be the ordinary course of shipping business, and on the presumption that both parties would, from considerations of mutual interest, have agreed to that effect if they had made it matter of express contract.

The question now before the House must also, in my opinion, be determined by some such reasonable considerations. A permanent obstacle can in no reasonable sense be held to mean an obstacle which will remain for ever. There must in every case be some limit of time within which an obstacle ceasing to exist cannot be regarded as permanent, and beyond

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which a continuing obstacle ceases to be temporary. It may be very difficult to fix that limit, which will obviously vary with the circumstances of each case and the terms of the charter-party; but I do not think the same difficulty exists in regard to the principle upon which it ought to be determined. I have always understood that, when the parties to a mercantile contract, such as that of affreightment, have not expressed their intentions in a particular event, but have left these to implication, a Court of law, in order to ascertain the implied meaning of the contract, must assume that the parties intended to stipulate for that which is fair and reasonable, having regard to their mutual interests and to the main objects of the contract. In some cases that assumption is the only test by which the meaning of the contract can be ascertained. There may be many possibilities within the contemplation of the contract of charter-party which were not actually present to the minds of the parties at the time of making it, and, when one or other of these possibilities becomes a fact, the meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence.

I am of opinion that the question at issue in the present appeal must be solved in that way, and that the *Euxine* cannot be held to have completed her voyage on the 7th of August, unless it be established that the delay which would have taken place before she was admitted to the Surrey Docks would have been so great that the parties, had they anticipated and provided against its occurrence on the 21st of June, 1877, would not, as reasonable men of business, have arranged that the vessel should wait outside the dock at owner's risk until a berth was ready for her. I adopt the view of Lord Justice Brett that the shipowner must bring his ship to the primary destination named in the charter-party, "unless he is prevented

from getting his ship to that destination by some obstruction or disability of such a character that it cannot be overcome by the shipowner by any reasonable means, except within such a time as, having regard to the adventure of both the shipowner and the charterer, is, as a matter of business, wholly unreasonable."

None of the authorities cited in the course of the argument, with the exception of two which I shall shortly notice, appears to me to have any material bearings upon the question before the House.

Most of these authorities related to the question whether, had she been permitted to enter the dock, the *Euxine* would have completed her voyage, and would have been at the charterer's risk as soon as she was moored there, or not until she reached a discharging berth alongside the quay. There being no proper lay days stipulated in her charter-party, it might in that event have been plausibly contended that the *Euxine* fell within the principle of the decision in *Burmester v. Hodgson* and not within the rule established in *Randall v. Lynch*. But it does not appear to me to be necessary to decide the point, because the *Euxine* never did get into dock; and I do not think that its decision one way or another would be of any assistance in determining whether it was impossible for her to get there.

The cases of *Parker v. Winlo* and *Bastifell v. Lloyd* (3) come somewhat nearer to the present, although their bearing upon it is not very direct. It was there held that the shipowner, having contracted in the knowledge, or at least with the means of knowing, that the primary place of discharge specified in the charter-party was a tidal port, was bound to take the risk of the tides being unfavourable when his vessel arrived, and to complete the voyage by proceeding to that place at spring tides. It appears to me to be a reasonable inference from these decisions that no impediment arising in the ordinary course of navigation to a particular port or dock, or arising in the usual and ordinary course of management of a particular port or dock, and not lasting beyond ten days or a fortnight, is to be regarded as a permanent obstruction, but that the ship must wait

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and proceed to its primary destination before the charterer can be required to take delivery of the cargo. But I do not think that much aid can be derived from these decisions in determining what shall be held to constitute a permanent obstacle in a case like the present.

In *Geipel v. Smith* and *Jackson v. The Union Marine Insurance Company* certain points were decided in regard to the effect of unreasonable delay arising from causes not imputable to any of the parties, and so far these cases appear to me to have a very close analogy to the present. In each of these cases there had been an impediment in the way of the chartered vessel, in consequence of which she did not go to her port of loading. That impediment, which arose in the first case from a blockade, and in the second from shipwreck, was temporary in this sense, that it would have been quite possible for the one vessel to have proceeded to the place of loading after the blockade was raised, and for the other after her repairs were completed. In *Geipel v. Smith* the charterer raised an action of damages for breach of contract against the shipowner; but the Court of Queen's Bench being satisfied of the fact that the ship could not have reached her destination within a reasonable time without running the blockade, held in law that the contract of the charter-party was thereby discharged. In *Jackson v. The Union Marine Insurance Company* the shipowner preferred a claim for lost freight against the underwriters, who resisted it on the ground that the charter-party remained in force notwithstanding the mishap which had befallen the ship, and that the plaintiff was entitled to demand either specific implement or damages from the charterer. At the trial of the cause, the jury, in answer to questions put to them by the presiding Judge, found that the time necessary for repairing the ship, so as to make her a cargo-carrying ship, was so long as to make it unreasonable for the charterers to supply the agreed-on cargo at the end of such time; and also that the time was so long as to put an end, in a commercial sense, to the commercial speculation entered upon by the charterers. A verdict

was entered for the defendants, leave being reserved to plaintiff; and the case was thereafter argued on a rule before the Court of Common Pleas under an agreement that the defendants should be at liberty to argue that the findings of the jury were against the weight of evidence. The majority of the Common Pleas took substantially the same view of the facts as the jury had done, and held that the delay occasioned by the getting off and repair of the ship was so unreasonable as to terminate the adventure, and that the plaintiff was accordingly entitled to recover under his policy on freight. And, upon appeal, the Court of Exchequer Chamber, with a single dissentient voice, affirmed the judgment. It was precisely the same question which arose for decision in these two cases; and, if I understand them aright, it was in both decided that this delay in loading a cargo would have been so unreasonable, so inconsistent with the presumable views and intentions of both the contracting parties, that the charter-party could no longer be held binding on either of them. No doubt in these cases the contract had not passed the executory stage; but seeing that unreasonable delay in reaching the place of loading, when occasioned by no fault of either of the parties, is effectual to discharge such a contract altogether, I conceive that, *a fortiori*, a similar delay in reaching the primary place of discharge ought to have the effect of enabling the vessel to complete her voyage by proceeding to the alternative destination.

That leaves only the question of fact, whether the state of the Surrey Commercial Docks in August, 1877, was such as would have unreasonably delayed the discharge of the *Euine* within that dock. Had I been called upon to decide that question in the first instance, I should have had great difficulty in coming to any conclusion satisfactory to my own mind. I agree that the question is sufficiently raised by the pleadings, and that it was in view of the parties, and was actually discussed in the course of the argument, which is interwoven with the evidence in this case, although it is not noticed in the judgment of the Master of the Rolls. But I cannot resist the im-

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pression that, in their anxiety to prove or disprove the alleged custom of the port, which has now been eliminated from the case, the parties have omitted to direct their evidence to many points upon which it would have been, in my opinion, desirable that a Judge, unacquainted with the port of London, should receive information. In the absence of such information I have done my best to sift the evidence, and the result is that I am not disposed to differ from the Court of Appeal. I think it may be taken as proved that the block occasioned by the great demand for steamship berthage in August and September, 1877, although that was rapidly becoming the normal condition of the Surrey Docks in the preceding months of June and July, was due not to ordinary but to exceptional causes. And seeing that, on the 4th of August, the authorities could not undertake within a month or any other given time to admit the *Euzine* into the dock, and that even on the 23rd of August they were not in a position to give a more definite or satisfactory undertaking, it appears to me to be safe to conclude that the length of time which the *Euzine* must have waited in the port of London, in order to discharge in the Surrey Docks, would have been in excess of any delay which either the shipowner or the charterer, at the time of entering into the charter-party, could reasonably have contemplated.

I am therefore of opinion that the judgment of the Court of Appeal ought to be affirmed.

THE LORD CHANCELLOR (LORD SELBORNE).—Having had an opportunity of seeing in print the opinions which have just been delivered by my two noble and learned friends who have addressed the House, and entirely agreeing with them, I think it unnecessary to add anything more.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors—Plews, Irvine & Hodges, for appellants;
Druce, Sons & Jackson, for respondents.

[IN THE COURT OF APPEAL.]

JAMES, L.J.
COTTON, L.J.
LUSH, L.J.

1881.

Feb. 28.

March 4.

April 13.

In re GOODMAN'S TRUSTS.

Statute of Distributions (22 & 23 Car. 2. c. 10), ss. 6 and 7—Intestate domiciled in England—Legitimation of ante natus by subsequent Marriage—Foreign Law—Next-of-kin—Brother's Child.

A child born in Holland before wedlock, but legitimatised according to the law of that country, by the subsequent marriage of her parents, who were at the time of the birth domiciled in Holland,—Held (by JAMES, L.J., and COTTON, L.J.; dissentiente LUSH, L.J.), entitled to share as one of the next-of-kin in the personal estate of an intestate who had died domiciled in England.

Decision of JESSEL, M.R., reversed.

The question of a person's legitimacy is a question of status to be determined by the law of the country where his parents are at his birth domiciled, and the English law, except as to succession to real estate in England, recognises and acts on the status as declared by the law of the domicile.

Boyes v. Bedale (1 Hem. & M. 798; 33 Law J. Rep. Chanc. 283) disapproved.

This was an appeal by Hannah Pieret from a decision of Jessel, M.R., holding that she was not entitled as one of the next-of-kin of Rachel Goodman to any share of her personal estate, on the ground that, although legitimatised by the subsequent marriage and recognition of her parents in Holland, the country of her birth, she was illegitimate in this country, and consequently not entitled as a brother's child within the Statute of Distributions.

The case is reported 49 Law J. Rep. Chanc. 805.

Hannah Pieret appealed.

Mr. H. Davey and Mr. Speed, for the appellant.—The question whether the appellant is a child of Leyon Goodman or not is one of status, and that must be

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determined by the law of her domicile—that is, the domicile of her father—

Story, on Conf. of Laws, 93b;

Huberus, De Conf. Leg., lib. i. tit. 3, s. 9;

Vinnius, Ad. Inst., lib. i. tit. 3, Introd.;

Burge, For. and Col. Law, vol. i. pp. 59, 97.

The claimant has already in *Goodman v. Goodman* been declared a legitimate child. That suit related to her grandfather's estate, and the reason the three elder children of Leyon Goodman were excluded was that they were born while their father was domiciled in England.

The case of

Birtwhistle v. Vardill, 5 B. & C. 438; 2 Cl. & F. 571; 6 Bligh, N.S. 479; 7 Cl. & F. 895; 6 Bing. N.C. 385; 9 Bligh, N.S. 32; 4 Law J. Rep. (o.s.) K.B. 190,

only goes to succession to real property. But throughout the whole case, the argument and the judgment, it seems to have been assumed that if the *ante natus* had been claiming succession to personal estate, that claim could not be contested.

So, too, the Statute of Merton, which was declaratory of the common law, only affected the law of inheritance, and it may be inferred from the claims of the bishops being limited to the succession to real estate, that as regards succession to personalty, the canon law was followed.

Boyes v. Bedale (ubi supra)

is relied on as an authority against the appellant's claims, but the remarks of the Vice-Chancellor as to the Statute of Distribution are only a *dictum*. The Vice-Chancellor there was correct in the principle, but was wrong in his application. He did not put a right construction on the word "child." He proceeded on the principle that the will being an English will must be construed by reference to the English law. That is so, but by English law the *status* of a child is to be determined by the law of the domicile; and in that case, as here, applying that principle, the child was legitimate.

In

Wright's Trusts, 2 Kay & J. 595; 25

Law J. Rep. Chanc. 621,

the father of the child claiming to be

legitimate was at the date of the birth of the child a domiciled Englishman, and therefore, according to the principle above stated, the child was excluded. And in

Udny v. Udny, Law Rep. 1 H.L. Sc. 441, 447,

Lord Hatherley explains the effect of his decisions in the two last cases to be that a bastard child whose putative father was English at its birth could not be legitimised by the father acquiring a domicile in a country which recognises the legitimisation of *ante nati* and then marrying the mother. So, too,

Don's Estate, 4 Drew. 194; 27 Law J. Rep. Chanc. 98,

is in our favour. That case was the converse of

Birtwhistle v. Vardill (ubi supra), and decided that a father could not inherit real estate as heir to his illegitimate son, but the Vice-Chancellor there laid down the principle for which we are contending, that the legitimacy or illegitimacy of an individual must be determined by the law of the country of his origin.

Skottowe v. Young, 40 Law J. Rep. Chanc. 366; Law Rep. 11 Eq. 474,

was a case under the Legacy Duty Act, and there the Vice-Chancellor held persons in the same position as the present claimant to be "children," and liable as such to pay duty at one per cent.—

Wallace v. The Attorney-General, 35 Bev. 1; 35 Law J. Rep. Chanc. 124; Law Rep. 1 Chanc. 1.

In

Fenton v. Livingstone, 3 Macq. H.L. 497, at p. 547,

Lord Wensleydale says that the distribution of the personal estate is governed by the law of the domicile.

They also referred to

Wilson's Trusts, 35 Law J. Rep. Chanc. 243; Law Rep. 1 Eq. 247;

Shaw v. Gould, 37 Law J. Rep. Chanc. 433; Law Rep. 3 E. & I. App. 55;

Munro v. Saunders, 6 Bligh, N.S. 468; *Shedden v. Patrick*, 1 Macq. Sc. App. 535;

Strathmore Peerage Case, 4 Wils. & Sh. App. 89;

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Munro v. Munro, 7 Cl. & F. 842;

Rose v. Ross, 4 Wils. & Sh. 289.

Mr. D. L. Alexander, for the respondents.—There is no direct decision to be found on this particular point, but the *dictum* of Wood, V.C., in

Boyes v. Bedale (*ubi supra*), is conclusive in my favour.

A will is construed according to the law of the testator's domicile, and the persons to take under that will are to be ascertained by the same law, and the same *a fortiori* holds good in the case of an intestacy—

Story, 479a

—that is, the law of the domicile of the testator or intestate (not of the claimant) settles the question of legitimacy or illegitimacy; and by the law of the domicile of the intestate here, "children" means "children born in wedlock." There is no question here as there may be in a will, whether there is not such a *designatio personae* as to include an illegitimate child. Words in an English statute must be construed by the interpretation put on them by English law, and therefore "brother's children," in section 7 of the Act, means the children born in wedlock. A constructive legitimacy, such as is the claimant's here, is not enough to entitle a person to claim under the statute. He referred also to

Dogliani v. Crispin, 35 Law J. Rep. Prob. & M. 129; Law Rep. 1 E. & I. App. 301;

Enohin v. Wylie, 10 H.L. Cas. 1; 31 Law J. Rep. Chanc. 402. (See observations of Lord Westbury at p. 13.)

Mr. Bleby and *Mr. Brabant* appeared for other parties.

Mr. Davey, in reply.

Our. adv. vult.

LUSH, L.J. (on April 13).—This case raises a question of great importance, namely, whether in the administration of the goods of an intestate English subject domiciled in England a child of the intestate's brother born illegitimate in Holland, but legitimated in that country by the after marriage of the father and mother, both being at the time of the birth and marriage domiciled in Holland,

is entitled to claim as one of the next-of-kin under the Statute of Distributions. The contention on the part of the appellant is that her *status* in Holland as a legitimated child of the brother of the intestate entitles her as "brother's child" within the meaning of that statute, thus raising the question whether the statute is to be interpreted with reference to the civil law or to the common law.

It was admitted, and as far as my researches have enabled me to form an opinion, rightly admitted, by the counsel on both sides, that no decision is to be found in our books which sanctions such a construction of the Act. It is well established that the distribution of an intestate's property is governed by the law of his domicile. If the father of the claimant, being domiciled in Holland and dying intestate, had left personal property in this country, our Courts would have administered it, not under the Statute of Distributions, but according to the law of Holland, and in that administration the claimant would have been treated as one of his lawful children. To that extent, and with reference to that course of administration, it might truly have been said that the *status* in her own country was recognised and accepted as her *status* here. But we are dealing with the estate of an intestate who was domiciled in England, and in such a case the administration is to be according to English law. This is admitted on all sides, but then it is argued for the appellant that English law, even when it has to deal with an English estate, has so far yielded to the comity of nations as to accept the *status* established by the law of the claimant's domicile, and departing from its own table of consanguinity to treat as of kin a person who, if born in this country, would have been *filius nullius*. This is the point upon which I have the misfortune to differ from my learned colleagues.

The only authority for this doctrine is to be found in the opinions of foreign jurists, and in some *dicta* of our own Judges based upon those opinions. It will be remembered that in the well-known case of *Birtwhistle v. Vardill*, which I shall presently have to discuss more fully, Lord Brougham warmly advo-

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cated this doctrine in the House of Lords, and with perfect consistency sought to carry it to its full extent as applicable to the succession to lands where, as in that case, the alleged heir was a British subject, but the House declined to adopt his view, and decided that a Scotchman legitimated in Scotland by the subsequent marriage of his parents, could not take as heir to his father in England, because he was not born in lawful wedlock. I cannot help remarking in passing that, this point being established, a decision in favour of the present claimant would now present the singular anomaly pointed out by Lord Brougham that the same person may be both legitimate and illegitimate in the same country—legitimate as regards succession to personalty, illegitimate as regards succession to real estate. In the appellants' own country no such anomaly exists. She is legitimated there for all purposes. But if she died seised of real estate in this country intestate and childless, that estate would undoubtedly go to the Crown, but her personalty, if she succeeds in her present claim, would go to those who by the law of Holland are her kindred.

I believe I may say with perfect accuracy that no trace of such an inroad upon the ancient common law of England is to be found in any digest or treatise of English law nor in any *dicta* of Judges until comparatively modern times. That it was part of the ancient law of England that a person born out of lawful wedlock was deemed *filius nullius* cannot be disputed. And as such a person had no kindred in the ascending line it follows that he had no collateral relations. The oft-quoted Statute of Merton shews that the clergy of that day sought to introduce the canon law, which, like the civil law, recognises the subsequent marriage of the parents as legitimating the previous issue, but that the barons stoutly resisted it. To understand the early part of this statute it must be remembered that general bastardy, where it was put directly in issue, whether in a real or in a personal action (2 *Roll. Abr.* 865), was tried by the certificate of the Ordinary, the validity of the marriage being supposed to be within the exclusive cognisance of the

Church (*Com. Dig.* "Bastardy," D 2), but special bastardy, as it was called, of which the question put in the King's Writ, mentioned in the statute, is an instance, was tried by the country—that is, by the rules of the common law (*ibid.*)—and general bastardy, when not put directly in issue, was also tried by the country. This explains the answer of the bishops to the King's Writ. The Statute of Merton is in these terms: "To the King's Writ of bastardy, whether one being born before matrimony may inherit in like manner as he that is born after." All the bishops answered that they would not, and could not, answer it, because it was against the common order of the Church, and "all the bishops instanted the Lords that they would consent that all such as were born after matrimony should be legitimate, as well as they that be born within matrimony, as to the succession of inheritance for so much as the Church accepteth such for legitimate. And all the earls and barons with one voice answered that they would not change the law of the realm which hitherto had been used and approved."

It was argued that this decision of the barons affected only the law of inheritance, and that it may be inferred from the demand of the bishops being confined to that branch of our law that the canon law already prevailed in the succession to personalty, and some of the reasoning in *Birtwhistle v. Vardill* undoubtedly favours this view. But this appears to me to be pure speculation, and when the subject is considered in all its bearings it will be seen that there is no foundation for it. It is easy to conceive why at that day prominence should be given to real estate, and that the bishops might well conclude that if the canon law were introduced into the law of inheritance it would be let in without hesitation to the succession to personalty. The Church had no more jurisdiction to certify the question proposed in the writ in a personal than in a real action. It was always tried by the country. It is true that the ordinary had at the time the disposal of the goods of an intestate, and after paying the widow and children their *partes rationabiles* they might apply

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the surplus as they pleased free from the control of the temporal Courts (2 *Black. Com.* 494; 1 *Williams on Executors*, pt. i. bk. v. p. 402). How they disposed of the surplus is immaterial to the present question. If the common law had recognised any distinction at that time between the succession to real and the succession to personal estate it would have been a strong argument for the bishops, and something one would expect would have been said about it. The Statute of Merton has been the subject of further consideration since *Birtwhistle v. Vardill* was decided. Even Lord Brougham, who so strenuously opposed that decision, said, in the late case of *Fenton v. Livingstone* (1), "*Birtwhistle v. Vardill* in some of the opinions of the learned Judges below is supposed to have been decided in consequence of a statutory provision; but the Statute of Merton is only declaratory of the common law, or rather it is a refusal to alter that law." Lord Wensleydale expressed himself to the same effect. And Lord Hatherley, when Vice-Chancellor Wood, in his judgment in *Wright's Trusts* (2), says, "Ever since the discussion that took place in *Birtwhistle v. Vardill* it has been acknowledged by all parties, and by Lord Brougham himself, who was opposed to the view of the Judges, that the Statute of Merton, though it is confined to the inheritance of lands, is, nevertheless, to be taken as a declaratory Act of the common law as it then existed. That is strongly verified by the presumption which arises from the contemporaneous change in the form of the writ directed to the bishop, which used to be open, but which, from fear of the bishop's attachment to the law of the Church, has been altered, and instead of sending an open writ to him to enquire as to bastardy, they always send to enquire whether the child was born in wedlock."

I have already shewn that when bastardy was put directly in issue the writ went to the bishop to certify as well in a personal as in a real action.

I therefore read the Statute of Merton as declaring that no innovation upon the

ancient law of England of the nature of that demanded by the bishops shall be made at all; not that the civil law was unknown to or unnoticed by the temporal Courts.

In *Rol. Abr.* tit. "Bastard D," it is said (quoting 47 Edw. 3. 14b, 11 Hen. 4. 84, *Bracton*, bk. v. pp. 416 and 417), "If A has issue by B, and afterwards they intermarry, still the issue is bastard by our law, but *mulier* by the civil law" (*mulier* being the designation of one born of a wife).

There is here no suggestion of any distinction between succession to real and succession to personal estate. Blackstone thus deals with the question who are bastards (original ed. vol. i. p. 442): "A bastard by our English laws is one that is not only begotten, but born out of lawful matrimony. The civil and canon laws do not allow a child to remain a bastard if the parents afterwards intermarry; and herein they differ most materially from our law, which, though not so strict as to require that the child shall be begotten, yet it makes it an indispensable condition" (to make it legitimate) "that it shall be born after lawful wedlock. And the reason of our English law is surely much superior to that of the Roman, if we consider the principal end and design of establishing the contract of marriage, taken in a civil light, abstractedly from any religious view, which has nothing to do with the legitimacy or illegitimacy of the children. The main end and design of marriage, therefore, being to ascertain and fix upon some certain person to whom the care, the protection, the maintenance and education of the children should belong, this end is undoubtedly better answered by legitimating all issue born after wedlock than by legitimating all issue of the same parties even born before wedlock so as wedlock afterwards ensues—first, because of the very great uncertainty there will generally be in the proof that the issue was generally begotten by the same man, whereas by confining the proof to the birth and not to the begetting, our law has rendered it perfectly certain what child is legitimate and who is to take care of the child; secondly, because by

(1) 3 Macq. H.L. 497, at p. 532.

(2) 25 Law J. Rep. Chanc. 621, at p. 627.

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the Roman law a child may be continued a bastard or made legitimate at the option of the father and mother by a marriage *ex post facto*, thereby opening a door to many frauds and partialities, which by our law are prevented; thirdly, because by those laws a man may remain a bastard till forty years of age, and then become legitimate by the subsequent marriage of his parents, whereby the main end of marriage, the protection of infants, is totally frustrated; fourthly, because this rule of the Roman law admits of no limitations as to the time or number of bastards so to be legitimated; but a dozen of them may, twenty years after their birth, by the subsequent marriage of their parents, be admitted to all the privileges of legitimate children. This is plainly a great discouragement to the matrimonial state, to which one main inducement is usually not only the desire of having children, but also the desire of procreating lawful heirs, whereas our constitutions guard against this indecency, and at the same time give sufficient allowance to the frailties of human nature. For if a child be begotten while the parents are single, and they will endeavour to make an early reparation for the offence by marrying within a few months after, our law is so indulgent as not to bastardise the child if it be born, though not begotten, in lawful wedlock, for this is an incident that can happen but once, since all future children will be begotten as well as born within the rules of honour and civil society. Upon reasons like these we may suppose the peers to have acted at the Parliament of Merton, when they refused to enact that children born before marriage should be esteemed legitimate. From what has been said it appears that all children born before matrimony are bastards by our law."

In another chapter (bk. ii. c. xv.) on "The Rights of Things," he states one instance in which our law shews indulgence to persons born out of lawful wedlock, but whose parents afterwards intermarry. "There is indeed one instance in which our law has shewn them some little regard, and that is usually termed the case of *bastard eigne* and *mulier*

puise. This happens when a man has a bastard son and afterwards marries the mother and by her has a legitimate son, who, in the language of the law, is called a *mulier*, or, as Glanville expresses it in his Latin, *filius mulieratus*, the woman before marriage being *concubina* and afterwards *mulier*. Now here the eldest son is bastard or *bastard eigne*, and the younger son is legitimate or *mulier puise*. If then the father dies and the *bastard eigne* enters upon his lands and enjoys it to his death and dies seised thereof, whereby the inheritance descends to his issue, in this case the *mulier puise* and all other heirs (though minors, *femes covert*s or under any incapacity whatever) are totally barred of their right. And this—first, as a punishment on the *mulier* for his negligence in not entering during the bastard's life and evicting him; secondly, because the law will not suffer a man to be bastardised after his death who entered as heir and died seised, and so passed for legitimate in his lifetime; thirdly, because the canon law (following the civil) did allow such *bastard eigne* to be legitimate on the subsequent marriage of his mother, and therefore the laws of England, though they would not admit either the civil or the canon law to rule the inheritance of this kingdom, yet paid such a regard to a person thus peculiarly circumstanced that after the land had descended to his issue they would not unravel the matter again and suffer his estate to be shaken. But this indulgence was shewn to no other kind of bastard, for if the mother was never married to the father such bastard could have no colourable title at all." These extracts, written nearly a century after the passing of the Statute of Distributions, shew that the learned commentator was not aware of any concession to the canon and civil law which should entitle a legitimated *ante natus* to rank in our table of consanguinity as a child born in wedlock. If he had, surely he would in one or other of these passages have mentioned it.

The Ordinary continued to have the disposal of the goods of an intestate until the 31 Edw. 3. st. 1. c. 11. That Act required him to depute "the next and

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most faithful friends" of the intestate to administer his goods—that is, said Coke, "the next of blood, who are not attainted of treason, felony or other lawful disability, but are lawful friends" (*Hensloe's Case*, 9 Co. 396). This is the original of administrator (*Williams on Executors*, pt. i. bk. v. p. 403).

The 21 Hen. 8. c. 5. s. 3 is founded upon the authorities cited by Coke. It enlarges in some degree the power of the ecclesiastical Judge by providing that in case any person dies intestate or that the executors named in any testament refuse to prove it, the Ordinary shall grant administration to "the widow of the deceased or to the next of his kin, or to both, as by the discretion of the same Ordinary shall be thought good;" and the section goes on to say that "where divers persons claim the administration as next-of-kin, which be equal in degree of kindred to the testator or person deceased, and where any person only desireth the administration, as next-of-kin, where indeed divers persons be in equality of kindred as is aforesaid, that in every such case the Ordinary to be at his election and liberty to accept any one or more making request where divers do require the administration."

The "next-of-kin" mentioned in this statute are the "next-of-kin" mentioned in the Statute of Distributions. Any person filling that relation so as to be entitled to share in the distribution is entitled in his order, subject to the discretion of the Ordinary given by the last-quoted Act, to take out administration. I have been unable to find an instance in which administration to an English estate has been granted or even applied for to a child born out of wedlock, but domiciled and legitimated in a foreign country.

Of the Statute of Distributions the late Mr. Justice Williams says, "It is obvious to observe how near a resemblance this statute bears to the ancient English law *de rationabili parte bonorum*. . . . It also bears some resemblance to the Roman law of succession *ab intestato*, which, and because the Act was also penned by an eminent civilian (Sir Walter Walker), has occasioned a notion that

the Parliament of England copied it from the Roman prætor, though it is little more than a restoration with some refinements and regulations of our old constitutional law, which prevailed as an established right and custom from the time of King Canute downwards, many centuries before Justinian's laws were known or heard of in the western parts of Europe" (*Williams on Executors*, 8th ed. p. 1493). And Chief Justice Holt laid it down in *Blackborough v. Davies* (3) in reference to this statute that if the spiritual Court attempted a distribution contrary to the rules of the common law they would prohibit, "for by that statute," said he, "they are restrained to the rules allowed among us."

I now come to the *dicta* of Judges which are supposed to sanction the doctrine contended for by the applicant, namely, that English law recognises for the purposes of succession to the personal estate of an intestate domiciled in England the *status* of legitimacy which the applicant has acquired in his or her foreign domicile. The first in order and importance is *Birtwhistle v. Vardill*, first reported in 5 B. & C. 438. The facts were that W. domiciled in England, died intestate, leaving one brother, who was domiciled in Scotland, and who, after having had an illegitimate son, married the mother of the child, who thereby became by the law of Scotland legitimated. The plaintiff was that son, and he claimed to inherit the lands in England as heir to W.

Tindal, who afterwards became Lord Chief Justice of the Common Pleas, contended for the plaintiff that legitimacy was a personal *status* which accompanied the man wherever he went, and after citing *Huber. De Conf. Leg.* and other writers on international law in support of the proposition, he said it must be conceded that the rules laid down by these writers could only apply where our laws admit the existence of a corresponding *status* and where they are not at variance with any positive law, and instanced the *status* of slavery as one "which was not recognised in this

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country." After quoting *Dalrymple v. Dalrymple* (4), that the validity of a foreign marriage must be tried by the law of the country where it was celebrated, and the *status* thereby acquired is recognised in every other country, he says, "In like manner in cases of intestacy the foreign law prevailing at the place of the intestate's domicile has governed the distribution of property in this country. The argument of the plaintiff only extends to the recognition of the *status* of marriage and of legitimacy which are known to the whole of Europe where Christianity is professed. We do recognise the foreign marriage, why not the consequences also?" The counsel on the other side pressed on the Court that this country does not recognise any foreign *status* where it is contrary to the spirit of our moral, religious and political opinions.

I have set out the substance of the arguments in order to explain passages in the judgment which are ambiguous, and which I venture to think have been misunderstood. Chief Justice Abbott said (at p. 451), "The rule as to the law of domicile has never been extended to real property, nor have I found in the decisions of Westminster Hall any *dictum* giving countenance to the idea that it ought to be so extended. Two decisions in the House of Lords have, however, been referred to, whence it has been said such an opinion may be inferred. It is, therefore, satisfactory to know that this case may be carried before that tribunal. There being no authority for saying that the right of inheritance follows the domicile of the parties, I think it must follow that of the country where the land lies. Personal property has no locality, and even with respect to that it is not correct to say that the law of England gives way to the law of a foreign country, but that it is part of the law of England that personal property should be distributed according to the *jus domicilii*."

"It is not against our law that a foreign marriage, however solemnised, should be held good.

"We adopt the laws of all Christian

countries as to marriage, but it by no means follows that we are to adopt all the consequences of such marriages which are recognised in foreign countries; it is sufficient if we admit all such consequences as follow from a lawful marriage solemnised in this country."

The single paragraph that "it is part of the law of England that personal property should be distributed according to the *jus domicilii*," forms the basis of the appellant's argument.

But to my mind it is obvious, looking to the argument and the well-established rules of distribution, that the domicile referred to is not that of the person who claims to participate in the distribution, but the domicile of the intestate whose property is under administration.

The property of an intestate domiciled in a foreign country, as I before observed, is and always has been distributed according to the foreign law, and if the property in question had belonged to a person domiciled in Holland, the appellant would undoubtedly have been entitled. But the property of an intestate domiciled in England is and always has been distributed according to English law. The concluding sentence of the judgment expresses the view of the Lord Chief Justice as to the law of England, and limits its recognition of the consequences of marriage to such "as follow from a lawful marriage solemnised in England."

Mr. Justice Bayley says (p. 453), "I concede that the *lex loci* governs the question of marriage, but whether all the consequences recognised in a foreign country as following upon a marriage there are also to be recognised in this country is a very different question, and I think must be answered in the negative." Mr. Justice Holroyd and Mr. Justice Littledale expressed themselves to the same effect. Though the judgment is confined to the point in question, namely, the right of succession to real estate, the observations quoted in answer to the arguments shew conclusively to my mind that neither of these Judges would, under the circumstances of this case, have sanctioned the appellant's claim.

The two cases in the House of Lords, quoted in the argument and referred to

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by the Lord Chief Justice, are *Shedden v. Patrick* and *The Strathmore Peerage Case*. *Shedden v. Patrick* was an appeal from the Court of Session. W. Shedden, of New York, entered into a regular marriage there with a woman who had previously borne him two children. He died there intestate, leaving an estate in Ayrshire. The marriage had not the effect in America of rendering the children legitimate. It was held that the son could not inherit the estate in Scotland, because his legitimacy or illegitimacy must be determined according to the laws of America, where his parents were domiciled and where he was born, and by the laws of that country he was illegitimate. It was argued in *Birtwhistle v. Vardill*, and perhaps rightly argued, that if the claim in *Shedden v. Patrick* had been founded upon circumstances similar to those upon which the case in question depended, the claim would have been established by the House of Lords. For the House was sitting to administer the law of Scotland, and if the civil law had prevailed in America as it prevails in Scotland, the claimant might have been held legitimate by the law of Scotland, and entitled to inherit. *The Strathmore Peerage Case* was decided on the same principle. It cannot, I should think, be doubted that a person legitimated by a subsequent marriage would in any country where the canon or civil law prevails, be recognised as legitimate; but we are dealing with English law, which has never, that I can find, adopted this rule of the canon or civil law, but, on the contrary, has persistently repudiated it and steadily abided by the common law of England.

The next reported stage of *Birtwhistle v. Vardill* is in 2 Cl. & F. 571; 9 *Bligh's New Reports*, 32. The question had been argued before the Judges, and their opinion was delivered by Chief Baron Alexander. It is clear that the opinion of foreign jurists had influenced the learned Judges, and they drew a distinction between what is there called "real and personal status;" the last being that which respects the person and follows it everywhere, the first that which is connected with the land and adherent

to it, and is as immovable as the subject to which it is applied.

They intended this doctrine, I have no doubt, to be applied as well to the administration of the goods of an intestate domiciled in England as to those of an intestate domiciled abroad. The quotation from Lord Stowell's judgment in *Dalrymple v. Dalrymple* (4) shows how strongly they had been prepossessed in favour of this distinction.

Dalrymple v. Dalrymple (4) was a suit by an alleged wife for restitution of conjugal rights, and the only question before the Court, and the only question touched on by the judgment, was the validity of a Scotch marriage. After recapitulating the facts Lord Stowell (then Sir W. Scott) says (at p. 58), "Being entertained in an English Court, the cause must be adjudicated according to the principles of English law applicable to such a case. But the only principle applicable to such a case by the law of England is that the validity of Miss Gordon's marriage rights must be tried by reference to the law of the country where, if they exist at all, they had their origin. Having furnished this principle the law of England withdraws altogether and leaves the legal question to the exclusive judgment of the law of Scotland." Not a word is said, from the beginning to the end of a long and elaborate judgment, devoted to the effect of the evidence on the single question of marriage or no marriage, as to the *status* of the children here or in Scotland, for no such question could possibly arise in the case. Yet Chief Baron Alexander quotes it as if it dealt with the *status* of ante-born children. He says at the commencement of the judgment, after stating that the first question in order regarded the *status* or condition of the then claimant, "I believe I express the opinions of the Judges when I say, in the well-considered language of Lord Stowell in *Dalrymple v. Dalrymple* (4), 'The cause being entertained in an English Court must be adjudicated according to the principles of English law applicable to such a case, but the only principle applicable to such a case by the law of England is that the *status* or condition of the claimant must be tried by reference

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to the law of the country where the *status* originated. Having furnished this principle the law of England withdraws altogether and leaves the question of *status* in the case put to the law of Scotland.' Such is the sentiment of that great Judge, and such is his language, varied only so far as to apply to a question of legitimacy what was said of a question respecting the validity of a marriage."

Thus the preliminary question in the cause leading up to the point which the Court had to determine was, notwithstanding what had been said by the Judges in the Court below, without reasoning or discussion quietly assumed. Dr. Story, I may here observe, adopts the version of *Dalrymple v. Dalrymple* (4) given by Chief Baron Alexander, and, starting from that broadly, lays it down that the *status* of legitimacy or illegitimacy, decided by the law of the place where the marriage took place, must be deemed equally true and valid everywhere else, quoting *Birtwhistle v. Vardill* (5). The Judges nevertheless, resting on the Statute of Merton, were of opinion that this doctrine was not applicable to immovable property, and advised the House that the claimant not being born in wedlock could not inherit as heir.

Lord Brougham strongly opposed both the distinction between movable and immovable property which the Judges had drawn, and their conclusion, and advocated the adoption of the civil law as regards succession in both cases. He pointed out with great force the anomalies and inconveniences which would result from such a distinction (6): "That a man may be bastard in one country and legitimate in another seems of itself a strong position to affirm; but more staggering is it when it is followed up by this other, that in one and the same country he is to be regarded as bastard when he comes into one Court to claim an estate in land and legitimate when he resorts to another to attain personal succession; nay, that the same Court of equity when the real estate happens to be impressed with a trust must view him

as both bastard and legitimate in respect of a succession to the same intestate. Further still, should he happen to be next-of-kin to his uncle, who had a mortgage upon the estate, he must be denied his succession to the land of the mortgagor in his quality of bastard and be allowed to come in as an incumbrancer upon the selfsame estate in his capacity of legitimate son to the same mortgagor. All this is assumed to be law by the learned Judges who have decided below, and advised your Lordships here." And he proceeds (at page 596), "May I be permitted most respectfully to express a doubt whether or not this question has received all due consideration at the hands of those learned Judges, and whether they have not dealt with it a little too easily—made somewhat too light of it." The learned Lord, deeming the decision wrong, thought it desirable that the case should undergo further consideration.

Lord Lyndhurst expressed himself as struck with some of the views put by Lord Brougham, and thought they required very full and patient consideration, and Lord Denman concurring, the case was ordered to be further argued before the Judges. In 1840 the case was argued before Tindal (then Chief Justice), Justices Vaughan, Bosanquet, Patteson, Williams, Coleridge and Coltman, and Barons Parke, Maule and Gurney, and the unanimous opinion of the Judges delivered by Chief Justice Tindal (7). One cannot but observe a marked difference between this opinion and that delivered by Chief Baron Alexander.

The opinions of foreign jurists were as before insisted on by counsel, but instead of taking for granted the proposition that the *status* of the claimant as regards succession to chattels must be tried by reference to the law of the country where the *status* originated, Chief Justice Tindal left that question untouched.

"There can be no doubt," he said, "but that marriage, which is a personal contract, when entered into according to the rites of the country where the parties are domiciled and the marriage celebrated

(5) 9 Bligh, N.S. 32 (*Story's Conflict of Laws*, 93c).

(6) 2 Cl. & F. at p. 595.

(7) 7 Cl. & F. 895.

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must be considered and treated as a proper and complete marriage throughout the whole of Christendom.

"But it does not therefore follow that with the adoption of the marriage contract the foreign law also adopts all the conclusions and consequences which hold good in the country where the marriage was celebrated. . . . But admitting, for the sake of argument—and we are not called upon to give our opinion on that point—that B, legitimate in Scotland, is to be taken to be legitimate all over the world, the question still recurs whether for the purpose of constituting an heir to land in England, something more is not necessary to be proved on his part than such legitimacy; and if we are right in the grounds on which we have rested the first point, one other step is necessary, namely, to prove that he was born after an actual marriage between his parents." No doubt this was said with reference to the succession to real estate, the point in question in the cause. But what I desire to call attention to is that the ultimate opinion of the Judges gives no sanction to the appellant's claim, but leaves that question open. Lord Brougham adhered to his former opinion, though he did not oppose the judgment being affirmed. The case therefore stands as a binding authority that for the purpose of succession to real estate the foreign *status* of legitimacy by the subsequent marriage of the parents is not recognised by the law of England. It remains to be decided, as far as this case or any other case up to 1840 (the date of this judgment) is concerned, whether the solecism already pointed out shall be introduced into our law or whether the succession to personal estate, always supposing it to be the estate of an intestate domiciled in England, shall follow the succession to realty.

I come now to the case of legacy duty, upon which great stress was laid by the counsel for the appellant—*Skottowe v. Young*. An Englishman by birth, but domiciled in France, was possessed of considerable estate in England. He married in France a French lady, by whom he had previously had two daughters, and they were legitimated according to French law and placed upon the same

footing as children born in wedlock. By his will he devised his real estate to trustees upon trust for sale and conversion, giving a share in the proceeds to each of his two legitimated daughters, whom he described in the will as his daughters. The question argued was at what rate legacy duty was to be paid upon these legacies. The Commissioners of Inland Revenue claimed ten per cent. on the ground that these daughters were illegitimate and "strangers in blood" within the meaning of 55 Geo. 3. c. 184. The petition prayed for a declaration that the legacy duty was only one per cent., treating them as children of the testator. Vice-Chancellor Stuart in giving judgment referred to *Birtwhistle v. Vardill* as a case in which it was admitted that the claimant then held in England the *status* of a legitimate son, except for the purpose of inheriting real estate, and treated these legatees therefore as entitled to rank as children, and in that character liable to a duty of only one per cent. The Vice-Chancellor's estimate of the effect of *Birtwhistle v. Vardill* is, I venture to say, certainly erroneous. Very different was Lord Cranworth's view as expressed by him in *Shaw v. Gould*: "The opinions of the Judges in that case and of the noble Lords who spoke in the House left untouched the question of legitimacy, except so far as it was connected with succession to real estate. I think they inclined to the opinion that for purposes other than succession to real estate, for purposes unaffected by the Statute of Merton, the law of domicile would decide the question of *status*. No such decision was come to, for no question arose except in relation to heirship to real estate. But the opinions given in the case seem to me to shew a strong bias towards the doctrine that the question of *status* must, for all purposes unaffected by the feudal law as adopted and acted on in this country, be decided by the law of the domicile." This is all that can be said of *Birtwhistle v. Vardill* so far as it bears upon the question now under discussion, and more than can be said of the opinions of the Judges in the second argument. Vice-Chancellor Kindersley took what I venture to call the same

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erroneous view of *Doe v. Vardill* in his judgment in *Re Don's Estate* as Vice-Chancellor Stuart took. But this is not the only part of the judgment of Vice-Chancellor Stuart which is unsatisfactory. It had been established twenty-six years before by the House of Lords in the case of *Thomson v. The Advocate-General* (8), as a general principle of law applicable to all such cases, that personal property follows the law of the domicile of the testator or intestate, and that it is the same as if the personal property had been in the foreign domicile at the time of his death. Further, that the Act imposing the legacy duties was limited to Great Britain, and that, notwithstanding the general terms contained in the schedule, those terms must be read in connection with the 1st section of the Act, and must receive that limited construction and interpretation which alone is consistent with the 1st section. Upon these principles it was decided that where a British-born subject died domiciled in Demerara, possessed of personal property in Scotland, probate being taken out there for the purpose of administering, and legacies paid to legatees residing in Scotland, such legacies were not liable to legacy duty. In a subsequent case—*Arnold v. Arnold* (9)—Lord Chancellor Cottenham, referring to *Thomson v. The Advocate-General* (8), said that, independently of that authority, he should, upon the construction of the 36 Geo. 3. c. 52. s. 2, have been of opinion that the legacies in question were not legacies given by the will of a person intended by the Act, for that “when the Act speaks of ‘any will of any person’ and of the legacies being payable out of the personal estate, it must be considered as speaking of persons and wills and personal estate in this country, that being the limit of the sphere of the enactment.” After the passing of the Succession Duty Act (16 & 17 Vict. c. 51), an attempt was made to charge such legacies with succession duty. This also failed, and upon the same grounds—*Wallace v. The Attorney-General*. This decision, which was by

Lord Chancellor Cranworth, was given five years before the case of *Skottowe v. Young* was argued, yet neither of the three cases was referred to by Vice-Chancellor Stuart.

If any distinction could be drawn between a legacy bequeathed out of the proceeds of land directed to be sold (which is in terms chargeable with legacy duty under the Act) on the ground that, at the date of the testator's death, it was real estate, it would have been satisfactory to know that that point was taken and dealt with, but it was not. The legacies were treated throughout as payable out of personalty. “The trust for conversion,” said the Vice-Chancellor, “is a valid trust, and the property in the view of the Court personal property.”

If legacy duty had been payable in this case, the decision would have been quite right. For the Court was administering a foreign, not an English estate, and as by the foreign law the petitioners took as children of the testator, they could not be charged in any other character. One other case supposed to be favourable to the appellant remains to be noticed. It is *Fenton v. Livingstone* (1). Lord Wensleydale's judgment is quoted as supporting the appellant's claim. I read it in an entirely opposite sense. The question in the cause related to the succession to real estate in Scotland, and to that only. The claimant was the issue of an incestuous marriage in England, which was solemnised before the passing of Lord Lyndhurst's Act, and in the Scotch Courts he was held entitled to succeed as heir, because, the mother being dead, the marriage, not having been questioned in the lifetime of the parties, must be taken as a valid marriage. The Lords reversed this decision. In giving judgment, Lord Wensleydale said (at p. 547), “It must be considered as established that the law of a man's domicile regulates his rights to a personal property wherever situated, on the acknowledged principle of *mobilia sequuntur personam*; therefore the succession to his effects takes place according to the law of the place where he is domiciled at the time of his death in the cases of intestacy or testacy. It is now fully and perfectly settled by our law

(8) 12 Cl. & F. 1.

(9) 2 Myl. & Cr. 256; 6 Law J. Rep. Chanc. 218.

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that the law of the domicile regulates the distribution of personal estate in the former case, and the form of the will in the latter. The law of the domicile also regulates the personal qualities which take effect from birth, such as legitimacy or illegitimacy, or absolutely as to the succession of personal property, but subject to a qualification as to realty. The laws of the State affecting the personal status of its subjects travel with them wherever they go, and attach to them in whatever country they are resident."

It must be admitted that there is some obscurity in the first and last of these passages. But read with the intermediate passages they appear to me clearly to mean that his rights "as to the disposition of his personal property are regulated by the law of the domicile," and therefore the succession to his effects takes place according to the law of the place where he was domiciled, not where the claimant is domiciled. So in the next sentence: "The law of the domicile" (that is the same domicile first spoken of—the domicile of the owner of the property) "regulates also the personal qualities which take effect from birth, such as legitimacy or illegitimacy, or absolutely as to the succession to personal property, but subject to a qualification as to realty."

The argument is, a person who is legitimate in England, but not legitimate in Scotland, is entitled in the administration of personal property which happens to be in Scotland of an intestate domiciled in England, just as he would be if the estate were administered in England, but it is not so as regards real property in Scotland. The succession to that is governed by the law of Scotland. On this ground the case was said to bear a close resemblance to *Birchcliffe v. Vardill*.

I now come to the authorities on the other side. In *In re Wright's Trusts* Vice-Chancellor Wood held that a child born in France of a French mother by an Englishman, who had not then become domiciled in France could not become legitimated in the view of English law by anything that afterwards occurred in France, and could not therefore take

under an English will as "child" of her father. *Udny v. Udny* is to the same effect. I mention this case because it was cited in the argument and referred to and distinguished by the Vice-Chancellor in the case which is precisely in point, namely, *Boyes v. Bedale*. An Englishman residing in England bequeathed a sum of 5,000*l.* upon trust after the death of his nephew, to whom he gave the dividends for life, to divide the principal amongst the children of his nephew attaining the age of twenty-one years, or, if only one such child, then to that only child. The only child the nephew had was one born in France of a French mother long after the death of the testator, but after the nephew had acquired a French domicile. Some years after the child's birth the parents intermarried, and the child then became legitimated by the French law. The question was whether such child could take under the bequest. After taking time to consider, the learned Vice-Chancellor delivered a long and elaborate judgment, which is fully reported in the *Law Journal*, reviewing the authorities, and especially quoting from *Story's Conflict of Laws*, and holding it to be clear that the daughter could not, in an English Court administering the trusts of an English will, be recognised as a "child." He adopts the rule laid down by Story, section 479*a*, that "where the will is made in the place of the domicile of the testator the general rule of the common law is, that it is to be construed according to the law of the place of his domicile in which it is made." A will therefore made of personal estate in England is to be construed according to the meaning of the terms used by the law of England, and this rule equally applies whether the judicial enquiry as to its meaning and interpretation arises in England or any other country. "It appears to me," said the Vice-Chancellor, "there is such an abundance of authorities as to the construction of all testators' wills, with reference to their domicile, that I really have no doubt upon the subject. The testator's will and every term in it must be construed according to the law of the testator's domicile unless there is something to the contrary apparent on the

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face of the will." He adds, "So, if you take a case under the Statute of Distributions, I apprehend the law would be the same. I apprehend it to be quite clear that if a man died domiciled in England, descendants of this description, not legitimate *ab initio*, but legitimated in another country, would never, under the statute, take a part in the distribution of the property."

In *In re Wilson's Trusts* (affirmed, *sub nom. Shaw v. Gould*) Vice-Chancellor Kindersley followed with approval the rule expressed by Vice-Chancellor Wood, that the "word 'children' in an English will must be construed to mean children lawfully begotten, unless an intention appears in the will to use the term in a different manner."

It is argued, and with truth, that the reference of Vice-Chancellor Wood to the Statute of Distributions was an *obiter dictum*. But does it not follow as a logical sequence from the decision?

If a testator uses the very words of the Statute of Distributions, and bequeaths legacies to his "brother's children" or "his next of kindred in equal degree," and nothing appears to shew that he intended to use the words in any other than their legal sense, a legitimated child, such as the applicant is, would not, according to the authorities, be entitled to rank as a legatee. Upon what principle can the same words in an English statute passed to supply the place of a will, and intended to govern the administration of the estate of a domiciled Englishman, receive a different meaning? I have already observed that the estate in this country of an intestate domiciled in a foreign country is administered according to the foreign law, and not under the Statute of Distributions, and I cannot help thinking that this distinction has not been always borne in mind, either in argument or in reading judgments or foreign treatises. In such a case it is correct to say that English law recognises the foreign *status*, but it is a mistake to apply this maxim to the administration of the estate of a domiciled Englishman.

I am, therefore, of opinion that this statute, like every other, must be construed in the sense which the common

law puts upon its words, and that "children" means such and such only as are recognised in our table of consanguinity.

I cannot allow myself to be influenced by considerations of hardship or inconvenience. The question for us is what the law is, not what we may think it ought to be. Anomalies and absurdities may be pointed out on both sides, some of which, as resulting from a decision in favour of the appellant, I have already adverted to.

For these reasons, I am of opinion that the judgment of the Master of the Rolls is right, and ought to be affirmed.

COTTON, L.J.—The question in this appeal is as to the right of the appellant to share in a portion of the personal estate of Rachel Goodman, as to which she died intestate. Rachel Goodman was a domiciled Englishwoman. She died a spinster, and at the time of her death she had neither father, mother, brother or sister. But two of her deceased brothers left children, who survived her. Leyon Goodman, one of these brothers, had cohabited with Charlotte Smith, and while domiciled in England had by her three children. He, after the birth of these children, removed to Amsterdam, and he was thenceforth, down to the time of his death, domiciled in Holland. While domiciled there, he, in the year 1821, had by the said Charlotte Smith another child, Hannah, the present appellant, afterwards the wife of Jean Pieret. Leyon Goodman, in the year 1822, married Charlotte Smith. The evidence shows that by the law of Holland this marriage made Hannah Pieret, and also the three children born while Leyon Goodman was in England, legitimate.

Under the Statute of Distributions (22 & 23 Car. 2. c. 10) the personal estate of Rachel Goodman, as to which she died intestate, was divisible amongst the children of her deceased brothers. No claim was made on behalf of the three children of Leyon Goodman born while he was domiciled in England, but Hannah Pieret claimed to share and the Master of the Rolls decided against her

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claim. In support of this decision it was urged that in an English Act of Parliament the nearest of kin must be taken to mean those who, by the law of England, are recognised as nephews and nieces—that is, as legitimate children of the intestate's deceased brothers. This is doubtless correct, but the question is, who are by the law of England recognised as legitimate. It is urged in support of the decision of the Master of the Rolls that the law of England recognises as legitimate those children only who are born in wedlock. This is correct as regards the children of persons who, at the time of the children's birth, are domiciled in England. But the question as to legitimacy is one of *status*, and, in my opinion, by the law of England, questions of *status* depend on the law of the domicile. For this proposition there is authority. It is stated by Mr. Justice Story in his book on the "Conflict of Laws," par. 93e, that foreign jurists generally, though not universally, maintain that the question of legitimacy or illegitimacy is to be decided exclusively by the law of the domicile of origin; and in par. 93e he states that the same general doctrine is avowedly adopted by the Courts of England; and he refers to the opinion expressed by Lord Stowell in *Dalrymple v. Dalrymple* (4), that according to the law of England the *status* or condition of a claimant is tried by reference to the law of the country where the *status* originated. Moreover, in the case of *Birtwhistle v. Vardill*, when it first came before the House of Lords in the year 1830 (reported in 2 Cl. & F. 571), Chief Baron Alexander, when giving the unanimous opinion of the Judges who were consulted, refers with approval to the opinion as expressed by Lord Stowell as applicable to a question of legitimacy.

In *Fenton v. Livingstone* (1) Lord Wensleydale, in a passage already read, and which I do not repeat, without qualification, expressed himself thus: "The laws of the State affecting the personal *status* of the subjects travel with them wherever they go, and attach to them in whatever country they are resident."

Vice-Chancellor Kindersley, in a pas-

sage of his judgment in *In re Don's Estate*, to which I shall afterwards refer, lays down the same rule.

If, as in my opinion is the case, the question whether a person is legitimate depends on the law of the place where his parents were domiciled at his birth—that is, on his domicile of origin—I cannot understand on what principle, if he be by that law legitimate, he is not legitimate everywhere, and I am of opinion that if a child is legitimate by the law of the country where, at the time of its birth, its parents were domiciled, the law of England, except in the case of succession to real estate in England, recognises and acts on the *status* thus declared by the law of the domicile. In fact, the respondents wish to use the proposition that "in an English Act of Parliament those only are next-of-kin or children of a deceased brother whom the law of England recognises as legitimate," as if it were, "whom the law of England would recognise as legitimate, if, at the time of their birth, their domicile—that is, the domicile of their parents—had been English."

But, in my opinion, in deciding questions of legitimacy—that is, of *status*—the law of England looks to the law of the actual, not of an hypothetical, domicile. I am of opinion that, on principle, as by the law of Holland, where the parents of Hannah Pieret were, in fact, domiciled at the time of her birth, she is legitimate, the law of England for the purpose of succession to personal estate ought to hold her to be legitimate. This, on principle, is my opinion, but the cases may have established a different rule, and it is necessary to consider the authorities which were relied upon in argument in support of the decision of the Master of the Rolls. The case which was much discussed was that of *Birtwhistle v. Vardill*, which in the year 1830, and again in 1840, came before the House of Lords. All that was actually decided in that case was that the eldest son, born in Scotland before marriage of parents domiciled there, though by Scotch law legitimate by reason of the subsequent marriage of his parents, was not capable of taking land in England as heir of his father.

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The unanimous opinion of the Judges, as expressed on two occasions, was that he could not; but Chief Baron Alexander stated the question to be considered as being, whether by the law of England a man is the heir of English land merely because he is the eldest legitimate son of his father, and though he gives his opinion that he is not, he particularly, in the passage to which I have already referred, treats the general question of his *status*—that is, of his legitimacy—as one to be determined by the law of the place where the parents were domiciled at the time of his birth, and he was then delivering the unanimous opinion of the Judges who had been consulted. When the case was before the House of Lords in the year 1840, Chief Justice Tindal delivered the unanimous opinion of the Judges then consulted, and he (7 Cl. & F. p. 924) stated the ground of their opinion to be that they held it to be a rule or maxim of the law of England with respect to the descent of land in England from father to son, that the son must be born after actual marriage between his father and mother. Chief Justice Tindal does not, it is true, so distinctly as was done by Chief Baron Alexander, state the proposition that legitimacy must depend on the law of the country of the parents' domicile at the time of birth, but he treats the Statute of Merton as referring only to the question of the right to inherit land in England; and in 7 Cl. & F. p. 932, there occurs this passage:—

“The contest above adverted to was a contest between the ancient law and custom of England on the one hand, and the canon law on the other, which should prevail as to the hereditary succession to land in England; canon and civil law being acknowledged and prevailing in England in all other respects, with the single exception of its application to the descent of land.”

The decision in that case, therefore, was not at variance with the rule which, in my opinion, is on principle the correct one, and the opinion expressed by the Judges strongly supports my view. But it was urged that the opinion expressed by the Judges as to the legitimacy of the

son born before marriage was intended to apply only to his right to share in the personal estate of the father, domiciled in Scotland. As the eldest son was admittedly legitimate by the law of Scotland, by which the succession to the father's personal estate must be governed, this contention would reduce to a nullity the opinion there expressed by the Judges, and in my opinion they did intend to express their opinion that the claimant, being legitimate by the law of Scotland, where his parents were domiciled at his birth and at the date of their marriage, must be considered legitimate in England, except for the purpose of succession to real estate, and that this depended on a special rule of the feudal law as adopted in England. This, in my opinion, was the view taken by Lord Cranworth in *Shaw v. Gould*, which has been already quoted in a different sense.

Vice-Chancellor Kindersley took the same view in *In re Don's Estate*. He says, “It appears to me that on the authorities applicable to this question the principle is this: that the legitimacy or illegitimacy of any individual is to be determined by the law of that country which is the country of his origin. If he is legitimate in his own country then all other civilised countries—at least, all Christian countries—recognise him as legitimate everywhere.” He then refers to the case of *Birtwhistle v. Vardill*, and treats it as an exception to the general rule above stated by him, founded on the rules of inheritance attached to land in this country. But although the decision in *Birtwhistle v. Vardill* is not against the appellant, and the opinions expressed in that and the other cases to which I have referred are in his favour, the case of *Boyes v. Bedale*, and the opinion expressed by the Vice-Chancellor in that case, are undoubtedly in favour of the decision of the Master of the Rolls.

In *Boyes v. Bedale* the question was on the construction of a bequest in the will of a domiciled Englishman to the children of a person named. The Vice-Chancellor held that a child, exactly in the same position as Hannah Pieret, was not entitled under the bequest. He said

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that the will, being that of a domiciled Englishman, must be construed according to English law, which, in my opinion, is correct so far as to require that this word "children" shall be construed "legitimate children." But he held that English law recognised as legitimate only those children born in wedlock. This, though correct as regards the children of persons domiciled in England at the time of their birth, is, in my opinion, erroneous as to children born of parents who, at the time of the birth, were domiciled in a country by the law of which the children were legitimate. The Vice-Chancellor, at the end of his judgment in *Boyes v. Bedale*, expressed his opinion that any claim under the Statute of Distributions would be dealt with in the same way.

In re Wright's Trusts (2), also a decision of Lord Hatherley when Vice-Chancellor, is not inconsistent with the opinion already expressed by me, and explains how the children of Leyon Goodman, born while he was domiciled in England, make no claim. They, like the children excluded by the Vice-Chancellor in *In re Wright's Trusts* (2), were born while their parents were domiciled in a country by the law of which no subsequent marriage of persons domiciled there could legitimate children born before their marriage. The exclusion of these children is therefore in accordance with the rule as to *status* already expressed by me.

The judgment in *In re Wilson's Trusts* (affirmed by the House of Lords under the name of *Shaw v. Gould*) is not an authority on the question involved in this case. For there, by the law of England, the mother of the children had not been effectually divorced from her first husband, and her marriage with the father of the children was void and the children illegitimate. *Boyes v. Bedale*, though mentioned with approval by Vice-Chancellor Kindersley in *In re Wilson's Trusts*, is really the only decision which supports the judgment of the Master of the Rolls, and *Skottowe v. Young* is certainly a decision in favour of the appellant. In that case the Vice-Chancellor Stuart held that children of a testator domiciled abroad, who were in exactly

the same position as regards legitimacy as Hannah Pieret, were, under the Legacy Duty Acts, liable to pay duty at the rate of one per cent. only—that is, as children of the testator within the meaning of that Act. Moreover, though in *Goodman v. Goodman* the point raised on this appeal is not mentioned in the judgment, Vice-Chancellor Stuart, who decided that case, and the counsel who argued it, appear to have assumed that if Hannah Pieret was born after her father acquired a domicile in Holland she was to be considered as a legitimate child according to the law of England, and entitled as such under the will of the testator in that case. There is therefore a conflict of decisions; and as, in my opinion, the decision in *Boyes v. Bedale* is contrary to principle, and erroneous, I think that we ought not to follow that case, and that Hannah Pieret is to be treated as a legitimate child of Leyon Goodman, and as such entitled to share in the personal estate as to which Rachel Goodman died intestate, as one of her next-of-kin.

JAMES, L.J.—I concur in the judgment of Lord Justice Cotton both in the conclusion and the reasoning. According to my view, the question as to what is the English law as to an English child is entirely irrelevant. There is, of course, no doubt as to what the English law as to an English child is. We have in this country from all time refused to recognise legitimization of issue by the subsequent marriage of the parents; and possibly our peculiarity in this respect may deserve all that was said in its favour by Professor—afterwards Mr. Justice—Blackstone, the somewhat indiscriminate enologist of every peculiarity and anomaly in our system of laws. But the question is, What is the rule which the English law adopts and applies to a non-English child? This is a question of international comity, and international law. According to that law, as recognised, and that comity as practised, in all other civilised communities, the *status* of a person, his legitimacy or illegitimacy, is to be determined everywhere by the law of the country of his origin—the law under which he was born.

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It appears to me that it would require a great force of argument derived from legal principles, or great weight of authority, clear and distinct, to justify us in holding that our country stands in this respect aloof in barbarous insularity from the rest of the civilised world. On principle, it appears to me that every consideration goes strongly to shew, at least, that we ought not so to stand. The family relation is at the foundation of all society, and it would appear almost an axiom that the family relation, once duly constituted by the law of any civilised country, should be respected and acknowledged by every other member of the great community of nations. England has been for centuries a country of hospitality and commerce. It has opened its shores to thousands of political refugees and religious exiles, fleeing from their enemies and persecutors. It has opened its ports to merchants of the whole world, and has by wise laws induced and encouraged them to settle in our marts. But would it not be shocking if such a man, seeking a home in this country, with his family of legitimated children, should find that the English hospitality was as bad as the worst form of the persecution from which he had escaped, by destroying his family ties, by declaring that the relation of father and child no longer existed, that his rights and duties and powers as a father had ceased, that the child of his parental affection and fond pride, whom he had taught to love, honour and obey him, for whom he had toiled and saved, was to be thenceforth, in contemplation of the law of his new country, a fatherless bastard? Take the case of a foreigner resident abroad, with such a child. If that child were abducted from his guardianship and brought to this country, can anyone doubt that the Courts of this country would recognise his paternal right and guardianship, and order the child to be delivered to any person authorised by him? But suppose, instead of sending, he were to come himself to this country in person, would it be possible to hold that he would lose his right to the guardianship of the child in this country because of the historical or mythical

legend that the English barons and earls many centuries ago cried out in Latin, *Nolumus leges Angliæ mutari*? Can it be possible that a Dutch father, stepping on board a steamer at Rotterdam, with his dear and lawful child, should on his arrival at the port of London find that the child had become a stranger in blood and in law, and a bastard, *filius nullius*?

It may be suggested that that would not apply to a mere transient visit or a temporary commorancy, during which the foreign character of the visitor and his family would be recognised, with all its incidents and consequences, but that it would only apply to a man electing to have a permanent English domicile. But what could, in that view, be more shocking than that a man, having such a family residing with him, perhaps for years, in this country as his lawful family, recognised as such by every Court in the kingdom, being minded at last to make this country his permanent domicile, should thereby bastardise his children; and that he could relegate them by another change of domicile from London to Edinburgh? And why should we on principle think it right to lay down a rule leading to such results? I protest that I can see no principle, no reason, no ground for this, except an insular vanity, inducing us to think that our law is so good and so right, and every other system of law is nought, that we should reject every recognition of it as an unclean thing.

But it is not merely on principle, but on authority, to my mind conclusive, that this question ought to be determined in favour of the appellant. I will not go through the roll of authorities which the Lord Justice Cotton has cited. But I content myself with the one case of *Birchcliffe v. Vardill*. In that case we have the careful and elaborate judgment of the Judges summoned to advise the House of Lords. And in that judgment, or advice, there are two distinct propositions clearly and distinctly enunciated. The first was that the claimant was for all purposes and to all intents legitimate. The second was that such legitimacy did not necessarily, and did not in fact in that case, include heirship to English

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land. The first proposition was accepted by the law lords without any doubt or question; the second was questioned. After further reference to the Judges and further hearing, the case was at last determined in accordance with the second proposition. But the first proposition has never been really questioned. No doubt it may be said that the only decision was against the heirship in that case. But the weight of such an authority, particularly of advice tendered by the assembled Judges to the House of Lords, is not affected by that consideration. It is the *ratio decidendi*—the rules, maxims, and principles of law which are to be found there—by which we are to guide ourselves. In fact, as is well known, the House has frequently put hypothetical states of fact, and abstract questions of law, for the advice and opinion of the Judges, of which I recollect one notable instance in the *D'Este Case* (10). What the assembled Judges said in *Birtchistle v. Vardill*, and what the Lords held was, that the case of heirship to English land was a peculiar exception to the rights incident to that character and *status* of legitimacy, which was admitted by both Judges and Lords to be the true character and *status* of the claimant. It was only an additional instance of the many anomalies which, at that time, affected the descent of land. Legitimate relationship in the first degree was of no avail if the claimant were an alien, or if he were of the half-blood, or in the direct ascending line, which, *pace* Professor Blackstone, were precious absurdities in the English law of real property. But in this particular case the exception is at all events plausible. The English heirship, the descent of English land, required not only that the man should be legitimate, but as it were *porphyro-genitus*, born legitimate within the narrowest pale of English legitimacy. Heirship is an incident of land, depending on local law, the law of the country, the county, the manor, and even of the particular property itself, the *forma doni*. Kinship is an incident of the person, and universal. It appears to me that a statement of the

law so given, and so accepted, nearly fifty years ago, which has been adopted without question by jurists as a correct statement of English adhesion to the universal law and comity of nations, is not to be questioned at this time by any tribunal short of the House of Lords, and I should humbly think not by them. There is only one authority to the contrary—the case of *Boyes v. Bedale*—on which I will say a few words. The decision there was on the ground that, in an Englishman's will, the children of a nephew must mean children who would be lawful children if they were English children. That seems to me a violent presumption. It was an accident in that case that the testator was an Englishman. But supposing it had been the will of a Frenchman, dying domiciled in England, and made in favour of his French relations and their children, or of his own children, there being children legitimate and legitimated, what would have been said of such a presumption and such a construction? In that case, by way of *obiter dictum*, the learned Judge goes on to say that the same construction would be applied to kindred under the Statute of Distributions. This point was never argued and never considered, I believe, by counsel, and must, I think, have been hastily uttered by the Vice-Chancellor at the close of an oral judgment. It must be borne in mind that the Statute of Distributions is not a statute for Englishmen only, but for all persons, whether English or not, dying intestate and domiciled in England (and not for any Englishman dying domiciled abroad). And it was to provide for what was thought an equitable distribution of the assets, as to which a man had, through inadvertence, not expressed his testamentary intentions. And as the law applies universally to persons of all countries, races and religions whatsoever, the proper law to be applied in determining kindred is the universal law—the international law—adopted by the comity of states. The child of a man would be his child so ascertained and so determined, and, in the next degree, the lawful child of his brother or sister would be his nephew or niece.

(10) *The Sussex Peerage Case*, 11 Cl. & F. 85.

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The real importance of the case of *Dalrymple v. Dalrymple* (4) has not been sufficiently appreciated. There must have been hundreds of cases in which a Scotchman, or a foreigner with legitimated children or other kindred, elected to domicile himself for business, or health, or pleasure at London or elsewhere in England. Can it be doubted that the English Court of Probate, of whose conception of the law the case of *Dalrymple v. Dalrymple* (4) is an authoritative exponent, would without question have admitted the right of some child or next-of-kin to take out administration? And if such right had ever been questioned, would not the fact of such a question—namely, whether a man, by changing his domicile had bastardised his child—have created a sensation which would have vibrated throughout the civilised world wherever there was a writer on international law or comity. The fact that no such case is to be found shews the universal consensus of all persons conversant with the Court of Probate's administration (the appropriate Court in that behalf), that no such question, in fact, existed. That consensus goes back, not only to the year in which the judgment in *Dalrymple v. Dalrymple* (4) was pronounced (1811), but to the furthest limit to which the knowledge and experience of the learned Judge who pronounced it extended. Moreover, if such a question had ever been raised in the distribution of assets by the Court of Chancery the Chief Baron Alexander must, in his long experience in that Court, have been aware of it, and would not have omitted to refer to it in the advice which, on behalf of the Judges, he tendered to the House of Lords.

Solicitors—Capron & Co., for appellant; Wild, Brown & Co. for respondents.

FRY, J. } *In re THE SILKSTONE AND DODS-*
1881. } *WORTH COAL AND IRON COM-*
March 19. } *PANY; ex parte PERKINS.*

Company — Winding-up — Distress — Rent—Companies Act, 1862, ss. 87 and 163.

The lessor of a coal mine to a company had power when the rent was in arrear to stop the working and enter. On the winding up of the company the liquidator continued the working after notice from the lessor to cease or pay the rent in arrear:—Held, that the landlord was entitled to be paid the full rent in arrear, or to distrain.

The Silkstone and Dodsworth Company held a lease for twenty years of a seam of coal from Richard Perkins, at a minimum rent of 250*l.*, payable half-yearly on the 3rd of May and the 3rd of November. The lease contained a proviso that if any rent should be unpaid for thirty days after the day on which the same should become due, it should be "lawful for the lessors, not only to stop and hinder the leading of coals from the colliery of the lessees, but also to enter into and upon the premises demised, and also any neighbouring lands occupied by the lessees, and to distrain."

On the 7th of October, 1880, a petition was presented to have the company wound up, and on the 5th of November an order was made on that petition to have the company wound up.

On the 6th of December, 1880, a notice was served on behalf of the lessor upon the liquidator requiring him to pay the half-year's rent that had accrued due on the 3rd of November, 1880, or stop working. The liquidator continued the working. This was a summons on behalf of the lessor, R. Perkins, to be allowed to distrain for the half-year's rent due the 3rd of November, 1880.

Mr. Popham, for the summons, argued that the liquidator in exercising his discretion, in carrying on the business of the company for the purpose of winding-up, had by continuing to work the colliery after notice elected to accede to the terms offered by the lessor as the price of being allowed to continue the working

In re Silkstone and Dodsworth Coal and Iron Co.; ex parte Perkins.

and keep the lease, which was a valuable asset, and that therefore the lessor was entitled to the full half-year's rent payable on the 3rd of November, under a contract made in the winding-up itself.

Mr. Higgins and Mr. Cozens-Hardy, for the liquidator, contended that the rent was apportionable—

The Swansea Bank v. Thomas, 48 Law J. Rep. Exch. 344; Law Rep. 4 Ex. D. 94;

Constable v. Constable, 48 Law J. Rep. Chanc. 621; Law Rep. 11 Ch. D. 681;

and the lessor was only entitled to be paid in full the apportioned part in respect of the period between the 7th of October, the commencement of the winding-up, and the 3rd of November, the day the rent became payable—

In re The North Yorkshire Iron Company; ex parte Richardson, 47 Law J. Rep. Chanc. 383; Law Rep. 7 Ch. D. 661.

Fry, J., said—In my judgment the landlord is entitled to the full amount. It appears that the rent which is now in question accrued on the 3rd of November, and that on the 5th of November an order was made for winding up this company which related back to the 7th of October, when the petition was presented. It is argued that the rent due on the 3rd of November ought to be apportioned between that period and the 7th of October, 1880. That question I do not intend to determine at all, because in the present case the lessor had this power—if rent remained unpaid for thirty days after the usual day of payment he had a right to enter and to stop as well as to distrain; and accordingly, on the 6th of December, he gave notice to the liquidator, demanding either payment of the arrears of rent or the stoppage of the works, when the liquidator, considering it desirable to carry on the enterprise of which this colliery forms a part, neither stopped nor paid the rent, but he continued working. That is, in my view, an election by the liquidator to continue in possession of the property; and if he continued in the possession of the property he could only do so upon the terms

of the lease; and, in my view, it is only equitable if he keeps the lease as an asset of the company and for the purposes of the liquidation, that he should satisfy those conditions upon which the asset remains his—in other words, he should pay the rent in full.

Now I find that in the case of *In re The Lundy Granite Company* (1) Lord Justice James expressed himself in these terms: "In some cases between the landlord and the company, if the company for its own purposes, with a view to the realisation of the property, remains in possession of the estate which the lessor is therefore not able to obtain possession of, common sense and ordinary justice require the Court to see that the landlord receives the full value of his property; he must have the same rights as any other creditor, and if the company choose to keep the assets for their own purposes they ought to pay the full value to the landlord as they ought to pay any other person for anything else, and the Court ought to take care that he receives it." The principle enunciated in that paragraph appears to me to entirely apply, because, but for the liquidator electing not to stop and to put an end to the working, the asset might have been lost.

I will make this further observation: The landlord was not in the position merely of a person who had a money demand against the company. He was, on the expiration of the thirty days, from the 3rd of November, in the position of a person who had a money demand against the company and a power to render less valuable the asset of the company. It is because he was armed with that power, and because the liquidator chose to act in a manner inconsistent with it, that I think the landlord is entitled to the full satisfaction upon which the asset had been granted to the company—in other words, that the amount should be paid in full.

Solicitors—Wilkinson & Son, agents for R. Perkins, York, for the applicant; Pritchard, Englefield & Co., agents for Grundy & Co., Manchester, for the official liquidator.

(1) 40 Law J. Rep. Chanc. 588; Law Rep. 6 Chanc. 462.

FRY, J. } *In re THE SOUTH KENSINGTON CO-*
1881. } *OPERATIVE STORES (LIMITED);*
April 2. } *ex parte SEYMOUR.*

Company — Winding-up — Rent — Distress—Companies Act, 1862, ss. 87 and 163 — Apportionment Act, 1870, s. 2.

The landlord of premises occupied by the liquidator for carrying on business during winding-up, was held entitled to payment in full of the apportioned rent in respect of the time subsequent to the presentation of the petition on which the winding-up order was made.

The South Kensington Co-operative Stores (Lim.) held the premises 19 and 20 Cromwell Place, at which they carried on business, on lease at the rent of 900*l.* a year, payable quarterly. The rent was paid down to June, 1880. On the 29th of September, 1880, a quarter's rent became payable. On the 27th of November, 1880, a petition was presented for winding up the company, and a provisional liquidator was appointed. He carried on the business of the company on the premises. On the 10th of December a winding-up order was made, and the provisional liquidator was appointed official liquidator, and he continued to occupy the premises and carry on the business for the purpose of winding-up. This was a summons by the landlord that he might be allowed to distrain for 225*l.*, the rent for the quarter from Michaelmas to Christmas.

Mr. North and Mr. Yate Lee, for the summons, argued that the liquidator having used these premises for the purpose of the business and winding-up to the best advantage, the landlord was in the position, so far as the rent which became payable during the winding-up was concerned, of any other creditor to whom the liquidator incurred debts—

In re The Silketone and Dodsworth Colliery Company; ex parte Perkins, ante, p. 444.

In re The Traders' North Staffordshire Carrying Company; ex parte The North Staffordshire Railway Company, 44 Law J. Rep. Chanc. 172; Law Rep. 19 Eq. 60;

In re The North Yorkshire Iron Company; ex parte Richardson, 47 Law

J. Rep. Chanc. 333; Law Rep. 7 Ch. D. 661;

In re The Lundy Granite Company; ex parte Heaven, 40 Law J. Rep. Chanc. 588; Law Rep. 6 Chanc. 462.

Mr. Higgins and Mr. Buckley, for the liquidator, contended that the rent was apportionable between the periods before and after the date at which the premises began to be occupied for the benefit of the creditors in the winding-up—

The Swansea Bank v. Thomas, 48 Law J. Rep. Exch. 344; Law Rep. 4 Ex. D. 94;

and the landlord was entitled to be paid in full for the rent apportioned in respect of the latter period; but for the rent in respect of the earlier period he would only be allowed to prove and receive a dividend. The provisional liquidator was the servant of the company as a going concern; and it was only for the occupation by the official liquidator that the rent was a debt incurred for the benefit of realising the assets. Therefore it was the actual date of the winding-up order, not the date of the presentation of the petition, that was to be taken as the point of time at which the line was to be drawn for the purpose of apportionment; in the same way as, by the 26th rule of the general order for regulating proceedings under the Companies Act, the date of the winding-up order, and not the date of the presentation of the petition, was the moment of time taken for fixing the value of the claims against the company.

They referred, in addition to the cases cited on the other side, to

In re The Coal Consumers' Association; ex parte Hughes, 46 Law J. Rep. Chanc. 501; Law Rep. 4 Ch. D. 625;

In re The Bridgwater Engineering Company, 48 Law J. Rep. Chanc. 389; Law Rep. 12 Ch. D. 181.

Mr. North replied.

FRY, J., said—The landlord now comes and asks me to allow distress to be levied on the goods of the company. That is an application to the judicial discretion of the Court. It is hardly in controversy between the parties that, roughly speaking, the rent which accrued before

In re South Kensington Co-operative Stores ; ex parte Seymour.

the liquidation should be a matter of proof, and the rest be a matter of full payment; but two questions have been discussed between them which are necessary to be determined in order that I may exactly state the rule on which I proceed. I will say at once I intend to proceed substantially on the same rule as that followed by Vice-Chancellor Hall in the case of *The North Yorkshire Iron Company*, because it appears to me that the rule there adopted is a reasonable and sound rule.

Now the first question is this: Is the rent to be calculated from the 27th of November, the date of the presentation of the petition, and, consequently, the commencement of the liquidation, or is it to be calculated from the 10th of December, the day the winding-up order was made? In my judgment it ought to be computed from the 27th of November, and for this simple reason, that that is the date which fixes the liabilities and claims of the company which are provable in the course of the winding-up. No doubt a general order has directed that those liabilities and claims should be valued as from the date of the order for winding-up; but that does not interfere with the fact that the claims and liabilities are those which existed at the commencement of the winding-up. Therefore, drawing the line, as I think I ought, between the debts which are provable under the winding-up and those which are not, it appears to me the commencement of the winding-up is the period at which I ought to draw that line.

The next enquiry is this—whether the rent which I ought to allow to be proved for, and the rent which I ought to allow to be paid in full or distrained for, is to be divided by the quarter days when the rent became due, or by a reference to the commencement of the winding-up. The order of the Vice-Chancellor Hall, which I have already referred to, directed the enquiry, “What rent was due at the commencement of the winding-up?” Now, if that be the true enquiry, it appears to me plain that I must, to use a common expression, apportion the rent between the periods before and after the 27th of November, 1880; and in my judgment I ought so to do, because the Apportionment

Act of 1870 has declared that all rents shall be considered as accruing from day to day, and shall be apportionable in respect of time accordingly. It declared that those rents should be apportionable like interest on money lent. Now, how did the law stand before this Act was passed? Plainly in this way, that rent neither accrued due nor was payable except on the day on which it was reserved; whereas interest on money lent accrued due *de die in diem*, although it might be payable at certain specified days. The effect of the section is to declare this, that rent, like interest, accrues due from day to day, and that the payments of rent, like the payments of interest, when they were periodical, shall be apportioned in respect of the time at which the rent, like interest, accrued due.

Now if that is the true construction of the Act, it follows that the rent which had accrued due up to the 27th of November, 1880, was a debt provable against the company under the liquidation, and that the rent which accrued after was not so.

In my judgment, the rent which accrued due and payable is that which ought to be proved for. The rent which cannot be proved for is that which ought to be paid in full. I shall therefore direct that the applicants be at liberty to dis-train for the latter.

There is one other observation I desire to make. This is not a case in which the landlord has endeavoured to enforce his right of re-entry. If he had done so and had come on that ground, I only desire to say it does not follow that my decision would have been the same as now, and for this reason, that in that case he would be seeking to exercise a legal right; and if the company desired to hold an estate subject to a legal right, it may well be that I should have decided, as I did recently, that the company must satisfy the legal condition which precluded the legal rights from being exercised. I make that observation in order that it may not be supposed that I consider this case as the same that I decided the other day.

Solicitors—Still & Son, for the applicant; Bridges, Sawtell, Heywood, Ram & Jibdin, for the official liquidator.

BANKRUPTCY. }
 BACON, C.J. } In re LONG; ex parte
 1881. } FULLER.
 Feb. 7. }

Solicitor's Lien—Mortgagees' Solicitor subsequently acting for Mortgagor.

A solicitor was entrusted with the custody of title-deeds as solicitor for mortgagees. He subsequently acted as solicitor for the mortgagor, who became indebted to him in costs on that account. The mortgage had not been paid off, but the mortgagor's trustee in bankruptcy was prepared with the money. Upon a claim by the solicitor to a lien upon the deeds for his costs against the mortgagor, —Held, that he had no lien.

This was an appeal from an order of the Judge of the Bristol County Court.

On the 17th of January, 1880, Long mortgaged certain freehold property to E. R. Fuller and F. W. Fuller, and at the same time the deeds relating to the property were handed to Messrs. Payne & Fuller as the mortgagees' solicitors. All costs in relation to the mortgage were duly paid. In May, 1880, Long, being in difficulties, instructed Messrs. Payne & Fuller to endeavour to arrange with his creditors, and to offer the mortgaged property for sale. Messrs. Payne & Fuller accordingly put the property up for sale, and for that purpose made use of the deeds in their possession. In consequence of the biddings falling below the reserved price the property was not sold. On the 23rd of June, 1880, Messrs. Payne & Fuller filed a petition for liquidation on Long's behalf, under which resolutions for liquidation were passed and a trustee appointed. The trustee sold the property, which realised sufficient to satisfy the mortgage to E. R. Fuller and F. W. Fuller, and also a second mortgage which existed upon the property. The mortgage-money was ready to be repaid to the mortgagees, and the latter had executed a reconveyance, and were prepared to hand it over to Long's trustee with the deeds, but had not yet done so in consequence of the claim which Messrs. Payne & Fuller put forward to a lien on the deeds in their hands for the costs (amounting to 49l.) owing to them by

Long in connection with the abortive sale and the attempts to arrange with his creditors.

The County Court Judge rejected Messrs. Payne & Fuller's claim, and ordered the deeds to be given up to Long's trustee upon payment of all moneys due upon the mortgage to E. R. Fuller and F. W. Fuller.

Messrs. Payne & Fuller appealed.

Mr. Horton Smith and Mr. Northmore Lawrence, for the appellants.—The money is ready to pay off the mortgage, and upon payment off we should hold the deeds for the mortgagor. We ought, therefore, to have a lien for our costs, as the mortgagor's solicitors.

The cases of

Re Mosely, 15 W.R. 975;

Colmer v. Ede, 40 Law J. Rep. Chanc. 185;

Pelly v. Wathen, 7 Hare, 351; 18 Law J. Rep. Chanc. 281; on appeal, 1 De Gex, M. & G. 16; 21 Law J. Rep. Chanc. 105;

Blunden v. Desart, 2 Dr. & W. 405, were referred to.

Mr. Winlow and Mr. Poole, for the respondent, were not called upon.

BACON, C.J.—In my opinion the appellants have no lien. The case of *Re Mosely* is by no means an authority in their favour. A lien can only exist against the person on whose behalf the solicitor is holding the deeds. Here the deeds belonged to the mortgagees, and were entrusted by them to their solicitors for safe keeping; against the mortgagees the solicitors never had a lien, since there never was any debt due from the mortgagees in respect of which a lien could arise. The fact that the appellants afterwards became the solicitors of the mortgagor was merely accidental; they still hold the deeds as solicitors for the mortgagees, and therefore, in my opinion, they can have no right to the lien which they claim.

Solicitors—Torr & Co., agents for Payne & Fuller, Bath, for appellants; C. Sawbridge, agent for Blake, Wotton-under-Edge, for the trustee.

JESSEL, M.R. }
 1880. } ENMA SILVER MINING COM-
 July 29. } PANY v. GRANT.

Company — Promoter — Secret Profit — Bankruptcy — Discharge — Proof — “Unliquidated damages” — “Debt incurred by means of fraud or breach of trust” — Bankruptcy Act, 1869, ss. 31 and 49.

The vendors to a company agreed to give a secret profit to G., a financial agent and promoter of the company, and G. received such profit out of the purchase-money payable to the vendors without the knowledge of the company. The company brought an action against G. to compel him to account for the amount of the secret profit, and upon certain issues which were directed to be tried, the Court found that G. was a promoter of the company, and that a large sum was due from him under the undisclosed agreement with the vendors. G.'s creditors subsequently passed a resolution under the Bankruptcy Act, 1869, for the liquidation of his affairs by arrangement, a trustee was appointed, and G. was granted his discharge. On motion for judgment on the result of the issues,—Held, that the company were to be at liberty to go in and prove in G.'s liquidation as creditors for the sum found due from him, such sum being a demand arising by reason of a contract, and not in the nature of unliquidated damages, and therefore provable notwithstanding section 31 of the Bankruptcy Act, 1869. Held also, that the sum found due from G. was a debt “incurred by means of fraud and a breach of trust” within the meaning of section 49 of the same Act, and that G. was not released therefrom by his discharge, and he was therefore ordered personally to pay the debt to the company, less any sum they might receive under his liquidation.

This was an action brought by the Emma Silver Mining Company (Limited), against Albert Grant, Maurice Grant and others. The plaintiffs claimed, amongst other things, an account of and payment by the defendants A. and M. Grant of all sums of money and profits derived by them as promoters of the plaintiff company out of moneys and shares to be paid and allotted under an

agreement of the 4th of November, 1871, and by which the Emma Mine was sold to the company.

By an agreement of the 2nd of November, 1871, made between Park & Stewart, on behalf of the vendors of the mine, and Albert Grant, trading as Grant & Co., it was agreed that the mine should be sold to a company to be formed by Grant for the purchase, and that the price to be paid by the company should be 1,000,000*l.*, half payable in cash, half in fully paid-up shares. It was also agreed that half the share capital should be offered for subscription by Grant & Co., who should be entitled to receive and be paid by the vendors twenty per cent. of the capital of the company, which might be allotted after certain small deductions.

On the 4th of November, 1871, an agreement was entered into between Park on behalf of the vendors of the mine and a nominee of the intended company for the sale of the mine to such intended company for 1,000,000*l.*, half payable in cash and half in fully paid-up shares.

The plaintiff company was on the 8th of November, 1871, incorporated under the Companies Acts, having been mainly promoted by the defendant A. Grant, and half the share capital was subsequently issued to the public and subscribed for.

The agreement of the 2nd of November, 1871, was not mentioned either in the agreement of the 4th of November, 1871, in the prospectus on the issue of the shares, or in the memorandum or articles of association of the plaintiff company.

On the 5th of December, 1871, another agreement was entered into between Park & Stewart and Grant & Co., by which it was arranged that Grant & Co. should dispose of the 500,000 vendors' shares as therein provided, and should be entitled to receive a certain commission on the sale of the shares. This agreement was also concealed from the company.

By an order of the Master of the Rolls made on the 22nd of November, 1878, certain issues of fact were directed to be tried, the plaintiff company giving an undertaking which was, as subsequently varied by the Court of Appeal,

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"not to seek relief against the defendants A. Grant and Maurice Grant in respect of any cause of action other than that covered by the issues, and also to discontinue such portion of the action as the Court shall direct."

The issues directed to be tried came on for trial before the Master of the Rolls on the 20th and 24th of February, 1879, when the action was compromised as against the defendant Maurice Grant, who was not a partner in the firm of "Grant & Co." until 1872. As against the defendant Albert Grant the Master of the Rolls found, as the result of the issues directed, first, that the defendant Albert Grant was a promoter of the company; and, secondly, that he received as profit under the agreements of the 2nd of November, 1871, and the 5th of December, 1871, or one of them, the sum of 108,188*l.* 6*s.* 11*d.* as a promoter of the company without the knowledge of the company, and was accountable to the company for the same less the sum of 2,250*l.*, ordered by consent to be paid by the defendant Maurice Grant to the company with interest at the rate of four per cent. per annum on 46,662*l.* 5*s.* 6*d.* from the 31st of December, 1871, and on the balance from the 30th of June, 1872.

On the 7th of March, 1879, Messrs. Albert and Maurice Grant presented a joint petition for liquidation of their affairs by arrangement. On the 27th of March, 1879, the joint creditors passed a resolution for liquidation by arrangement, and Mr. James Waddell was appointed trustee of the joint property of the debtors, who were thereupon discharged from the claims of the joint creditors.

On the 31st of March, 1879, the separate creditors of Albert Grant passed a similar resolution, Mr. Waddell being appointed trustee of his separate property, whereupon he was discharged from the claims of his separate creditors, and on the 19th of April, 1879, he duly obtained his certificate of discharge. Mr. Waddell was joined as defendant, and on the 24th of February, 1880, the plaintiff company served the defendants Albert Grant and Waddell with a notice of motion—That, in accordance with the finding of the Court on the 26th of Feb-

ruary, 1879, on the trial of the issues, the plaintiffs might be admitted to prove against the estate of the defendant Albert Grant, as creditors, for the sum of 137,611*l.* 3*s.* 5*d.*, being the amount which, at the date of the liquidation by arrangement of the affairs of the said Albert Grant, appeared from the same finding to be due from him to the plaintiffs in respect of the sum of 108,188*l.* 6*s.* 11*d.* received by him as a promoter of the plaintiff company, as therein mentioned, and interest on the same as in the said finding specified, and for the costs of and incidental to the trial of the said issues, and the application for such trial, and the costs of the present application and of so much of the said action as related to the questions raised by such issues, after deducting from and setting off against the said sum of 137,611*l.* 3*s.* 5*d.* and the said costs the costs of the defendant Albert Grant of so much of the action as related to any cause of action other than that covered by the said issues, and that it might be declared that the said debt of 137,611*l.* 3*s.* 5*d.* due from the defendant Albert Grant to the plaintiffs was incurred by means of fraud or breach of trust, and that the said Albert Grant had not been released therefrom by his discharge in the said liquidation, and that the said Albert Grant might be accordingly ordered to pay to the plaintiffs the said sum of 137,611*l.* 3*s.* 5*d.*, or so much thereof as should not be received by the plaintiffs under the said liquidation.

On the 29th of July, 1880, the above motion for judgment came on to be heard.

Mr. Davey and Mr. Grosvenor Woods, for the plaintiff company.—What the plaintiff company claim by their motion is liberty to prove against Albert Grant's estate in the liquidation, and also a personal judgment against him. We are entitled to the latter judgment under section 49 of the Bankruptcy Act, 1869, which provides that "an order of discharge shall not release the bankrupt from any debt or liability incurred by means of any fraud or breach of trust." We submit that as the result of the find-

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ings the debt must be considered as incurred both by means of fraud and a breach of trust, inasmuch as Grant stood in a fiduciary position towards the company—

Erlanger v. The New Sombrero Phosphate Company, 48 Law J. Rep. Chanc. 73; Law Rep. 3 App. Cas. 1218;

Bagnall v. Oarlton, 47 Law J. Rep. Chanc. 30; Law Rep. 6 Ch. D. 371;

The Panama and South Pacific Telegraph Company v. The India Rubber, Gutta Percha and Telegraph Works Company, 45 Law J. Rep. Chanc. 121;

In re The Forest of Dean Coal Mining Company, Law Rep. 10 Ch. D. 450.

They were stopped by the Court.

Mr. Whitshorne, for the defendant Waddell.—The notice of motion is irregular, and an order is never made in the Chancery Division giving leave to prove in Bankruptcy—

Seton on Decrees, 4th ed. p. 473.

[THE MASTER OF THE ROLLS.—The proper form of order is to give liberty to go in and prove.]

Then I also submit that the plaintiffs cannot prove at all in respect of this debt, which is a “demand in the nature of unliquidated damages arising otherwise than by reason of a contract or promise,” and therefore, by section 31 of the Bankruptcy Act, 1867, not provable. The present action is one really in the nature of an action to recover damages for a tort founded on fraud or misrepresentation, and the amount of the judgment is not provable in bankruptcy unless judgment is signed before the adjudication—

In re Newman; *ex parte Brooke*, Law Rep. 3 Ch. D. 494;

Ex parte Baum, 44 Law J. Rep. Bankr. 25; Law Rep. 9 Chanc. 673.

Mr. Benjamin and *Mr. Everitt*, for the defendant Albert Grant.—Following the previous orders the action should be discontinued except so far as it is covered by the issues directed to be held.

[*Mr. Davey*, for the plaintiff, assented, and his Lordship said he should order the whole of the action to be discontinued against the defendant Albert Grant except

so much thereof as was covered by the issues.]

No doubt the plaintiff company are entitled to judgment for the money found due from the defendant Albert Grant as promoter of the company, but we submit the money was not obtained by fraud, and that his liability is that simply of an agent for money had and received, and who has retained such sum by way of secret profit—

The Imperial Mercantile Credit Association v. Coleman, 42 Law J. Rep. Chanc. 644; Law Rep. 6 E. & I. App. 189.

This was also not a “liability incurred by means of a breach of trust.” It is now no doubt settled by the case of

Erlanger v. The New Sombrero Phosphate Company (*ubi supra*)

that a promoter is in a fiduciary position towards the company he is promoting, but that decision was not pronounced until after the defendant Albert Grant had obtained the sum now in question. The result of the last-mentioned decision is that a promoter is a constructive trustee. We submit that section 49 of the Bankruptcy Act, 1869, does not refer to constructive but only to express trustees. The defendant Albert Grant is not in such a position, but is rather in that of a commission merchant, who sells goods and receives money for his principal which he holds as a debtor and not as a trustee—

Diplock v. Blackburn, 3 Campb. 43;

Morison v. Thompson, 43 Law J. Rep. Q.B. 215; Law Rep. 9 Q.B. 480;

and

Williamson v. Barbour, Law Rep. 9 Ch. D. 529,

were also referred to.

THE MASTER OF THE ROLLS.—There are two points to be decided in this case as regards the defendant Albert Grant. The first point is as to whether the transaction in question was a fraud; and the second is whether it was a breach of trust within the purview of the Bankruptcy Act, 1869.

As regards the first question, I will put the following case: An agent for the

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purchaser of a horse—say, his groom—goes to the vendor of the horse and says, "What will you take for it?" The vendor says, "I will take 100*l.*" "No," says the agent, "make it 120*l.*, and we will divide the 20*l.*—I will take 10*l.*, and you will take 10*l.*; make out a contract for the sale at 120*l.*" The vendor, who is as much a rogue as the agent, agrees to this, and makes out a contract for 120*l.* Thereupon the agent goes to the purchaser and says, "I had to give 120*l.* for the horse, I could not get it for less; here is the receipt;" and he induces the purchaser to hand him 120*l.*, of which he pays 110*l.* to the vendor and retains 10*l.* for himself. Is that transaction to be characterised as a fraud on the purchaser, or is it not? In my opinion it is a clear fraud, and I think that even the ingenuity of the very eminent counsel who addressed me on behalf of Mr. Albert Grant could not suggest any definition of a fraud which would not include such a transaction. Now that is substantially the case I have to deal with here. Messrs. Albert and Maurice Grant, as the agents of the Emma Mining Company (for that was their position—they were what are called "promoters"—they formed the company and were fiduciary agents), agreed with Messrs. Park & Stewart for the purchase of the mine. They nominally purchased for a million, and they agreed to divide something over 200,000*l.* between themselves and the vendors by which they, the Grants, pocketed upwards of 100,000*l.* How does that transaction differ from the case I have put, except that the sums in the one case are much larger than the sums in the other? You have only to substitute "mine" for "horse," "100,000*l.*" for "10*l.*" and these great financial agents for the groom, and the two cases are substantially identical. The present transaction is one as between man and man which, in my opinion, is wholly undistinguishable from the illustration I have ventured to put. It appears to me there is no other word to characterise the transaction except "fraud."

It is said, however, that Mr. Albert Grant did not believe it to be a fraud. That may be so. A man may commit a

fraud without believing it to be a fraud—that is, without believing it to be a fraud for which he can be held responsible in law—though I am by no means convinced that even Mr. Albert Grant could have treated this originally as an equitable or moral transaction. But the question is, what has his belief got to do with it? His belief was, as he told me on the former occasion (and I have no reason to suppose his statement not to be true), that a promoter was not, in law, an agent. That was the foundation of his belief as to his right to retain the money. He did not tell me—in fact he is too acute a man to have told me—that if he had only been an agent he would have had a right to pocket the profit; that is a totally different question. His ignorance at that time was as to his legal position as an agent; but that of course could make no difference in a Court of law. The mere fact of a man not being aware that the law can reach him will not prevent his being convicted in a criminal Court. A man must take the consequences of his acts, and he cannot be allowed in a Court of justice to say he has failed to estimate correctly either their moral or their legal bearings. The first point appears to me, therefore, clear.

The other point is, I must say, much more arguable, and is one upon which there is much more difficulty. It is not absolutely necessary for me now to decide the point; but it has not been my habit, when a point has been properly discussed, to refrain from expressing an opinion on it merely because I have decided another point which happens to be conclusive of the case before me. The question is, whether this transaction is a breach of trust within the Bankruptcy Act, 1869. In the first place, I see no reason for construing the words "breach of trust" in that Act otherwise than in their ordinary sense. It must be recollected there was another Act passed at the same time as the Bankruptcy Act, namely, the Debtors Act, 1869, for the abolition of imprisonment for debt. Certain persons in a fiduciary position who misappropriated money were made liable to the penal sections of that Act. The two

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Acts were passed on the same day, and related to the same subject; and there can be no reason for imagining that the persons in a fiduciary position in the one Act were to be a different class from the persons in a fiduciary position in the other. I see no reason for exempting the bankrupt when you would not except the insolvent from penal consequences.

It is suggested that to use the words "breach of trust" in that sense—that is, as meaning a breach of a constructive trust as well as a breach of an express trust—might involve divers merchants and directors in the city of London or elsewhere in the difficulty of having to pay their debts in full instead of escaping by paying a small dividend and recommending their career of fraud. I do not think that is a sufficient reason. It has been suggested that an agent who for his own purposes sells property, the proceeds of which he is liable to keep intact for his principal and hand over in specie, is not to be treated as guilty of a breach of trust under any circumstances. I can only say, Why not? Morally it is as great an offence as if he had consols handed to him as a trustee, and he sold out the consols and applied the proceeds to his own use. I can conceive no difference between the groom who, having a horse entrusted to him to sell, and being authorised to receive the purchase-money—say 50*l.*—which he is told to bring to his employer, runs away with the 50*l.* and spends it in dissipation, and the man who, being a trustee of 50*l.* in consols, which happens to stand in his name, sells it and applies the proceeds to his own purposes. Neither morally nor legally is there any difference.

There does not appear to me any reason in the world for not giving the words "breach of trust" in the Bankruptcy Act their proper technical legal meaning. If an agent, either buying or selling, misuses or abuses the confidence reposed in him with a view to retaining the profits for himself, he commits a breach of trust. If you entrust an agent with 100*l.* to buy a bale of goods, and he lays out 90*l.* and pockets 10*l.*, and tells you he has laid out the 100*l.*, that is a breach of trust as regards the 10*l.* which he has not

applied according to the trust. If, on the other hand, he sells a bale of goods for you for 100*l.* and tells you he has sold it for 90*l.* and pockets the 10*l.*, he is guilty of a breach of trust as regards the 10*l.* Why a Judge should be asked to exercise his ingenuity to allow a man to escape the consequences of his acts I do not know. The right mode of reading the section is the literal mode of reading it; and I so read it. Consequently, I hold that Mr. Albert Grant has, in the present case, not only been guilty of the fraud, but has also been guilty of the breach of trust.

As regards the defendant Waddell, the trustee in bankruptcy, the argument which was addressed to me that the plaintiff company could not prove for the amount in question has not met with my approbation. The Act of Parliament does not allow any proof for unliquidated damages unless they arise from a contract. In the first place, I do not consider this sum of money to be in the nature of unliquidated damages at all, because it is the sum received by Mr. Albert Grant for which he is liable to account. Besides, this sum of money does arise from a contract—that is to say, a contract of agency, or promotion, or trusteeship—call it what you like. Under that contract he became liable for the sum he received in that character; and he is liable to account for it by reason of that contract. It seems to me a clear case arising from contract. The liberty given in the old form of decree in the Court of Chancery to prove against the estate of a bankrupt trustee, was always put on the ground that the trustee contracted to perform his trust, and therefore his liability was always treated as a liability arising from a contract, and not from what I will call pure tort. Our law got into a little confusion in that respect—a confusion now happily got rid of—I mean the confusion between tort and contract. That arose from a very curious circumstance. There was an option given to the plaintiff to sue either in tort or contract on the same transaction, and that led to a confounding of the form of action with the nature of the remedy, which are totally different things. There was, as I have said, an

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option to bring either form of action, although from the nature of the case the demand must have arisen from a contract.

There will be judgment against the defendant, the trustee in bankruptcy, in the terms of the notice of motion, except that the plaintiff company "is to be at liberty to go in and prove" under the liquidation for the sums therein mentioned, and the trustee will take his costs out of his own estate. There will also be a declaration against the defendant Albert Grant, that the debt found due from him on the issues was incurred by means of fraud and a breach of trust, and there will be judgment for payment by him of the amount to the plaintiff company. The action will be discontinued except to the extent covered by this judgment.

Solicitors—Snell & Greenip, for plaintiff; Michael Abrahams & Co., for defendant.

FRY, J. } *In re THE VICTORIA MANSIONS*
1881. } (LIMITED). NORTON'S CASE.
March 31.

Companies — Contributory — Companies Act, 1862, s. 98—Companies Act, 1867, s. 25—Contract to take Shares—Set-off in Respect of Shares not allotted at Date of Winding-up.

Section 25 of the Companies Act, 1867, has no application in a question in a winding-up of liability to take shares which were never allotted by the company. Therefore in a winding-up effect was given to an unregistered contract which was interpreted as entitling a person to set off against calls on shares to be allotted to him moneys to become due to him for work done for the company, no shares having been allotted to him before the winding-up.

The company was formed with a capital of 100,000*l.* in 20*l.* shares, for the erection of buildings in Westminster."

On the 31st of October, 1878, Mr. Norton, who was an architect, wrote to

the secretary respecting buildings which the company proposed to erect, enclosing sketch plans, mentioning 20,000*l.* as the probable cost of the buildings, and stating that if he were employed upon the work, he would be willing to take 1,000*l.* in shares. By his affidavit, Mr. Norton said that he meant by this, fully paid-up shares to be handed to him in equal proportions of shares to cash payments as and when his commission became due. The company on the 24th of January, 1879, made a contract with Messrs. C. Aldin & Sons, builders, for the work referred to, the price being 22,535*l.*, on which the architect's commission would be 1,126*l.* 15*s.* Mr. Norton acted as architect. Extra works were afterwards authorised, and Mr. Norton also prepared plans for a second contract.

On the 2nd of July, 1879, Mr. Norton wrote to the secretary as follows: "I enclose agenda of matters I desire to bring before the directors at to-morrow's meeting. Oblige me also by placing upon your agenda 'to confirm the appointment of Mr. Norton as architect to the company.'"

On the 3rd of July the secretary answered: "As you appear to be in doubt as to the resolution appointing you architect to the company, I annex copy of the same. I thought I had sent you this before." The resolution was dated the 5th of February, 1879, and was in the following terms: "That Mr. Norton be, and he is hereby appointed, the architect of the company to carry out the works under the contract with Messrs. C. Aldin & Sons, in accordance with the terms of his letter of the 31st of October, 1878, namely, that he should subscribe for 1,000*l.* in shares of the company."

Mr. Norton continued to act as architect, and on the 19th of December, 1879, he wrote to the secretary as follows: "At the directors' meeting on Saturday, I trust you will be in a position to consider the question of a payment to your architect. My commission note on first payment to Aldin is for c: 400*l.* I propose to ask for 200*l.* in shares and 200*l.* in cash, to be paid when your financial arrangements are completed." Mr. Norton never formally applied for

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shares, and none were allotted to him or registered in his name.

The company went into liquidation in March, 1880, and Mr. Norton carried in a claim for services for 1,166*l.* 19*s.* On the official liquidator's summons to settle the list, Mr. Norton was placed on the list of contributories for fifty shares. His application to remove his name was adjourned into Court.

Mr. Napier Higgins and *Mr. Methold*, for the liquidator.—Mr. Norton can be now put on the register by the Court under sections 35 and 98—

Ward & Henry's Case, 36 Law J. Rep. Chanc. 462; Law Rep. 2 Chanc. 431.

Section 25 of the Act of 1867 would not apply here, because the shares never were issued. He claiming commission, the liquidator properly put him on the list though there had been no allotment—

Lindley on Partnership, p. 1372.

Mr. Glasse and *Mr. Davenport*, for Mr. Norton.—If the shares ought to have been registered in Mr. Norton's name, it is the company's fault that this was not done, and it cannot be done now by the liquidator—

Buckley on the Companies Act, p. 85.

[*Fry, J.*—Still, if the circumstances justify it, the Court can put him on the list under section 98. If the company should have given him paid-up shares, my difficulty is with regard to section 25 of the Act of 1867.]

Where payment could be pleaded, registration of the contract is unnecessary—

Spargo's Case, 42 Law J. Rep. Chanc. 488; Law Rep. 8 Chanc. 407.

Mr. Higgins, in reply.—Mr. Norton claimed his full commission, and therefore the liquidator put him on the general list.

Fry, J.—Every member of a company is a contributory in winding-up, and every person is a contributory who has agreed to take shares. The register may be rectified. The real question before me is, Was there or was there not an agreement to take shares? If there was, I can rectify the register by adding the name. Mr. Norton has applied to have his name

removed, the liquidator having settled him on the list of contributories. The facts are these: Mr. Norton wrote to the company on the 31st of October, 1878, enclosing plans for building offices, and in the letter he says, "If I am employed upon the work, I shall be willing to take 1,000*l.* in shares." He was employed on the work. On the 24th of January, 1879, the company entered into a contract with Messrs. Charles Aldin & Son, for the carrying out of works which appear to be in pursuance of Mr. Norton's proposal. On the 5th of February the directors passed the following resolution: "Resolved that Mr. John Norton be, and he is hereby appointed, the architect of the company to carry out the works under the contract with Messrs. C. Aldin & Son, in accordance with the terms of his letter of the 31st of October, 1878, namely, that he should subscribe 1,000*l.* in shares of the company." It may be, as Mr. Glasse has said, that the resolution does not accurately follow the terms of his letter. But that point becomes immaterial, because on the 3rd of July the secretary furnished a copy of the resolution to Mr. Norton, who after that continued to act, and thereby accepted the contract as put in the resolution. Therefore, to put it at the lowest, there is an offer by the company, accepted by Mr. Norton by his conduct. This is moreover confirmed by his letter in December, 1879, asking for 200*l.* in shares. The real bargain seems to have been, that he was to be entitled to treat his commission payable to him by the company as payment up of the shares. In March, 1880, the winding-up commenced. The delay on the part of the company in performing their part of the contract had been waived by Mr. Norton by his conduct. I therefore hold that he is a contributory. He is not, however, a contributory liable to pay all calls on the shares. I had some doubt whether section 25 did not stand in the way of this last conclusion; but that section only applies to shares when issued. In this case the shares were not issued. Accordingly, he is only liable to calls in the event of their exceeding the commission due to him from the company. The result is, that the contri-

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butory's present application is not right, because it seeks to remove his name altogether, although the liquidator should not have claimed that he was a contributory liable to pay up absolutely. For this reason Mr. Norton must pay his own costs of this adjournment; the liquidator will take his costs out of the estate.

Solicitors—Bolton, Smith & Co., for official liquidator; Campbell, Reeves & Hooper, for Mr. Norton.

[IN THE COURT OF APPEAL.]

JAMES, L.J.	}	HENDRIKS v. MONTAGU.
BRETT, L.J.		
COTTON, L.J.		
1881.		
March 29.		

Company—Similarity of Names—Registration—Quia Timet—Injunction to restrain Company from applying for Registration—Fraud—Intention to Deceive.

An injunction was granted to restrain a proposed new company from applying to the Registrar of Joint-Stock Companies for registration under a name which, in the opinion of the Court, was calculated to deceive, although the company had not begun to carry on its business.

It is not necessary, to entitle the plaintiffs to an injunction, that the defendants should have a fraudulent intent. They are responsible for the reasonable consequences of their action.

The statutory right to register must not be exercised in such a way as to violate some other right, or offend against the law.

This was an appeal from a decision of Jessel, M.R., refusing to grant an injunction, on the application of the Universal Life Assurance Society, to restrain a proposed new company from applying to the Registrar of Joint-Stock Companies for registration under the name of the Universe Life Assurance Association (Limited). The facts of the case are fully reported *ante*, p. 257.

The plaintiffs appealed.

On the appeal further affidavits, which were not before the Master of the Rolls, were read on the part of the appellants, deposing to the injury that would be caused to the plaintiff company. Notice of the appellants' intention to read this further evidence was given to the respondents, who, however, did not answer the affidavits.

Mr. Chitty and Mr. H. Warlters Horne, for the appellants.—We do not rely on the 20th section of the Companies Act at all, but only refer to it as shewing the intention of the Legislature. The motion is founded on the fact that the name of the proposed new company is so similar that it is calculated to deceive, and an intention to appropriate the plaintiffs' business must be imputed to the defendants—

Croft v. Day, 7 Beav. 84.

Assuming that the name was originally adopted quite honestly, the moment their attention was called to the similarity, and notice of our objection was given, the continuation of the name afterwards is sufficient evidence of fraudulent intention—

Orr, Ewing & Co. v. Johnston & Co., Law Rep. 13 Ch. D. 434, at p. 454.

All we have to do to entitle us to an injunction is to shew that there is such a probability of injury that, in the view of ordinary men using ordinary sense, injury will follow—

Patison v. Gilford, 43 Law J. Rep. Chanc. 524; Law Rep. 18 Eq. 259.

An injunction was granted in

Braham v. Beacham, Law Rep. 7 Ch. D. 848; *sub nom. Braham v. Beauchamp*, 47 Law J. Rep. Chanc. 348;

Boulnois v. Peake (before Vice-Chancellor Giffard), Law Rep. 13 Ch. D. 513 n;

Lee v. Haley, 39 Law J. Rep. Chanc. 284; Law Rep. 5 Chanc. 155;

and in

Hoby v. The Grosvenor Library Company, 28 W.R. 386, before Vice-Chancellor Hall, the company which was restrained was a projected company which had not then begun to carry on business.

This application is necessary, as the Re-

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gistrar, whose office is purely ministerial, cannot refuse to register a company unless the name in which the company is proposed to be registered is similar to that of another registered company.

Mr. Rozburgh and Mr. Bond Ooze, for the respondents.—The new company cannot trade till it is registered, and the Court has no jurisdiction to restrain us from applying to the Registrar.

The cases of

The Colonial Life Assurance Company v. The Home and Colonial Assurance Company, 33 Beav. 548; 33 Law J. Rep. Chanc. 741;

The London and Provincial Law Assurance Society v. The London and Provincial Joint-Stock Life Assurance Company, 17 Law J. Rep. Chanc. 37;

The London Assurance v. The London and Westminster Assurance Corporation (Limited), 32 Law J. Rep. Chanc. 664,

all of which are cited and referred to by the Master of the Rolls in

The Merchant Banking Company of London v. The Merchant Joint-Stock Bank, 47 Law J. Rep. Chanc. 828; Law Rep. 9 Ch. D. 560,

are in our favour, in all of which an injunction was refused.

JAMES, L.J.—I am unable to agree with the view that the Master of the Rolls has taken in this case. No doubt the application is an application *quia timet*—that is to say, it is to prevent something which Lord Justice Cotton referred to, in the language of our old pleadings, as being threatened and intended—to prevent something which the defendant is threatening and intending to do. Now it appears to me that it is made out beyond all possibility of doubt and beyond all possibility of argument, I think substantially, that the defendant company is threatening and intending as soon as it is registered to transact all the ordinary descriptions of life assurance business, the head office being in London, under the name and style of the Universe Life Assurance Association (Limited). That is clearly what it intends and threatens to do, unless it is restrained by injunction, and with the view of doing

this, and as the first step in doing it, it threatens and intends to get itself registered upon the Joint-Stock Companies Register under that name. The plaintiffs' name is the Universal Life Assurance Society. Now is there such a similarity between those names as that the one is in the ordinary course of human affairs likely to be confounded with the other? Are persons likely who have heard of the Universal to be misled into going to the Universe? I should think, speaking for myself, very likely indeed. Many people do not care to bear in mind exactly the very letters of everything they have heard of, and we have had a great body of evidence before us of persons, whose business it is to be acquainted with these life assurance companies, all of whom concur in deponing in the strongest possible terms that nothing is more calculated to injure an old society of this kind than having a new society established which has got a name so similar to that of the other as that it is likely to be mistaken for it. They say that likelihood exists in this case—that it is likely, morally certain, in fact, that there will follow the results which they describe. Well, that being so, it seems to me we have got everything that is required according to the principles of the Court—all the Court requires is to be satisfied that the names are so similar as to be calculated to produce confusion between the two companies—so calculated to do it that when it is brought to the attention of those adopting the name complained of, that that would be the result, it is not honest for them to persevere in their intention, though originally the intention might not have been otherwise than honest. I think, therefore, these defendants ought not to be permitted to persevere in their intention, now that they know exactly what it is the plaintiffs complain, and reasonably complain, of; that they ought not to be permitted to persevere in their intention of using that name merely because they say—and that is all they do say in their affidavits—that when they formed the intention of using the name Universe in the first instance they had not any idea of stealing the plaintiffs' name. We may give them credit for that, but when their attention

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was called to it they ought to have acted immediately upon that notice instead of disregarding it and continuing to use the name. It is said that this is a premature application, but that might be said in any case of *quia timet* where persons always do come to the Court before the mischief is done, and if these plaintiffs had waited until the defendant company had actually been registered and had begun its business I know perfectly well the answer to their application then would have been: "You are too late; you allowed us to form the company; you allowed the company to be floated and advertised; you allowed us to incur all the expense of that, and now you come down upon us and try to stop us carrying on the business which you knew perfectly well we were going to carry on and had incurred all this expense for." Of course, defendants in these cases always do say "you are too early" in one case, and "you are too late" in the other, but plaintiffs are never too early when the Court is satisfied that the thing which the plaintiff dreads is really and substantially threatened to be done, as in this case.

Then it is said that the Court has no right to restrain them from registering the company under this name; that there is a statutory right in any of Her Majesty's subjects to form a joint-stock company, and to go and register themselves in any name they think fit. So far as the Registrar is concerned they have a right possibly to go to him and say, "Register this company subject to the statutory provision as to similarity of name with that of any other registered company;" but that has nothing to do with the jurisdiction of the High Court to say, Yes, but you must not do mischief to anybody else; and as was put during the argument by one of their Lordships, Supposing they had attempted to register in the very name of an existing company they might say, We are entitled to do that because we have not registered for the purpose of carrying on the same business, although we have registered in your very name. Then the same thing must apply conversely, and if the new name is so like the other name the Court will say they ought not to be allowed to carry on a similar business, by

restraining them from doing so in a name so similar to that of the plaintiffs, as that it is calculated to mislead. I am of opinion, therefore, that the order ought to be not that of the Master of the Rolls, but to restrain the defendant company in the terms of the application.

BRETT, L.J.—I also differ from the result at which the Master of the Rolls has arrived; but I hardly think we are differing from him at all as to the law of this matter, and I doubt very much whether we are acting upon the same evidence, or upon evidence which when the case was before him was quite equivalent to that which is now before us. It seems to me clear that the defendants were intending to carry on business under the name of the Universe Life Association (Limited), that they were intending to carry on the ordinary business of life insurance, that they were intending to carry out business in the ordinary way, which is the same way, therefore, as the plaintiffs carry on that business, and that they were intending to carry on that business in London. It seems to me those are all the intentions on the part of the defendants, which I should upon the facts be inclined to find. I should certainly decline, if my judgment depended upon such a finding, to find that either the defendants or Mr. Alexander had any intention of committing any fraud whatever. I should even decline myself to find that after they knew of the name of the other company, and although they still intended to carry on their own company in the name which they had proposed to adopt, that they even then intended to do anything which is really fraudulent. I have often said I cannot bring my mind to say that, sitting as a Judge, or in any other capacity, I will ever find a man to be guilty of an intent to be fraudulent unless I am of opinion that he really has a fraudulent mind. If, therefore, this judgment were to depend upon any idea of that kind of supposing that there was an intentional fraud, either present or future, I should venture to resist; but it seems to me it is not at all necessary, according to the authorities, and according to the doctrines of the

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Court, to suppose there was any intention of fraud existing, or that there would be in the future. The question is simply whether the name they have adopted is so like the name which the plaintiffs had used as their trade name for so long a period, whether the name which is intended to be used in order to cover a business of the same kind carried on in London, would result in the defendants, in fact, appropriating a material part of the business of the plaintiffs' company by misleading people to suppose that they were dealing with the plaintiffs when, in fact, they were dealing with the defendants. The question is whether we can come to the conclusion that that will be, in fact, the effect of their using the name which they propose to use, and that must depend in the first place not upon whether the names are identical, but upon whether they are so alike that we are of opinion that in truth and in fact it would have that effect. I do not think that judicially we could decide that as a matter of law; it is a question of fact whether the name is so similar to the other that it would lead to that result—that it would lead to it in business. It is not a question of law at all, but of fact upon the evidence. We have evidence before us, and we are here to judge of the effect of that evidence. If the names were identical I do not say whether one might or not come to a conclusion without any more evidence, but as it is, I think that evidence was admissible and was necessary. Before the Master of the Rolls, it seems to me that the evidence was rather feeble; there was some evidence before him, but it was feeble; but since then further affidavits have been put in from a number of experienced people. I will call them people experienced in this kind of business, and they have all deposed that the similarity of these two business names is so great that the use of this new name would have the effect of misleading people into supposing, when they were in truth dealing with the defendants, that they were dealing with the plaintiffs—of inducing them to deal with the defendants, although their desire and wish was to have dealt with the plaintiffs on account of the

character which had been acquired by their name. That evidence was put in upon affidavits filed, and the defendants' attention was called to it a long time ago, but from reasons of their own they have wholly abstained from answering it. That evidence seems to me to be satisfactory evidence of the fact, and therefore I think we ought to come to the conclusion, as I do as a matter of fact, that the similarity of the names would in truth have that effect. That seems to me all that it is necessary to decide. It is possible, no doubt, as a matter of possibility, that it would not, but that is not the case here upon the evidence; the question is whether we are of opinion, sitting as a tribunal judging of the fact, that it will—not whether it is possible it might not, but whether in truth it will; and that, to my mind, is made out. Then it is said this is an application for an injunction *quia timet*, and that it ought not to have been made under the Act, and that the Master of the Rolls so held. But that does not seem to me to have been the ruling of the Master of the Rolls. He seems to have thought the application might have been made *quia timet*, but that the evidence before him was not sufficient. The case before Vice-Chancellor Hall seems to me to be precisely in point. With regard to the other proposition, that we could not restrain these parties from applying to be registered, it seems to me that the application to be registered is part of the intention which would be made out as a part of the injury, and that therefore this Court can prevent the defendants, and enjoin them from making that application. The whole application therefore for an injunction in this case ought to be granted.

COTTON, L.J.—The first point urged by the respondents here was in the form of a preliminary objection, and though we did not so regard it, the Master of the Rolls seems to have thought it fatal to the application. That objection was that the application was under the particular section of the Companies Act, 1862, and that it could not therefore be made, the company not being registered. It is an application for an injunction made in an

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action brought to enforce a well-known equity, namely, to prevent the defendants from doing that which is calculated to mislead the public and lead them to think that the defendant company is the company of the plaintiffs. Well, the question is whether that is made out. But before I deal with that I will deal with another objection which has been considerably pressed, namely, that this action was premature. The company, it is said, does not exist and does not carry on business; and that if it is premature to apply for an injunction against a company which does not exist, it is premature to so apply when you do not know how it will carry on its business. But the whole principles of the Court are opposed to that argument. No doubt the Court must be satisfied on the evidence that injury will result from the acts which the defendant "threatens and intends" to do, to adopt the technical language of the old pleadings in bills of complaint, which Mr. Roxburgh rather objected to my using; and if the Court is satisfied that he intends to do acts which, as far as all reasonable probability goes, will interfere with the rights which the plaintiffs have in equity, then in my opinion it was the old-established practice of the Court of Equity, and the duty of the Court now, not to wait until injury is done, when a Court of law would have granted damages, but to interfere by way of prevention and stop that from being done which, if done, would be an injury to the plaintiffs. Now there was mixed up with this argument this question: It was said, How can you tell that the company will carry on its business in such a way as to cause any injury? And the Master of the Rolls in his judgment has referred to the case of *Haines v. Taylor* (1), where there was an application made to stop a gas works from being erected, but there the injunction was refused on grounds which have no application to this case. There the question depended upon whether there would be a nuisance arising from the manufacture of the gas, and according to the defendant's case the gas would be manufactured by a process

which would prevent any nuisance whatever, so that it depended there upon the gas being manufactured in such a way as to prevent injury. But this is not like a case where the Court is asked to interfere in the erection of a building of that description; it is asked here to restrain the defendants from doing certain acts which, if done, will be an interference with the rights of the plaintiffs. Now, what is the result upon the evidence? In my opinion the result is this, that what the defendants will do if they are not restrained will cause confusion and will induce people, or be the means of inducing people, who desire to insure in this long-established society—namely, that of the plaintiffs—to insure in the defendants' office instead. That, in my opinion, is the result of the evidence. It is said that possibly they may carry on their business in some other way; but what we have here is that, although this company is not registered and is not carrying on business, it has put forth to the world, to induce the public to join as shareholders, a prospectus in which it states how it intends to carry on its business. Are we, therefore, without any evidence to the contrary as to how they are going to carry on their business, to say that this application is premature? The result must be that the intention of the defendants is to be deemed to be to carry on their business in the way their prospectus states it is to be carried on, that there is a head office in London with various agencies and branches in England and the colonies; and that, in my opinion, coupled with the similarity of the name, is sufficient to lead to the conclusion that what they are going to do is calculated to deceive, and will deceive, the public to the prejudice of the plaintiffs. But it is said, "Why should not they have their offices at a distant part of London from where the plaintiffs have their office?" If they had been selling butter or cheese, or some such article, it would have been material to consider in what part of London their office is to be, but when an insurance office starts by stating that it intends to carry on its business not only in London but throughout the United Kingdom and in all parts of the world,

(1) 10 Beav. 75.

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and the plaintiffs do the same, then I think it is very immaterial in what part of London they intend to establish their head office. This is a very different case therefore from that of the *Guinea Coal Company* which has been referred to. I will say one word further as to the intent of the defendants. In my opinion it is not necessary that in taking the name they have there should have been any fraudulent intent; but whether there was a fraudulent intent or not, everybody is responsible for the reasonable consequences of what he is doing, upon the facts known to him. It is hardly possible to suppose that Mr. Alexander, if not the persons associated with Mr. Alexander, did not know all the facts connected with the adoption of this name—Universe Life Assurance Association; and even if they did not, from the very moment the first advertisement of the company appeared in the *Times*, an application was sent to the defendants pointing out the consequences of what they were doing, and therefore, even if they had been unaware of that, their attention was then called to the fact that those would be the consequences, and it was wrong on the part of the defendants to persist afterwards in the use of the name which they had taken. There is only one other point, namely, whether the plaintiffs are entitled to the whole of the injunction they ask. It is said there is a statutory right to register. Yes, there is a statutory right, provided the person who is doing it is not in doing it violating some other right, or offending against the law. If he is, this Court has the most perfect right to stop him from doing so, just as it has a right of stopping him from going to a Court of law; though it has no right to prevent a Court of law from entertaining his suit. Here one of the grounds of applying to this Court is that the Registrar, who registers on application the names of limited companies, could not, under the Act, have refused to register this company, and for this reason, that the particular section of the Act only applies to similarity between names of companies already registered. If, therefore, the Court is satisfied, as we are in this case, that what the defendants intended to do would

be a wrong to the plaintiffs, the Court is entitled to prevent the very first step in the wrongful act being taken.

Solicitors—Pollock & Co., for plaintiffs; W. F. Nokes, for defendants.

KAY, J. }
1881. } THOMPSON v. SIMPSON.
May 17, 18. }

Will—Appointment—Power created subsequently to the Will—Contrary Intention—1 Vict. c. 26. ss. 24 and 27.

By a settlement certain real estate was conveyed to trustees, upon trust to sell, and to pay the proceeds of sale to such persons as A should by deed or will appoint. By a second deed of settlement A appointed that the trustees of the first settlement should stand possessed of the sale moneys in trust for such persons as she should by will appoint.

By her will, made previous to the second settlement, A, "in pursuance of" the power contained in the first settlement, appointed the property comprised therein (describing it as real estate) to her three sons.

Semble, that the will was revoked by the second settlement.

Held, that the will, if not revoked, did not operate as an execution of the power contained in the second settlement.

Trial of action.

This was an action brought by the surviving trustee of two settlements, dated respectively the 30th of July, 1833, and the 29th of June, 1857, to have the trusts thereof carried into execution under the direction of the Court.

By the first settlement (of July, 1833) certain lands were conveyed by Elizabeth Simpson and her husband to two trustees upon trust for sale as therein mentioned; and upon further trust to pay and apply the moneys arising from such sale, and the rents in the meantime until such sale, in the first place in payment of a sum of 1,600*l.* (which was subsequently paid off out of the proceeds of sale of part of the

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land); and then to pay the residue of the purchase-moneys to such persons and for such uses as Elizabeth Simpson, notwithstanding coverture, should by deed or will appoint; and, in default of appointment, upon trust to place the same out at interest, and pay the income thereof to Elizabeth Simpson for her own use; and, immediately after her death, upon trust to stand possessed of the residue of the purchase-moneys for her executors, administrators or assigns.

In February, 1856, Elizabeth Simpson and her husband mortgaged the "proceeds of sale" of a portion of the unsold property comprised in this settlement to secure the repayment of 800*l*.

By the second settlement (of June, 1857) Elizabeth Simpson, "in pursuance of the power vested in her" by the first settlement, appointed that, subject and without prejudice to the mortgage of February, 1856, the trustees of that settlement should stand possessed of the sums of money to be produced by the sale of the said hereditaments in trust for such persons and for such purposes as Elizabeth Simpson, whether covert or sole, should by will appoint; and, in default of appointment, for her, her executors, administrators and assigns.

In the meantime, on the 15th of February, 1851, Elizabeth Simpson made her will, whereby, after reciting that by the first settlement the premises thereafter mentioned and devised were settled and conveyed to her with power to appoint, she "in pursuance of such deed enabling her in that behalf," devised and appointed certain specified property (describing it as real estate) to her eldest son John Simpson; and certain other real estate to her second son Edward Simpson; and certain other real estate to her third and only other son Ambrose Simpson.

In August, 1863, Elizabeth Simpson died. A few days afterwards each of her three sons, John Simpson, Edward Simpson and Ambrose Simpson, executed a memorandum in writing, giving to his sisters Ellen Simpson, Elizabeth Simpson the younger, and Jane Simpson, the three defendants, all his interest under his mother's will.

In August, 1869, Lionel Simpson (the

husband of Elizabeth Simpson) made his will, and thereby gave all his property, real and personal, to his daughters, the three defendants, and appointed them joint executrices. He died in September, 1869. In the year 1877 the mortgage debt of 800*l*., and the securities for the same, were transferred to the three defendants.

The defendants, by their statement of defence, submitted that, owing to the execution by Elizabeth Simpson the elder of the second settlement, her will did not operate on the property comprised in the first settlement; but that the property passed as personal estate to Lionel Simpson as her administrator, and then to the defendants under his will.

The question now arose whether the will of Elizabeth Simpson operated as an execution of the power created by the subsequent deed.

Mr. Warmington, for the plaintiff, the surviving trustee, submitted the point to the Court, and referred to

Boyes v. Cook, 49 Law J. Rep. Chanc. 350; Law Rep. 14 Ch. D. 53.

[*KAY, J.*—Does not the reference in the will to the power contained in the first settlement shew a sufficient "contrary intention" within the meaning of sections 24 and 27 of the Wills Act?]

Mr. Levett, for the defendants.—Under sections 24 and 27 of the Wills Act, a general gift may be a good execution of a general power of appointment, although the power was created after the date of the will. But no case has yet decided that a will, referring to a particular power, and not containing the usual words "in exercise of every or any other power in anywise enabling her," or words to the like effect, can operate as an execution of a new power created after the date of the will.

The defendants are entitled to the property in any event: First, if the will operated as a good execution of the power, under the will and the several memoranda signed by their brothers; secondly, if the will did not execute the power the property passed to their father as personal estate as his wife's administrator, and then to the defendants under his will.

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KAY, J. (on May 18), after stating the facts of the case as set out above, and expressing his opinion that the first settlement was so worded as to effect a complete conversion of the property, and that it must, therefore, be treated as personal estate, said—Then what was the effect of the will of Elizabeth Simpson? Was it revoked by the subsequent settlement, or did it execute the power contained in that settlement? My impression is, that it was revoked by the subsequent settlement. But, if not revoked, it did not, in my opinion, execute the power in the subsequent settlement, because it expressly refers to the power contained in the first settlement. It was, therefore, inoperative to pass any part of the property.

Solicitors—Crawley & Arnold, for plaintiff; Lewis & Lewis, for defendants.

[IN THE COURT OF APPEAL.]

JAMES, L.J.	}	WHITING to LOOMES.
COTTON, L.J.		
LUSH, L.J.		
1881.		
Feb. 29.		

Mortgage-Deed — Stamp — Stamp Act, 1870, ss. 9 and 17.

A mortgage-deed of leaseholds by demise made in 1879 was stamped merely with a 10s. deed stamp. On a sale by the mortgagor, it being arranged that the mortgagees were to be paid out of the purchase-money, and to join in the assignment to the purchaser,—Held (affirming JESSEL, M.R.), that, notwithstanding, the purchaser was entitled to have the mortgage-deed stamped with the full ad valorem duty stamp.

This was an appeal by the vendor of some leasehold premises from a decision of JESSEL, M.R., on a vendor and purchaser summons declaring the purchaser entitled to have a mortgage-deed pro-

perly stamped as such before completion of his purchase.

The case is reported 49 Law J. Rep. Chanc. 617.

Mr. Davey and Mr. Arthur F. Leach, for the appellant, repeated the arguments used in the Court below, and cited, in addition to the authority there cited,

Matheson v. Ross, 2 H.L. Cas. 286;

Rutty v. Benthall, 36 Law J. Rep.

C.P. 194; Law Rep. 2 C.P. 488.

Mr. Bardswell, for the purchaser, was not heard.

JAMES, L.J.—The Master of the Rolls said in this case, “When I say the question is unarguable I only mean that I think so.” I quite agree with the Master of the Rolls that this point is perfectly unarguable for any effectual purpose. The purchaser says, Here is a title-deed; it ought to be stamped with a proper stamp, and it is not so stamped. As long as it is not stamped with a proper stamp he cannot use it for any purpose, whether to defend his title or attack a wrongdoer. It is impossible to say he will not want it; he may have occasion to fall back on this very deed to protect himself against an incumbrance for the purpose of deducing the legal title, and therefore the deed is still in effect a deed. The deed cannot be set aside, and you could not safely put the deed in the fire and say it has answered its purpose. The purchaser wants it as part of his title, and he has a right to have it in a state in which it will be available. The deed ought to be stamped. The appeal will be dismissed.

COTTON, L.J.—I am of the same opinion. The purchaser may clearly require this as a deed for certain purposes, even if he may not hereafter require it as a mortgage-deed. Then can it be put in evidence? It cannot as a mortgage-deed, because it is not properly stamped.

But it is said it is sufficiently stamped as a deed, and therefore can be put in evidence. That is not as a deed *simpliter*. It is what is described in the schedule to the Act as a mortgage-deed, and when we look at the schedule we

Whiting to Loomes, App.

find that the only thing that can be properly stamped with a 10s. stamp is a deed of any kind whatever not described in this schedule. But this is described in the schedule otherwise than as a deed *simpliciter*. It is described as a mortgage-deed, and therefore the 10s. stamp is not sufficient to let it in as a deed for the purpose of shewing that the legal estate has been conveyed.

The cases which have been referred to have really no application, whether they are right or wrong. In one case the receipt was admitted although not duly stamped as a receipt, not as anything that required a stamp under the Act of Parliament, but as something that did not require a stamp under the Act. Here, if this is required by the purchaser, it must be required as something that does require a stamp; and this stamp is not sufficient. So in the case of a deed which contained an agreement to consent to something; it was not required as a deed or power of attorney, but simply to shew a consent, and a consent in writing, to what had been done. In my opinion the objection of the purchaser is well founded.

LUSH, L.J.—I am of the same opinion. The Court is not entitled to speculate as to whether the purchaser may or may not have occasion to use the deed.

A purchaser is entitled to have every deed forming a step in his title in such a shape that he can, if he need it, give it in evidence.

Appeal dismissed with costs.

Solicitors—Hunter, Gwatkin & Haynes, for appellant; Loxley & Morley, for purchaser.

JESSEL, M.R. }
1881. } *In re METHUEN AND BLORE.*
March 19. }

Will—Construction—Residuary Legatee—After-purchased Real Estate.

A made a will whereby she "committed to paper" her "wishes respecting the disposal of" her "property," and left "everything she was possessed of" to her sister for life; and after her death she "gave and devised" certain legacies, and concluded by appointing her two nephews (naming them) "her executors, and the latter residuary legatee." Afterwards she made a codicil which referred only to some of the legacies given by her will. She had no real property at the date of her will or codicil, but she purchased some subsequently, and it belonged to her at her death:—Held, that her real property did not pass by her will.

Hughes v. Pritchard (46 Law J. Rep. Chanc. 840; Law Rep. 6 Ch. D. 24) distinguished.

Dorothy Plumptre, spinster, made her will in 1854, which, so far as is material, was as follows: "I commit to paper my wishes respecting the disposal of my property, and give this as my last will and testament. Everything I am possessed of I leave to my dearest sister Sophia Plumptre, for her life. After her death I give and devise as here annexed." Then followed several specific and pecuniary legacies, some of which were expressed to be "devised" to the legatees. And the will concluded thus: "My two nephews, Henry Hoare Methuen and Francis Paul Methuen, I leave my executors, and the latter residuary legatee." In 1869 the testatrix made a codicil to her will, but it referred only to some legacies given by it. Subsequently she purchased some freehold property, and it belonged to her at the time of her death.

F. P. Methuen having contracted to sell a portion of this property, the purchaser took the objection that he had shewn no title to it; and a vendor and purchaser summons which raised that question, and had been adjourned into Court, now came on for hearing.

Mr. Whitehorne, for the vendor.—The will begins by a statement that the tes-

In re Mahoon.

tatrix was committing to paper "her wishes as to the disposal of her property." That must mean all her property, whatever it might be; and since the will speaks as from the date of her death, it is immaterial that these freeholds were purchased after the date of her will.

Next, she leaves "everything she is possessed of" to her sister for life. That clearly makes the sister tenant-for-life of all the testatrix's property; and the next words, "After her death I give and devise as here annexed," are so connected with the gift for life that they must refer to, and pass, the same property. In

Davenport v. Coltman, 9 Me. & W. 481; 12 Sim. 588; 11 Law J. Rep. Exch. 114,

a will contained these words: "It is my will and pleasure that M. and C. shall divide equally between them, as residuary legatees, whatever I may die possessed of." And it was held that this gift passed real estate. In

Pitman v. Stevens, 15 East, 505, the testator devised as follows: "I give and bequeath all that I die possessed of, real and personal, of what nature and kind soever, after my just debts are paid. I appoint P. my residuary legatee and executor." It was held that P. took the testator's residuary real estate in fee-simple. The Court is not precluded, merely by the use of the word "legatee," from holding that a person so designated takes real estate where the will shews, as I submit this does, a plain intention that he shall take it.

The case of

Hughes v. Pritchard (*ubi supra*)

was very like this, and is a strong authority in favour of the purchaser. There a testator commenced his will by saying, "As to my estate which God has been pleased to bestow upon me, I do make and ordain this my last will and testament as follows." Then after making various devises and bequests, he concluded thus: "I make M. P., R. H. and O. P. my residuary legatees." The Court of Appeal held that these persons took the testator's real estate not specifically mentioned in his will. Your Lordship, in giving judgment, pointed out that, although the appointment of residuary

legatees standing alone would have been a gift of the personal estate only, yet that was modified by the first words of the will, which amounted to a declaration that the testator intended by his will to dispose of all his estate real and personal; that he intended to do it, and did do it by the subsequent words.

He referred also to the following cases:—

Kellett v. Kellett, 3 Dow, 248;

Windus v. Windus, 6 De Gex, M. & G. 549; 26 Law J. Rep. Chanc. 185;

Thomas v. Phelps, 4 Russ. 348;

Warren v. Newton, Drew. 464;

Singleton v. Tomlinson, Law Rep. 3 App. Cas. 404.

Mr. Wintle, for the purchaser.—The opening words of the will are merely expressive of an intention, and do not amount to words of gift. Consequently there is nothing to qualify the ordinary meaning of the words "residuary legatees."

He was stopped by the Court.

THE MASTER OF THE ROLLS.—I must begin by stating a fact, which, to my mind, is not without importance, namely, that at the date of her will the lady had no real estate. I say that is not without importance, because, although there is a presumption against a person who makes a will dying intestate as to any part of the property which he has, that presumption is not so strong as regards property which he has not, and which, as far as we know, he had no intention of acquiring. That does appear to me to be not immaterial. I do not say it is very material, or very strong, but it is not immaterial. It does weigh as regards the presumption as to a person not intending to die intestate.

Now this lady, having only personal estate, begins her will in this way: "I commit to paper my wishes respecting the disposal of my property." That does not dispose of her property—it is only a statement of her wishes respecting the disposal of her property. It does not follow that her wishes would dispose of the whole of her property. It may well be that her wishes, up to that time, only

In re Methuen.

related to part of her property, and still these words are fulfilled. It is only her wishes as to her disposal of it, and is different to the will we had in *Hughes v. Pritchard*, because there it was, "As to my estate which God has been pleased in his good providence to bestow upon me, I do make and ordain this to be my last will and testament as follows, that is to say." I read that to mean, "I do by this my will dispose of all my estate real and personal;" whereas here it is only committing to paper the lady's wishes respecting her disposal of the property. Her wishes may have fallen short of the disposal of the entirety. Therefore to that extent it is distinguishable. But even assuming that the opening words of this will are not distinguishable from the opening words of the will in *Hughes v. Pritchard*, I will read an extract from the judgment of Lord Justice Bramwell, which I take in preference to my own for a very obvious reason. He says: "The testator begins by saying, 'As to my estate, I do make and ordain this my last will and testament.' Mr. Rigby made a suggestion that the word 'whole' was not there, but I have always understood that when you speak of a thing you need not amplify the expression by using the word 'whole,' and that when a man says, 'As to my estate,' it is the same as if he had said, 'As to the whole of my estate.' But it is true that though he says, 'I ordain this to be my last will and testament,' if he had omitted to dispose of any portion of it, it would follow then that the intention he had expressed would be unfulfilled as to a part of his estate." So that even as to those words he does not take them to mean, as I thought they did mean in that particular will, "I do dispose." The words were, "As to my estate I do make and ordain this my last will and testament." The Lord Justice did not read them to be of so great importance, and thought them not equivalent to, "I do dispose."

The question in *Hughes v. Pritchard* turned, therefore, on the use of words which we have not got here—that is, we have no direct gift of real property. Now, in *Hughes v. Pritchard* I said this: "That being so, and finding in the will a

disposition of parts of his property"—"real property" it should be put, but that has slipped out of the report, or perhaps I did not use it—"with that appointment of residuary legatees, why are we not to say that the expressions in the former part of the will are entitled to as much consideration as the expressions in the latter part, and that he intended these three people to take the residue of his property?"—that is, of course, his real property. Then Lord Justice James puts it on that ground expressly, and so does Lord Justice Bramwell; so that when you come really to examine the case, it turned on the fact not merely of the general words at the beginning, but of the gift of real property found in the will.

Now, in this case I have nothing, as I said before, but a statement of a commitment to paper of the wishes of the testatrix respecting the disposal of her property. I am repeating myself, but those wishes may not extend to the disposal of the whole of her property. It is not like saying, "As to the property I am possessed of or entitled to, I dispose thereof as follows." I think these are words which give me very little assistance. Then she goes on: "Everything I am possessed of I leave to my sister Sophia Plumtre for her life." In my opinion, having regard to the Wills Act, and having regard to the expressions used, Sophia Plumtre takes this property for life. I wish to say that distinctly—I do not wish to be misunderstood: but she takes it because she takes everything. There is nothing I can find to cut down the meaning of the words "everything I am possessed of." But although everything is left to a person for life, it does not follow that everything is left after her decease. Although words have been used which, having regard to their natural meaning, or having regard to the operation of the Wills Act, would pass everything she had to her sister for life, there is no indication of an intention to shew that the remainderman must necessarily take all that is given to the tenant-for-life. It would, to my mind, have made a very great difference if specific freehold property had been given by the will itself, and then the residue over. We have not

In re Methuen.

got that here. All we find is, that after the death of her sister there are a great number of pecuniary legacies or specific legacies consisting of personal estate, the will winding up with a specific gift of certain pictures. It does not appear to me that there is in this will that amount of context which is necessary to give to "residuary legatee" the meaning of "residuary devisee." If I were asked as to the testatrix's own intentions I should have very little doubt about it.

The cases are not in a satisfactory state, and I should be glad therefore to encourage an appeal in this case; and as the purchaser has succeeded I dismiss the summons with costs.

Solicitors—Bridges, Sawtell & Co., for vendor;
Philpot & Son, agents for Morrell & Son,
Oxford, for purchaser.

JESSEL, M.R. } *In re* GRUNDY, KERSHAW
1881. } AND COMPANY.
March 25. }

Practice—Costs—Third Party—Taxation as between Solicitor and Client—Party and Party Costs—Solicitors Act, 1843 (6 & 7 Vict. c. 79), s. 38.

The solicitors of a company on the withdrawal of a petition for its winding-up gave the petitioners' solicitors a written undertaking "to pay all proper costs and charges incident to and recoverable under the petition, such costs in case of difference to be taxed." The petitioners' solicitors subsequently delivered their bill to the solicitors of the company, but they were unable to agree the amount. The company subsequently obtained an order of course under section 38 of the Solicitors Act, 1843 (the third party section), for the taxation of the bill:—Held, on motion to discharge the order, that the undertaking was one to pay party and party costs, that section 38 of the Solicitors Act, 1843, referred only to the taxation of solicitor and client costs, that the company were not third parties within the section, and that the order was therefore

irregular and must be discharged with costs.

In re Hartley (30 Beav. 620) considered and explained.

Semble, that if on a party and party taxation, where the party taking the taxation pays the costs, the solicitor whose bill is under taxation delivers an extortionate bill with the view of increasing the costs of taxation, the Taxing Master has a discretion and can report the circumstances specially, and the Court has authority in such a case not only to deprive the solicitor of his costs, but also to make him pay the costs of taxation.

On the 21st of January, 1881, a petition for the winding up of the Bedford Brewery and Malting Company was presented by Grundy, Kershaw & Co. as solicitors for Goodenough and another. Before the petition came on to be heard the company paid the debt in respect of which the petition was presented, and on the 2nd of February, 1881, Messrs. Hulton & Lister, the solicitors of the company, gave Messrs. Grundy, Kershaw & Co. an undertaking in the following terms:—

"The Bedford Brewery Company.

"Dear Sirs,—In consequence of your withdrawing the petition for the winding up of this company, we undertake to pay all proper costs and charges incident to and recoverable under such petition. Such costs, in case of difference, to be taxed.

Yours truly,

"Hulton & Lister.

"Messrs. Grundy, Kershaw & Co."

The petition was accordingly withdrawn, and Grundy, Kershaw & Co. sent to Hulton & Lister a bill of their costs, headed, "In the matter of the Bedford Brewery and in the matter of the Companies Acts, Messrs. Grundy's charges."

The amount of the bill could not be agreed, and on the 2nd of March Grundy, Kershaw & Co. were served with a common order to tax the bill, dated the 25th of February, 1881, made on the petition of the Bedford Brewery Company as third parties, under section 38 of the Solicitors Act, 1843, and ordering in the usual way that, if a sixth should be taxed

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off, Grundy, Kershaw & Co. should pay the costs of taxation.

Upon the taxation Grundy, Kershaw & Co. contended that the order of the 25th of February was irregular as inapplicable to a taxation as between party and party, upon which scale the costs were payable under the undertaking, but they proposed before the Master, and afterwards by letter to Hulton & Lister, that the Master should treat the order of the 25th of February as made under the petition to wind up, and as an order for the taxation of the petitioners' costs and payment thereof by the company.

The offer was not accepted, and a motion was now made on behalf of Grundy & Co. that the order of the 25th of February, 1881, might be discharged with costs to be paid by the company.

Mr. Cozens-Hardy, for the motion.—I submit that the order of the 25th of February is irregular, as an order under the 38th section of the Attorneys and Solicitors Act, 1843, can only be made when the taxation is as between solicitor and client; the costs payable under the undertaking given by Hulton & Lister are costs as between party and party only. Moreover, the undertaking by Hulton & Lister was a personal one, and the order to tax should have been obtained in their name, and not in that of the company.

Mr. Romer, for the company.—I submit that this case is within the words of section 38 of the Solicitors Act, 1843, and that the bill delivered is properly taxable under the section.

The company were third parties so far as Grundy, Kershaw & Co. were concerned, and were entitled to an order of course under the section—

In re Hartley (*ubi supra*);
Vincent v. Venner, 1 Myl. & K. 212.

THE MASTER OF THE ROLLS.—This is an application to discharge an order of course for the taxation of a solicitor's bill. The order has been obtained under a very extraordinary misapprehension of what the rights of the parties really are.

The solicitors whose bill was taken in were the solicitors of the petitioners, who petitioned for the winding-up of a com-

pany. The company did not like the petition to go on, and their solicitors on the 2nd of February, 1881, wrote this letter. [His Lordship read the letter above set out.] The offer contained in the letter was accepted and the petition withdrawn.

The meaning of that letter is so plain that I can only use the words of it. It is an undertaking to pay by the solicitors of the company. The company is alleged to be insolvent, and therefore the solicitors give their personal undertaking to pay the petitioners' costs. They perfectly well knew (at least I must assume so) that "we undertake to pay" made them personally liable. And I do not suppose they were ignorant of the fact that it would not do for the company to undertake to pay, because, if another winding-up petition had intervened, that undertaking would not have been of any avail. Independently of the company being insolvent, therefore, there was an excellent reason why they should give their personal undertaking, because nothing but that or cash would have been accepted by the petitioners.

Then, having given that undertaking to pay, and the petition having been withdrawn, Messrs. Grundy, Kershaw & Co. send in a bill of costs to Messrs. Hulton & Lister, and they head it, "In the matter of the Bedford Brewery and in the matter of the Companies Acts, Messrs. Grundy's charges." They do not make out the bill to anybody. In fact, it is a bill against their own client, but it would be limited to party and party costs, and the only person they could charge in law would be their own client, or Messrs. Hulton & Lister, under their undertaking; but the latter were only liable to pay the "costs and charges incidental to and recoverable under the petition"—that is, party and party costs—and they were to be taxed in case of difference.

Now if Messrs. Hulton & Lister wanted them taxed, their course was a very simple one—that was, to take out a summons and get them taxed under the agreement. They could not tax under section 38 of the Solicitors Act, 1843 (the third party clause), because the third party clause only applies to solicitor and

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client costs. The taxation under section 38 is a taxation between solicitor and client, and is conducted in a totally different way to a taxation between party and party. In an ordinary taxation between party and party the costs of the taxation are borne by the person taking the taxation. I am by no means prepared to say that that is a universal rule which cannot be disregarded. No doubt there is a discretion in the Taxing Master, and if he finds a solicitor bringing in an extortionate bill with the view of increasing the costs of taxation so as to take advantage of that rule I have no doubt he can report specially, and that the Court has authority, not only to deprive the solicitor of costs, but make him pay costs for taking such an improper proceeding. But that is merely saying that the rules may be abused, and that the Court is strong enough to punish such abuse. But in an ordinary case the costs of taxation are not paid by the solicitor whose bill is taxed, but by the party who obtains the taxation, whereas, under orders obtained under sections 37 and 38 of the Solicitors Act, 1843, the costs depend upon the result of the taxation. If more than one-sixth is taken off the solicitor has to pay the costs of taxation, so that there is a very great difference both in the mode and the result of the taxation.

But, beside that, there is another objection to the order. It was obtained not by Messrs. Hulton & Lister, who undoubtedly were entitled to an order to tax (on the usual terms of being liable to pay—that is, to pay the amount found due on the bill, and also the costs of taxation), but it was obtained by the alleged insolvent company by an order of course, and I cannot see how the solicitors could get their money under the order, because if the company were really insolvent as alleged, of course they would not get it, and they might become mere creditors in the liquidation. Therefore it was obtained by the wrong people, and was obtained on an allegation that the solicitors delivered to the petitioners—which was not true—their bill of costs which contained improper charges, and therefore they asked for taxation. So that you have the wrong

petitioners, wrong jurisdiction and the wrong order. It is all wrong—in every way—and in every possible way.

That being so, the solicitors move to discharge the order.

First of all, it is alleged that the delivery of the bill in the way I have mentioned does not amount to delivery of the bill to the company. Of course it does not. There is no liability on the part of the company at all to pay these costs—that is, no direct liability. They may be, and probably are, liable to pay Messrs. Hulton & Lister.

Then it is said the order can be defended, first of all, as an alleged waiver, the waiver being this, that the solicitors very properly not wishing to incur costs for nothing, and I suppose believing somebody would pay them, offered to let the taxation go on if it were corrected and made a taxation of party and party costs, and if it were agreed that they were to have the costs of the taxation. That was not accepted. If it had been, it would have been a waiver as far as Messrs. Hulton & Lister were concerned. But not being accepted, of course there is no waiver of their strict rights.

Then two cases were relied on, as to one of which I wish to say a word or two, because it is imperfectly reported. I have no hesitation in saying that I think, under the peculiar circumstances of that case, the order was right. Therefore it must not be supposed that any observations I make on the case involve the opinion that the order made was wrong. But the case is so imperfectly reported that it might mislead anyone who did not look at it minutely. The case I refer to is that of *In re Hartley*. The facts were that there was a suit of *Milne v. Wild* and a cross suit, and by agreement the suits were compromised between Milne and Wild, on the terms that the costs of Milne incurred in the suits should be paid by Wild. It does not say in the report “incurred as between solicitor and client,” but it seems to have been so on looking at Mr. Follett’s argument, who cites an unreported case of *Re Bellyse*—in which the compromise was that the costs were to be taxed as between solicitor and client—and from the judgment of the Master of the Rolls, who

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speaks in this way of that case: "I was referred by Mr. Follett to a case in which I decided the point. I find I there referred to *Vincent v. Venner*, which expressly decides the case." Now in *Vincent v. Venner* there was an agreement for compromise, and the costs of the suit as between solicitor and client were to be paid by the petitioner. So that *Vincent v. Venner* and *Re Bellyse*, which were said by the Master of the Rolls to be in point, did contain the words "as between solicitor and client," and I have no doubt that, though the word "incurred" is used in Mr. Beavan's report, he means to have said "incurred as between solicitor and client." I have no doubt whatever from the argument and judgment in the case of *In re Hartley*, that the costs were to be paid as between solicitor and client. The next point in the case was this: The costs being payable as between solicitor and client by Wild, Hartley delivered his bill of costs to Wild—that is (as it was put in the argument), he adopted the agreement. Hartley then sought to discharge the order of course obtained by Wild under the third party clause, on the ground that Wild was not liable to pay except by contract between himself and Milne, and that that ought not to affect Milne's liability to pay Hartley.

The answer was, that he (Hartley) had adopted the agreement as between Milne and Wild that he was to look to Wild for payment, that the terms of the third party clause were wide enough to include the costs, and that under the circumstances, Hartley, having delivered the bill to Wild, could not complain of Wild obtaining the order for taxation under the third party clause. But it is clear that Hartley, being treated as having adopted Wild as his paymaster, was not injured at all; he got the costs taxed in exactly the same way as they would have been taxed against Milne—that is, under the third party clause. The costs of taxation of course followed the usual rule as to the one-sixth, and the only difference was that Wild, against whose solvency not a word was said, was substituted for Milne; but that was done by his own act in sending the bill to Wild. If he had declined to send the bill to Wild, and had sent it to

Milne, probably the decision would have been the other way. That being so, it is no authority in this case, where the costs are to be paid as between party and party, and where nothing has been done by Messrs. Grundy, Kershaw & Co. to adopt the company as their paymaster, and they have only sent the bill, headed as I have said, to Messrs. Hulton & Lister, who, as far as they are concerned, are their paymasters. The result, therefore, is, that I must discharge the order, and give the applicants their costs as against the company of the present application.

As the applicants have very reasonably said they only want the right order, and as Mr. Romer is willing to take the right order on behalf of Messrs. Hulton & Lister, by whom he is instructed, I will now make an order to tax the bill, on the application of Messrs. Hulton & Lister, as between party and party in the usual way.

Solicitors—Pritchard, Englefield & Co., for applicants; Milne, Riddle & Mellor, agents for Hulton & Lister, Manchester, for respondents.

JESSEL, M.R. }
1881.
May 14.

In re BRIDGES.
HILL v. BRIDGES.

Administration—Insolvent Estate—Annuity—Covenant—Contingent Liability—Valuation—Contingency arising during Administration—Proof—Judicature Act, 1875, s. 10—Bankruptcy Act, 1869, s. 31—Bankruptcy Rules, 1870, rule 77.

A testator covenanted to pay his daughter a sum of 5,000l., with interest at four per cent. per annum, within one month after the death of his wife, and to pay his said daughter an annuity of 100l. a year, during the joint lives of himself, his wife and the life of the survivor, if his daughter should so long live. The testator died in 1879, leaving his widow and daughter surviving, and judgment for the administration of his estate, which was insolvent, was given in an action instituted by the daughter as a creditor. The daughter sent in a proof

In re Bridges.

in respect of the principal sum and the annuity, and they were valued as at the date of the judgment. The testator's widow died before the chief clerk had made his certificate:—Held, that section 10 of the Judicature Act, 1875, applied as to the proof which was of a contingent liability, and that following the rules in bankruptcy as to contingent liabilities, the daughter was entitled to prove for the full amount of the 5,000*l.*, less a rebate of interest at four per cent. per annum for the period between the date of the judgment and the death of the widow, but only for the amount of the arrears of the annuity at the time of the judgment and for the amount accrued due between that time and the death of the widow, less a similar rebate.

In re The Northern Counties of England Fire Insurance Company (Lim.) (Ante, p. 273) followed.

Adjourned summons.

By the settlement, dated the 18th of August, 1853, and made on the marriage of Emma Bridges, jun., and Thomas James Longworth, Thomas Charles Bridges, her father, covenanted with the trustees of the settlement that he, his executors, administrators and assigns would, during the joint lives of himself and his wife, Emma Bridges, sen., and the life of the survivor, if the said T. J. Longworth and Emma Bridges, jun., or either of them, should so long live, pay to the trustees an annuity of 100*l.*, and that he would also within one calendar month after the death of Emma Bridges, sen., pay the trustees the sum of 5,000*l.* with interest at four per cent. from such death to the date of payment. The settlement subsequently contained the trusts of the 5,000*l.* and the annuity.

Emma Longworth survived her husband and subsequently married one Hill, whom she also survived.

T. C. Bridges died in 1879, leaving Emma Bridges, sen., his widow, surviving him.

Under the trusts of the settlement, upon the death of her father Emma Hill became absolutely entitled to the 5,000*l.* and the annuity.

An action for the administration of T. C. Bridges' estate, which was in-

solvent, was commenced by Emma Hill on behalf of herself and all other creditors against the executors of T. C. Bridges' will, and judgment for administration was given on the 21st of July, 1879. Emma Hill brought in a claim against the testator's estate for the full amount of 5,000*l.* and to have the annuity valued. The chief clerk directed the principal sum and the annuity to be valued by an actuary as at the date of the judgment. The principal sum was accordingly valued at 3,872*l.* and the annuity at 518*l.* The chief clerk adopted the valuations, and he allowed the claim at the amounts of the valuations. Emma Bridges, sen., died after the valuation. The chief clerk had not yet made his certificate.

Questions were now raised upon adjourned summons—First, Whether, in consequence of the death of the testator's widow pending the proceedings under the judgment, Mrs. Hill was not entitled to prove for the full amount of the 5,000*l.*; and secondly, Whether the proof for the annuity should now be admitted at the assessed sum, seeing that the time for its payment had elapsed.

Mr. Chitty and Mr. Cozens-Hardy, for Mrs. Hill.—The Court is now administering an insolvent estate, and therefore the rules as to proof in bankruptcy under section 10 of the Judicature Act, 1875, are to apply. Under section 31 of the Bankruptcy Act, 1879, "all debts and liabilities, present or future, certain or contingent, to which the bankrupt is subject at the date of the order of adjudication, or to which he may become subject during the continuance of the bankruptcy, by reason of any obligation incurred previously to the date of the order of adjudication, shall be deemed to be debts provable in bankruptcy, and may be proved in the prescribed manner." The date of the judgment corresponds to the order of adjudication—

In re Sumners, Law Rep. 13 Ch. D.

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and "the continuance of the bankruptcy" will correspond to the continuance of the administration of the estate of the insolvent. There is no rule under

In re Bridges.

the present Bankruptcy Rules directing how the valuation of contingent claims is to take place, although, under section 177 of the Bankruptcy Act, 1849, proof for the full amount of a contingent debt was allowed where the contingency happened during the bankruptcy.

As to the 5,000*l.*, we submit that proof for the full amount should be admitted, as the contingency happened before the chief clerk had made his certificate; and admitting the proof on that principle will be simply following your Lordship's previous decision in

In re The Northern Counties of England Fire Insurance Company (Lim.) (ubi supra).

As to the interest from the judgment to the death of the widow, the claimant will probably have to make an allowance, or rebate, in respect thereof—

Bankruptcy Rules, 1870, rule 77.

The annuity, we presume, will be treated in the same manner, and Mrs. Hill will only be entitled to prove for the arrears at the time of the judgment and for the payments accrued due at the death of the widow, less a rebate of interest between the judgment and that time.

Mr. Ince and Mr. G. H. Orpen, for the executors, referred to

In re Pannell; ex parte Bates, 48 Law J. Rep. Bankr. 113; Law Rep. 11 Ch. D. 914,

as shewing that the proof must be taken to have been made once for all.

THE MASTER OF THE ROLLS.—I am of opinion, as regards the 5,000*l.*, following the principle I adopted in *In re The Northern Counties of England Fire Insurance Company (Lim.)*, inasmuch as the contingency upon which the claim was dependent happened before the chief clerk made his certificate, that the claimant is entitled to prove for the full amount of the 5,000*l.*, less a rebate of interest, at the rate of four per cent. per annum, for the period between the date of the judgment and the widow's death.

The annuity must be treated on the same principle; so that the claimant must first prove for the amount of the arrears due at the date of the judgment,

and then for the full amount of subsequently accruing payments, less a similar rebate of interest.

Solicitors—Abbott, Jenkins & Co., for plaintiff and defendants; H. White, for a creditor.

[IN THE COURT OF APPEAL.]

JAMES, L.J.

BRETT, L.J.

COTTON, L.J.

1881.

Jan. 28, 29, 31.

April 8.

RAYNER v. PRESTON.

Vendor and Purchaser—Insurance by Vendor—Fire after Contract but before Completion—Right to Insurance-Moneys.

A house insured by the vendor was after the date of the contract for sale, but before completion, partly burnt down, and the vendor received the insurance-moneys. There was no provision in the contract as to insurance:—Held (per BRETT, L.J., and COTTON, L.J.; dissentiente JAMES, L.J.), that the purchaser as against the vendor could not recover the insurance-moneys either as an abatement of his purchase-money or for the reinstatement of the premises.

Seemle, in such a case the insurance company can compel the vendor to refund the money they have paid, if he receives the whole of his purchase-money, on the ground that the contract of fire insurance is merely a contract of indemnity.

This was an appeal from the decision of the Master of the Rolls.

By a contract, dated the 31st of July, 1878, the defendants agreed to sell to the plaintiffs certain freehold premises for 3,100*l.*

At the date of the contract the premises stood insured by the vendors against fire, but the contract contained no reference to this insurance.

After the date of the contract, and before completion, the premises were damaged by fire to the extent of 330*l.*, which sum was paid to the vendors by the insurance company, who had no knowledge of the contract.

Rayner v. Preston, App.

The vendors were trustees under a will, and, in consequence of some of the beneficiaries being under disability, were unable either to hand over the 330*l.* to the purchasers or to expend it in reinstating the premises. The purchasers, therefore, brought this action against the vendors, claiming a declaration that they were entitled to the benefit of the moneys received by the defendants from the insurance company, and to have such moneys paid to them accordingly, or otherwise to have them laid out towards reinstating the premises. The plaintiffs alleged that from some communications which had been made to them by the solicitor of the defendants shortly after the fire took place, they had been led to believe that they would have the benefit of the insurance.

THE MASTER OF THE ROLLS, in dismissing the action with costs, delivered judgment as follows: If this case were *res integra*, and I had to decide it on my own view of what was reasonable, I might have found some way of assisting the plaintiffs; but it appears to me the case is really concluded by authority. The first point I have to decide is, whether, assuming that Lord Westbury's decision in *Ex parte Gorely* (1) as to the generality of the statute 14 Geo. 3. c. 78—that is to say, as to its application to districts other than those within the bills of mortality—applies to every case of an unpaid vendor, the vendors, having entered into this contract, are, upon the facts alleged in the statement of claim, trustees for the purchasers of the insurance-money received by them. [His Lordship then read the allegations in the statement of claim as to the plaintiffs having been led to believe that they were to have the benefit of the insurance-money, and held that no case of representation had been made out against the defendants. His Lordship then continued:]

The only point that remains to be considered is as to the general law. The general law is asserted to be this, that when a man contracts to buy a house without

paying immediately his purchase-money, and the vendor has insured the house against fire, and a fire happens before the completion of the contract by payment of the purchase-money, and then the insurance company pays the insurance-money to the vendor instead of laying it out in reinstating the house, there is an equity on the part of the purchaser to make the vendor apply the insurance-money in part payment of the purchase-money; in other words, that the insurance-money results to the purchaser without any special contract.

Having regard to Lord Westbury's decision in the case I have mentioned, it is possible that were I making the law for the first time I might in this case devise some arrangement which would be fair to the purchaser; but I find that the law on this subject has already been laid down long ago.

Now let us see how Lord Eldon laid down the law seventy-nine years ago in *Paine v. Meller* (2). That was a peculiar case: the insurance policy was allowed to expire on the day on which the contract was to have been completed, and it was said that the vendor should have communicated to the purchaser the circumstance of the insurance expiring. Upon that Lord Eldon says (p. 352), "Then as to the non-communication, I cannot say that, in my judgment, forms an objection, for I do not see how I can allow it unless I say this Court warrants to every buyer of a house that the house is insured, and not only insured but to the full extent of the value. The house is bought, not the benefit of any existing policy." So there he puts it in plain terms—in buying a house you do not buy the existing policy. Then he goes on: "However general the practice of insuring from fire is it is not universal, and it is yet less general that houses are insured to their full value or near it. The question, whether insured or not, is with the vendor solely, not with the vendee; unless he proposes something upon that, and makes it matter of contract with the vendor, that the vendee shall buy according to that fact, that the house is insured."

The point came before Vice-Chancellor

(1) 4 De Gex, J. & S. 477; 34 Law J. Rep. Bankr. 1.

(2) 6 Ves. 349.

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Kindersley in 1864, in *Poole v. Alams* (3), where the Vice-Chancellor held that, in the absence of any provision in his contract, a purchaser of a house is not entitled to the benefit of an existing insurance against fire. There the very point we have here occurred—before the completion of the contract the house was burnt down. At the date of the contract and the fire the house was insured in the name of the vendor for 100*l.*, and he received the insurance-money from the office without the privity of the purchaser and without communicating to the office the fact that a sale had taken place. The Vice-Chancellor held that there being no provision in the contract that the purchaser should have the benefit of the insurance the vendor was entitled to retain the insurance-money, and that the purchaser must pay the whole of his purchase-money.

That decision was in 1864, and I am not aware that it has since been doubted.

The case of *Collingridge v. The Royal Exchange Assurance Corporation* (4) does not have any direct bearing upon this case. All that the Judges there decided was that an unpaid vendor who had insured was entitled to recover from the insurance company, the ground of the decision being that an unpaid vendor could not know whether he would ultimately get his purchase-money or not. Mr. Justice Mellor says, "Whether, when he (the vendor) receives this money, supposing that the defendants do not choose to reinstate the premises, he will become trustee of it for the Board of Works (the purchasers), is another question, but I do not see why the unexecuted bargain between him and the board can affect his right to recover." There was another question, namely, whether a contract for fire insurance being merely a contract of indemnity, the insurance company were not entitled to recover from the vendor on his being paid his full purchase-money by the purchaser.

That question was not considered at all. Then Mr. Justice Mellor proceeds, "If it were otherwise he would suffer

great inconvenience, and would have to rely on the solvency of the purchaser of his property, and although in the present case the purchaser is a powerful corporation, and there is no reason to doubt that the purchase-money will be paid, this is a mere accident, which ought not to interfere with his right to take measures for the protection of his security. The defendants are quite mistaken in supposing that they have only to pay the plaintiff for the amount of the loss which as between him and third persons he may ultimately sustain."

Then Mr. Justice Lush says, "If the plaintiff had actually conveyed them (the premises) away before the fire that would have been a defence to the action, for then he would have had no interest at the time of the loss." That is, if the vendor had been paid his purchase-money in full, he would have had no interest in the property, and could have maintained no action.

We will now turn to a text-book on the subject. On looking at *Bunyon on Fire Insurance* (2nd ed. p. 181), I find the law thus stated: "If, therefore, a fire occurs between the time of the sale and the completion of the contract, in the absence of any provision to the contrary, the loss falls upon him (the purchaser); he cannot claim either an abatement for his purchase-money or repudiate his bargain. Neither is the vendor under any obligation to communicate to him whether there is any existing policy or not. The vendor is indeed trustee for him of the legal estate and of the possession until the purchaser is put into possession, but he is not a trustee to all intents and purposes so as to place him under the same obligations as might attach upon an express trustee. If there is an insurance existing at the time of the fire, without an express stipulation to that effect the purchaser cannot claim the benefit of it, and if there is none it follows that he is not damaged."

That is how the law was stated in 1875.

Therefore, whether we look at actual decision, or whether we rely on the text-books on the subject, we find the law treated as valid. I do not think I can in

(3) 12 W.R. 683; 33 Law J. Rep. Chanc. 639.

(4) 47 Law J. Rep. Q.B. 31; Law Rep. 3 Q.B. p. 173.

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the year 1880 take upon myself to alter what Lord Eldon said in 1801, or what Vice-Chancellor Kindersley said in 1864.

The plaintiffs appealed.

Mr. Roxburgh and Mr. Ingle Joyce, for the appellants, contended that, having paid the whole of the purchase-money, they were entitled to be repaid by the vendor (the defendant) the insurance-moneys he had received, on the grounds—first, that, having regard to the authorities as they now stand, especially

Darrell v. Tibbitts, 50 Law J. Rep. Q.B. 33; Law Rep. 5 Q.B. D. 560,

the decision in

Poole v. Adams (ubi supra)

was no longer law, and that the vendor (the defendant) was a trustee for the plaintiffs of the benefit arising from the policy of insurance; secondly, that by reason of the representations made by the solicitor of the defendant when the fire took place, the plaintiffs were prevented from getting the benefit of the policy, because, the policy being a contract of indemnity, the plaintiffs would, but for the representations that were made, have given notice to the insurance company as "persons interested in the property" under 14 Geo. 3. c. 78. s. 83, and the company would have been bound to apply the insurance in reinstating the premises. On the first point they also cited

Ex parte Gorely (ubi supra);

Collingridge v. The Royal Exchange Assurance Corporation (ubi supra);

Reynard v. Arnold, Law Rep. 10 Chanc. 386;

Edwards v. West, 47 Law J. Rep. Chanc. 463; Law Rep. 7 Ch. D. 858.

Garden v. Ingram, 23 Law J. Rep. Chanc. 478;

Dart's Vendors and Purchasers (5th ed.) p. 812;

Lees v. Whiteley, 35 Law J. Rep. Chanc. 412; Law Rep. 2 Eq. 143;

Durrant v. Friend, 5 De Gex & S. 343; 21 Law J. Rep. Chanc. 353;

Robertson v. Skelton, 12 Beav. 260; 19 Law J. Rep. Chanc. 140;

Paine v. Meller (ubi supra).

Mr. Ohitty and Mr. Bardswell, for the respondents, argued *contra*, on the first point, that a contract of insurance is a contract of indemnity personal to the insured—

Darrell v. Tibbitts (ubi supra)—

and was in no sense annexed to the house, and did not pass under the contract for sale, unless expressly included in it, nor could the vendors have been held liable had they allowed the policy to lapse—

Knox v. Turner, 39 Law J. Rep.

Chanc. 207, 750; Law Rep. 9 Eq. 155; *ibid.* 5 Chanc. 515;

Dobson v. Land, 8 Hare, 216;

Hamilton v. Baldwin, 15 Beav. 232; and relied on

Poole v. Adams (ubi supra);

Edwards v. West (ubi supra);

on the second point, that there was a conflict of evidence and no clear proof that the vendor's solicitor was authorised to make the statement which he was alleged to have made, if he did make it; and if he did make it, it was a mis-statement not of fact, but only of law.

Mr. Roxburgh, in reply.

Cur. adv. vult.

Judgment was delivered (on April 8) as follows:—

COTTON, L.J.—This is an appeal from a judgment of the Master of the Rolls dismissing the action. The plaintiffs purchased from the defendants a messuage and workshops. Between the date of the contract and the time fixed for completion, the buildings purchased were injured by fire. The vendors had before the contract insured the buildings against fire, but there was not in the contract any mention of this fact nor of the policy. The plaintiffs brought an action to establish their right to a sum received by the vendors from the insurance office, or to have it applied in or towards reinstating the buildings injured. The Master of the Rolls decided against their claim, and from this the plaintiffs appealed.

It was contended by the appellants that they were entitled to the moneys, first, on general principles, irrespective of any special circumstances alleged to exist in

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the case; secondly, under the provisions of the Act, 14 Geo. 3. c. 78, either alone or with the aid of the special circumstances of the case. On the first point it was urged that, although the contract did not mention the policy, it gave the plaintiffs, as purchasers, a right to all contracts to the benefit of which the vendors were entitled, and of which the execution would be beneficial to or improve the thing purchased. This was inconsistent with one of the conditions on the back of the policy, which stipulated that assigns of the property (with certain exceptions, not including a purchaser) should not be entitled to the benefit of the insurance. But independently of that objection, I am of opinion that the contention of the appellants cannot prevail. The contract passes all things belonging to the vendors appurtenant to or necessarily connected with the use and enjoyment of the property mentioned in the contract, but not, in my opinion, collateral contracts; and such, in my opinion, at least, independently of the Act of Geo. 3, the policy of insurance is. It is not a contract limiting or affecting the interest of the vendors in the property sold, or affecting their right to enforce the contract for sale. For it is conceded that, if there were no insurance and the buildings sold were burnt, the contract for sale would be enforced. It is not even a contract in the event of a fire to repair the buildings, but a contract in that event to pay the vendors a sum of money which, if received by them, they may apply in any way they think fit. It is a contract, not to repair the damage to the buildings, but to pay a sum not exceeding the sum insured or the money value of the injury. In my opinion, the contract of insurance is not of such a nature as to pass without apt words under a contract for sale of the thing insured. But the appellants' case was put in another way. It was said that the vendor is, between the time of the contract being made and its being completed by conveyance, a trustee of the property for the purchaser, and that as, but for the fact of the legal ownership of the building insured being vested in him, he could not have recovered on the policy, he must be

considered as a trustee of the money so recovered. In my opinion, this cannot be maintained. An unpaid vendor is a trustee in a qualified sense only, and is so only because he has made a contract which a Court of equity will give effect to by transferring the property sold to the purchaser, and so far as he is a trustee he is so only in respect of the property contracted to be sold. Of this the policy is not a part. A vendor is in no case a trustee for the purchaser of rents accruing before the time fixed for completion, and here the fire occurred and the right to recover the money accrued before the day. The argument that the money is received in respect of property which is trust property is, in my opinion, fallacious. The money is received by virtue or in respect of the contract of insurance, and though the fact that the insured had parted with all interest in the property insured would be an answer to the claim, on the principle that the contract is one of indemnity only, this is very different from the proposition that the money is received by reason of his legal interest in the property. It remains to be considered whether the statute of the 14th of Geo. 3 can give the plaintiffs any right to the money. In my opinion, the statute does not of itself so connect the money with the land sold as to entitle the plaintiffs successfully to contend that, under the contract, they were entitled to the money. I give no opinion whether the plaintiffs, as purchasers who are liable to the vendor for the full amount of the purchase-money, even though the buildings are burnt, are persons who can (possibly to the prejudice of the office) insist that the money is to be applied in rebuilding. Even if they were so entitled, the Act only gives a right to insist on the money being so applied, and their claim to have this done is the foundation of and essential to the existence of their right. But it was urged that the vendors misled the plaintiffs, and thus prevented them from insisting on their rights under the statute. In my opinion, this has not been established by the plaintiffs. The evidence of the plaintiff E. Rayner the younger, who is not supported by the other plaintiff, though present when the conversation

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relied on took place, is contradicted by the defendants' solicitor, the person whose statements are said to have misled the plaintiffs, and the alleged misrepresentation is at the utmost a statement of the law, which, in my opinion, if made was erroneous, but which the plaintiffs have contended to be correct. The plaintiffs were not entitled, as against the defendants, to rely on a statement of opinion made by the solicitor of the defendants as to the legal right of the parties, and, in my opinion, the plaintiffs cannot establish their claim by the special circumstances on which they rely. The appellants, however, contended that there was authority in their favour, and it therefore becomes necessary to consider shortly the cases relied upon. The most important, and that which apparently is most in their favour, is *Garden v. Ingram*, a decision of Lord St. Leonards. He, affirming a decision of Vice-Chancellor Knight-Bruce, declared that the purchaser from the mortgagee of a lease was entitled to the benefit of a policy of insurance effected in pursuance of a covenant contained in the lease in the joint names of the lessor and lessee, and ordered the defendant, the lessee, to concur with the landlord in giving a receipt for the money. But there the lease contained a provision that any money recovered on the policy should be laid out in reinstating the buildings injured by fire; and this, in my opinion, was the ground on which the decision was based, and this is the view of the case expressed by Vice-Chancellor Kindersley, in *Lees v. Whiteley*. The appellants also relied on *Durrant v. Friend*, where Vice-Chancellor Parker, though he refused to give a legatee of specific chattels, which perished at the same time with the testator, the benefit of an insurance effected on the chattels by the testator, he used expressions which shew that he thought the legatee would have been entitled to the policy if the chattels were shewn to have existed after the testator's death. But this was *dictum* only, not decision. In *Garden v. Ingram*, Lord St. Leonards refers to a case not quoted in argument and of which he does not give the name, in which it had been decided that a remainderman was entitled

to a policy effected by a tenant-for-life. No such case was quoted to us, and the only case of the sort which I have been able to find is *Norris v. Harrison* (5), in which Lord St. Leonards was counsel, and of which he probably had an imperfect recollection. In that case it is true a remainderman did receive the balance of a fund received by a previous tenant-for-life on account of a policy effected by such tenant-for-life, but he did so because the executor and residuary legatee of the tenant-for-life had by his will treated the fund as appropriated for the benefit of the remainderman.

In my opinion, therefore, there is no decision in favour of the appellants. Against them there is the direct decision of Vice-Chancellor Kindersley in *Poole v. Adams* (3). It is urged by the appellants that the Vice-Chancellor arrived at this decision from an erroneous view of Lord Eldon's judgment in *Paine v. Meller* (2). In my opinion, though the decision of Lord Eldon is not expressly in point, yet the part of his judgment quoted by the Master of the Rolls does to some extent support the view of the Vice-Chancellor in the case referred to. In my opinion, the judgment of the Master of the Rolls was correct.

BRETT, L.J.—For a reason which will presently appear, I give with some fear the result of the, I must say, very clear opinion which I have in this case.

This action is brought by the plaintiffs against the defendants to recover money which is in the hands of the defendants, and therefore if the action had been brought at common law, it would have been an action for money had and received. That action was always treated at common law as founded upon equity, and therefore it seems to me that the decision in this case, whatever it ought to be, would be the same whether it should be considered to be a decision at common law or in equity. It seems to me that the question raised between the plaintiffs and the defendants calls upon us to consider first of all the nature of a policy of fire insurance; and secondly, what was

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the relation with regard to the policy and with regard to the properties between the plaintiffs and the defendants in this case. Now in my judgment the subject-matter of the contract of insurance is money and money only. The subject-matter of insurance is a different thing from the subject-matter of the contract. The subject-matter of insurance may be a house or premises in a fire policy, or may be a ship or goods in a marine policy. These are the subject-matters of insurance, but the subject-matter of the contract is money and money only. The only result of a policy, if an accident happens which is within the insurance, is a payment of money. It is true that under certain circumstances in a fire policy there may be an option to spend the money in rebuilding the premises, but that does not alter the fact that the only liability of the insurance company is to pay money. The contract therefore is a contract with regard to the payment of money, and it is a contract made between two persons and two persons only.

Then in this case there was a contract of insurance made between the defendants and the insurance company. That contract was made by the defendants, not on behalf of any undisclosed principal, not on behalf of anyone interested other than himself. The contract was made by the defendants solely and entirely on their own behalf, and at a time when they had no relation of any kind or sort with the plaintiffs. It was a personal contract between the defendants and the insurance company, to which they were the sole parties. It is true that under certain circumstances a policy of insurance in equity may be assigned, so as to give another person a right to sue upon it; but in this case the policy as a contract never was assigned by the defendants to the plaintiffs. It would have been assigned by the defendants to the plaintiffs if that had been made a part of the contract of purchase, but it was not. Any valuation of the policy, any consideration of the price of the premises in consequence of there being a policy, was wholly omitted. There was nothing given by the plaintiffs to the defendants for the contract. The contract was, therefore, in my

opinion, neither expressly nor impliedly assigned to the plaintiffs. So far as regards the contract of insurance, there never was any relation of any kind between the plaintiffs and the defendants, any more than between the defendants and any other stranger.

But there did exist a relation between the plaintiffs and the defendants, not with regard to the subject-matter of the contract (which is money and money only), but with regard to the subject-matter of the insurance—that is, the premises. There was a contract of purchase and sale between the plaintiffs and the defendants in respect of the premises insured. It therefore becomes necessary to consider and state in accurate terms what is the relation between two people who have contracted together with regard to premises in a contract of sale and purchase. With the greatest deference, it seems to me wrong to say that the one is a trustee for the other. It is a contract which a Court of equity will enforce by means of a decree for specific performance. But if the vendor were a trustee of the property for the vendee it would seem to me to follow that all the product, all the value of the property received by the vendor, from the time of the making of the contract, ought to belong to the vendee. What is the relation between them, and what is the result of the contract? Whether there shall ever be a conveyance depends upon two conditions—first, whether the title is made out; and secondly, whether the money is ready. And unless those two things coincide at the time when the contract ought to be completed, then the contract never will be completed, and the property never will be conveyed. But suppose at the time when the contract should be completed the title should be made out and the money should be ready, then the conveyance takes place. Now, it has been suggested, that when that takes place, or when a Court of equity decrees specific performance of the contract, and the conveyance is made in respect of that decree, then, by relation back, the vendor has been trustee for the vendee from the time of the making of the contract. But, again, with deference, it appears to me that if that were so, then of all the rents

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which have accrued due and which have been received by the vendor between the time of the making of the contract and the completion of it, the one was trustee for the other, and those rents ought to belong to the vendee. But it seems to me that that is not the law. Therefore I venture to say that I doubt whether it is a true description of the relation between the parties to say that, between the time of the making of the contract and the time when the completion ought to take place, the one is, either by relation back, or at the time, or during the time, a trustee for the other. They are only parties to a contract of vendor and purchaser of which the Court of equity will, under certain circumstances, decree specific performance. But if the vendor were a trustee for the vendee it does not seem to me at all to follow that anything under the contract of insurance would pass—anything, that is, in respect of the money. As I have said, the contract of insurance is a mere personal contract for the payment of money on the happening of certain conditions. It is not a contract which runs with the land. If so, upon the completion of the purchase there ought to be a decree that the policy be handed over. But that is not the law. It does not run with the land. It is a mere personal contract; and unless, therefore, the personal contract is assigned there can be no suit or action maintained upon it.

My brother Cotton has mentioned the cases in equity. As I have said, it seems to me that the cases at common law must follow the same view. At common law with regard to marine policies it has been always held that where there is a policy, and where the subject-matter of the insurance is sold by contract during the running of the policy, no interest under the policy passes unless it is made part of the contract of purchase and sale, or that it would be considered in a Court of equity as assigned. The binding case upon the subject is *Powles v. Innes* (6), in which it is stated that “a person who assigns away his interest in a ship or goods after effecting a policy of insurance upon them and before the loss, cannot sue upon

the policy except as a trustee for the assignee, in a case where the policy is handed over to him upon the assignment, or there is an agreement that it should be kept alive for his benefit.” Lord Abinger and Lord Wensleydale both said that the mere fact of making the contract of purchase and sale does not pass any interest in the policy, that there must be a bargain with regard to the policy in order to pass the interest. That is more clearly expressed by Mr. Justice Quain in *The North of England Pure Oil Cake Company v. The Archangel, &c. Insurance Company* (7), where he lays down as the adopted and recognised law that, “on the sale of a thing insured no interest in the policy passes to the vendee unless at the time of the sale the policy be assigned either expressly or impliedly.” That seems to me to have been the law always in Courts of law; and it seems to me that Vice-Chancellor Kindersley, in the case which has been referred to, lays it down that that was the well-settled and recognised law in Courts of equity also.

I therefore, with deference, think that the plaintiffs here cannot recover from the defendants on the ground that there was no relation of any kind or sort between the plaintiffs and the defendants with regard to the policy, and therefore none with regard to any money received under his policy.

JAMES, L.J.—I am unable to concur in affirming the judgment of the Master of the Rolls. According to my view of the case, the plaintiffs' contention is founded not only on what I may call the natural equity which commends itself to the general sense of the lay world, not instructed in legal principles, but also on artificial equity as it is understood and administered in our system of jurisprudence.

I am of opinion that the relation between the parties was truly and strictly that of trustee and *cestui que trust*. I agree that it is not accurate to call the relation between the vendor and purchaser of an estate under a contract, while the contract is *in fieri*, the relation of trustee and

(6) 11 Mee. & W. 10; 12 Law J. Rep. Exch. 163.

(7) 41 Law J. Rep. Q.B. 121; Law Rep. 10 Q.B. 249.

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cestui que trust. But that is because it is uncertain whether the contract will or will not be performed, and the character in which the parties stand to one another remains in suspense as long as the contract is *in fieri*. But when the contract is performed by actual conveyance or performed in everything but the mere formal act of sealing the engrossed deeds, then that completion relates back to the contract, and it is a thing ascertained that the relation was throughout that of trustee and *cestui que trust*. That is to say, it is ascertained that while the legal estate was in the vendor, the beneficial and equitable interest was wholly in the purchaser, and that is, in my opinion, the correct definition of a trust estate. Whenever that state of things occurs, whether by act of the parties or by act or operation of law, whether it is ascertained from the first or after a period of suspense and uncertainty, then there is a complete and perfect trust—the legal owner is and has been a trustee, and the equitable owner is and has been a *cestui que trust*. This being the relation between the parties, I hold it to be an universal rule of equity that any right which is vested in a trustee—any benefit which accrues to a trustee, from whatever source or under whatever circumstances, by reason of his legal ownership of the property—that right and that benefit he takes as trustee for the beneficial owner. If the policy of insurance in this case were a collateral contract, such as the policy which a creditor effects on the life of his debtor, the case would be wholly different. But the policy of fire insurance is not, in my opinion, a collateral contract; it is not a wagering contract—a contract that if a fire happens then a certain sum of money shall be paid to the insurer; it is, in terms and in effect, a contract that, if the property is injured, then that the insurance company will make good the actual damage sustained by the property. That damage, and that damage only, gives the right and is the measure of the right, and it seems to me impossible to say that it is not by reason of the legal ownership and in respect solely of the injury done to that legal ownership that the right to recover from the insurance company accrued to the

insurer. If the fire in this case had happened through the wrongful or negligent act of a third person while the contract was *in fieri*, the legal right to sue for the damage would be in the vendor; but on the completion of the contract the purchaser would be entitled to use the name of the vendor as his trustee to sue for the damage so sustained, or, if the damage had actually been recovered in the interval, to recover the damages from the vendor. And it appears to me that there is no distinction in principle between this right and the right to use the vendor's name in a contract of indemnity against loss by fire, which the policy of insurance is. It is not, in my view of the case, at all material to consider what would be the case if, after actual conveyance and during the currency of the policy, a fire had occurred. The vendor in that case would have no right as between him and the insurance office, and the purchaser would have no right of action because one of the conditions of the policy excludes it, and independently of that condition the policy would, or might probably be held not to run with the land in the hands of the subsequent owner, and in that case there would not be that which is the foundation of the right—legal ownership and right in one person, and equitable ownership in another.

No doubt it is mere accident that there was such a policy, and there was such a right. The vendor could not have complained if there had been no insurance. But that has occurred in a great variety of cases in which equitable rights have arisen. Where there is a creditor and a debtor and a surety, and the surety finds out that by something to which he was not privy and of which he had never heard somebody else had become surety, or the creditor had obtained security, the surety has a right to obtain contribution from such surety or to obtain such security, as the case may be, and the creditor releasing such surety or parting with such security would probably find himself in considerable peril.

In the same city in which this controversy has arisen there occurred some time ago a great destruction of property by reason of an explosion of gunpowder

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caused by a fire. Houses were damaged, not by fire but by the explosion caused by a fire in another neighbouring place. The insurance office thought that it was for their interests to be very liberal, and treat the damage from the explosion as a damage by fire within the policies and to pay accordingly. This was a mere act of liberality. They thought it was for their permanent benefit commercially to be liberal, and they were liberal accordingly. *Taunton v. The Royal Insurance Company* (8). I cannot myself doubt that if a trustee or a vendor who had become trustee by the completion of his contract had received the bounty, he would have received it by reason of his trusteeship, and would have had to give it up to his *cestui que trust* and purchaser.

In my view of the case it is, perhaps, unnecessary to refer to the Act of Parliament as to fire insurance; but the Act seems to me to shew that a policy of insurance on a house was considered by the Legislature, as I believe it to be considered by the universal *consensus* of mankind, to be a policy for the benefit of all persons interested in the property, and it appears to me that a purchaser having an equitable interest under a contract of sale is a person having an interest in the house within the meaning of the Act. I believe that there is no case to be found in which the liability of the insurance office has been limited to the value of the interest of the insured in the house destroyed. If a tenant-for-life, having insured his house, has the house destroyed or damaged by fire, I have never heard it suggested that the insurance office could cut down his claim by shewing that he was of extreme old age or suffering from a mortal disease. In the case of *Ollingridge v. The Royal Exchange Assurance Corporation* the vendor recovered the whole amount of the loss, although it was absolutely certain, having regard to the solvency of his purchaser, that he would really never suffer any loss at all, personally or otherwise than as trustee for such purchaser. Of authority on the subject there is no doubt the express decision of Vice-Chancellor Kindersley against the plaintiffs,

(9) 2 Hem. & M. 130; 33 Law J. Rep. Chanc. 406.

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but against that there are to be set off the very distinct opinions of Lord St. Leonards and Vice-Chancellor Parker, men of great knowledge of equity and of great accuracy and sense in their *dicta*. But I prefer to rest my judgment on the fact that the relation between the vendor and purchaser became and was in law, as from the date of the contract, and up to the completion of it, the relation of trustee and *cestui que trust*, and that the trustee received the insurance-money by reason of and as the actual amount of the damage done to the trust property.

The plaintiffs also put their case on the ground of the representations made to them by the defendants' solicitor and agent. What took place appears to me to be this: The solicitor said to the purchasers, "I do not know who is entitled, but the vendor is the only person who has a legal claim, and I will make the claim accordingly, whichever is entitled," and the purchasers left the matter in his hands. Now the purchasers could at that time have applied to the office to compel the money to be laid out in restoring the building. And I am of opinion that when the money was under these circumstances obtained from the office, it reached the vendor's hands according to the then rights of the parties as between them and the insurance office—that is to say, as money which ought to be laid out in reinstating the premises, or, in other words, as money in which the purchasers alone had any real and substantial interest.

BRETT, L.J.—I should like to add to what I have said that I feel very considerable doubt indeed whether, as between the defendants and the insurance company, the defendants can keep the money.

COTTON, L.J.—I quite concur in that doubt. I did not express it in my judgment, though it is implied in one passage.

The majority of the Court agreeing with the judgment of the Master of the Rolls, the appeal was dismissed with costs.

Solicitors—Venn & Co., agents for Hugh Quinn, Liverpool, for appellants; Torr & Co., agents for Anthony & Imlach, Liverpool, for respondents.

FRY, J. }
1881. }
March 31. } WORMALD v. MUZEEN.

Will—Annuity—Charge on Rents—After Death of Annuitant—Gift of "remainder" of Rents.

Gift by will of real and residuary personal estate on trust out of the rents and income to pay to the testator's widow the clear annual sum of 300l. during her life, by half-yearly payments, and to pay the remainder of such rents and income to his sister during her life,—Held, to entitle the widow to a continuing charge for her annuity on rents and income.

Stelfox v. Sugden (Johns. 284) distinguished.

G. F. Wormald, by his will, gave his real and residuary personal estate to his children on their attaining twenty-one; and in case there should be no such children (which happened), he gave the residue of his personal estate to trustees upon trust for conversion and payment of debts, &c., and legacies, and as to the clear residue in trust, and for the like purposes, as his real estate. And he devised his lands to the trustees upon trust, in the first place, with and out of the rents and profits of the said estates, and the income arising from his said residuary personal estate, to pay to his wife, the plaintiff, the clear annual sum of 300l., for and during the term of her natural life, by half-yearly payments, the first to be made at the end of six calendar months after his decease; and upon further trust to pay the remainder of such rents and income unto his sister, Mary Wormald (afterwards Mrs. Muzeen), for her separate use as therein mentioned, without power of anticipation, and for and during the term of her natural life, and from and after her decease, or on her anticipating the same rents and income, or any part thereof, upon trust as to the said trust estates for all the children of his said sister equally.

The will was disputed, and a compromise was come to which was sanctioned by the Court in this action by an order dated the 23rd of April, 1875. One of the terms of the compromise was that

the annuity should be paid, but reduced in amount to 200l.; and the order provided that the trustees should, out of the rents and profits of the real estate and income arising from the residuary personal estate, pay to the plaintiff the clear annual sum of 200l. for and during the term of her natural life, by equal half-yearly payments in manner by the will provided with reference to the clear annual sum of 300l. therein mentioned, and pay the remainder of such rents and profits and income to Mrs. Muzeen on her separate receipt, and the plaintiff was to be at liberty to apply in case the said clear annual sum of 200l. should fall into arrear.

The current income being insufficient to answer the annuity, the trustees took out the present summons for the opinion and direction of the Judge, whether, upon the construction of the will and order, the plaintiff was entitled to the clear annual sum of 200l., or whether she was only entitled to take the annual income so far as the same should not exceed 200l.

Mr. Nalder, for the trustees.

Mr. John Pearson and *Mr. Bardswell*, for the plaintiff.

Mr. Dunning, for Mrs. Muzeen.—There being a gift over of income, there is no authority for holding the annuity a continuing charge unless the gift over is expressed to be subject to the annuity. That was so in

Booth v. Coulton, 39 Law J. Rep. Chanc. 622; Law Rep. 5 Chanc. 684;

Taylor v. Taylor, 43 Law J. Rep. Chanc. 314; Law Rep. 17 Eq. 324.

[FRY, J.—Here the only gift over is of the remainder of the rents.]

The annuity is of an amount assumed to be less than the rents; the annuitant is as little entitled to disturb the donee of the remainder as if instead of the annuity the whole of the rents had been given to her for her life. The case is like

Stelfox v. Sugden (ubi supra).

Mr. Pearson, in reply as to

Stelfox v. Sugden (ubi supra).—

In that case the persons among whom

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the surplus income was to be annually divided during the life of the annuitant were not the same as the persons entitled after the annuitant's death.

Fry, J.—In my opinion the annuitant is entitled to claim the annual sum of 200*l.* out of the rents and profits accruing, not merely during the life of the annuitant, but after her death. The trust is expressed as follows: "In the first place, with and out of the rents and profits of the said estates, and the income arising from my said residuary personal estate, to pay to my said wife the clear annual sum of 300*l.*, for and during the term of her natural life, by half-yearly payments, the first to be made at the end of six calendar months next after my decease." Then he proceeds: "And upon further trust to pay the remainder of such rents and income unto my sister, Mary Wormald, for her sole and separate use, free from the debts and control of any husband, without power of anticipation, for and during the term of her natural life; and from and after the decease of my sister Mary, or on her anticipating the rents, &c., upon trust as to the said trust estates, for all the children of my said sister equally as tenants in common." Therefore the peculiarity here is this: the income given to the wife is given "in the first place." That makes it a primary charge. Further, there is no gift to the person who takes the residue of the income, or the income in remainder, except of "the remainder" of that income. Therefore the testator has indicated a strong intention that the annuitant is the primary object of his bounty.

It is also reasonably clear that nobody can take the remainder of anything till that is satisfied with reference to which the remainder is defined. To apply that principle here, there is no remainder of the rents after the annuity until the annuity is paid. The claim now made on behalf of Mary Wormald is to the rents, not to the remainder of them.

The only difficulty which I have felt was from the case of *Stelfox v. Sugden*, which is an authority by which I am bound; but I do not think it is the same as this case. In that case there was a

gift of an annuity, and of the residue of the annual proceeds during the life of the annuitant; and after the death of the annuitant there was a gift of the fund in favour of persons other than the donees of the residuary income during the annuitant's life; and the Vice-Chancellor found there provision for an annual division of the income. In the case before me there is a remarkable absence of anything to indicate an annual division or annual settlement. On the contrary, the words are perfectly general. Vice-Chancellor Wood, in that case, says (1), "The direction is, that the trustees 'shall out of the interest, dividends and annual proceeds of the said trust moneys, stocks, funds, shares or securities,' when once the residue has been invested, pay to the testator's widow, 'for and during the term of her natural life, the clear annual sum of 100*l.*, without any deduction or abatement therefrom whatsoever.' That direction, it was said, contains no limitation with regard to the period during which such interest is to be received; and it is followed, in the gift over after the decease of the wife, by a declaration that the trustees 'shall stand possessed of the residue of the said trust moneys, stocks, funds, shares or securities, and divide the same into six equal parts,' and pay the same to the parties there named. Now, if the will contained those directions alone, and omitted the intervening direction with reference to the residue of the interest and proceeds during the life of the testator's wife (which seems to me to be alone conclusive of the question before me); if it were the simple case of a gift at the commencement of the bequest of all dividends and income, without limit as to time, for the purpose of meeting a certain annuity, and after the death of the annuitant, a bequest of the residue of the principal sum to other parties—the construction for which the widow contends being thus confirmed at both ends of the bequest—the authorities cited would be strongly in favour of the contention that the annuity is a charge on the *corpus*, and not merely upon the income of the trust fund; and that the

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trustees are bound to go on applying the income of the trust fund in payment of the annuity, until that annuity shall be entirely satisfied." Then he went on to decide that the annuity was not a continuing charge. I am bound to say that the case was very much like the present. It is not precisely the same case. In my case the gift over is of the residue once for all; and that being so, I think that the Vice-Chancellor's judgment is in favour of the way in which I decide. The annuity must be satisfied in the first instance.

Solicitors—Burton, Yeates, Hart & Burton, agents for L. White, Driffeld, for plaintiff; Collyer, Bristow & Co., agents for J. D. Whitehead, Pickering, for defendants; Emmet, Son & Stubbs, agents for Jackson, Malton, for other parties.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.	} <i>Ex parte</i> NEWTON; <i>ex parte</i> GRIFFIN; <i>in re</i> BUNYARD.
BAGGALLAY, L.J.	
COTTON, L.J.	
THESIGER, L.J.	
1880.	
June 24.	
Dec. 9.	

Proof in Bankruptcy—Accommodation Acceptance—Deposit of as Security for less than Value of Bill—Proof for Full Amount.

The holder of a bill, accepted for the accommodation of the drawer, and deposited with him by the drawer as security for a sum less than the amount of the bill, is entitled to prove in the bankruptcy of the acceptor against his estate for the whole amount of the bill; but with the restriction that he shall not receive dividends on his proof to an amount exceeding the sum due on his security.

This was an appeal from a decision of Bacon, C.J., in which he held that the holders of accommodation bills of exchange deposited with them as security for a debt less in each case than the amount of the bill were only entitled to

prove for the amount actually due to them by the drawer.

In November, 1878, H. Bunyard, a sack manufacturer in the city, entered into a contract with Newton to sell him 5,000 sacks, to be delivered as Newton should require them, at the price of 27*l.* 16*s.* 8*d.*, for which sum Bunyard drew a four months' bill of exchange upon Newton, which Newton accepted. Bunyard subsequently indorsed the bill to the London and County Bank.

Bunyard, by way of security for the performance of his contract, indorsed to Newton a bill of exchange for 300*l.* drawn by him upon and accepted by a firm of Thomas Bunyard & Sons, of Maidstone, for the accommodation of H. Bunyard (of which fact, however, Newton was ignorant). The bill was dated the 12th of November, 1878, and payable four months after date.

This bill, it was agreed between H. Bunyard and Newton, should not be negotiated until H. Bunyard failed to fulfil his contract.

H. Bunyard supplied sacks to the value of 32*l.* 10*s.* only, and failed to deliver any more. Newton, however, did not negotiate the 300*l.* bill.

In January, 1879, Newton filed a petition for liquidation, and his creditors resolved to accept a composition. The bank received a composition in respect of the bill indorsed to them.

T. Bunyard & Sons filed a liquidation petition before the 300*l.* bill matured, and Newton tendered a proof in their liquidation upon the bill for the full amount.

The Registrar, acting as Judge, held that the proof could only be admitted for the sum of 240*l.* 6*s.* 8*d.* the balance remaining due to Newton under his contract.

Newton, and a person named Griffin, with whom accommodation bills, accepted by the debtors, had been deposited to secure a debt less than the amount of the bill, appealed to the Chief Judge, who affirmed the decision of the Registrar, and Newton and Griffin appealed to the Court of Appeal.

Mr. E. O. Willis, for Newton, claimed to prove for the whole bill, the dividends

Ex parte Newton (App.), Bankr.

to be received to be limited to the amount due from H. Bunyard, and referred to

Ex parte Blosham, 5 Ves. 448; 6 *ibid.* 449, 600;

Robson's Bankruptcy, 3rd ed. p. 222.

Mr. De Gea and *Mr. D. Kingsford*, for the trustee, contended that in the case of accommodation bills the holder could not prove for more than he could obtain from the person from whom he received them; that in bankruptcy the amount of proof was limited to the amount which could be recovered in an action against the debtor if solvent.

They referred to

Ex parte Gordon; *in re Gomersall*, 45 Law J. Rep. Bankr. 1; Law Rep. 1 Ch. D. 137; *sub nom. Jones v. Gordon*, 47 Law J. Rep. Bankr.

1; Law Rep. 2 App. Cas. 616; *Oooke's Bankrupt Law*, 8th ed. p. 176; *Jones v. Hibbert*, 2 Stark. 304;

Simpson v. Clarke, 2 Cr. M. & R. 342; 4 Law J. Rep. Exch. 255;

Chitty on Bills, 11th ed. p. 55; *Wiffen v. Roberts*, 1 Esp. 261;

Heath v. Sansom, 2 B. & Ad. 291, 297; 9 Law J. Rep. (o.s.) K.B. 246;

Smith v. Knox, 3 Esp. 46;

Fentum v. Pocock, 5 Taunt. 192;

Ex parte Earle, 5 Ves. 833.

Mr. E. O. Willis, in reply, said the express ground of the decision in

Wiffen v. Roberts (ubi supra)

was that the holder knew it was an accommodation bill. Here the appellant had no notice of the fact. He referred to

Byles on Bills, 12th ed. p. 452;

Ex parte Philips, 1 Mont. D. & D. 232.

Mr. Finlay Knight, for Griffin, referred to

Ex parte Schofield; *in re Frith*, 48 Law J. Rep. Bankr. 122; Law Rep. 12 Ch. D. 337, 348.

Our. adv. vult.

THESIGER, L.J., died before the judgment of the Court was delivered, and the parties agreed to accept the judgment of the two surviving Lords Justices.

COTTON, L.J. (on Dec. 9), delivered the judgment of the Court.

Each of these appeals raised the same question, namely, whether the holder of a bill taken from the drawer as security for a sum less than the amount of the bill is entitled as against the estate of the bankrupt, who had accepted for the accommodation of the drawer, to prove only for the amount due to him, the holder, or for the amount of the bill, with a restriction that he shall not receive dividends on his proof to an amount exceeding the sum due to him on his security.

It was conceded that if the bill had been accepted for value, the holder would have been entitled to prove for the larger amount. But it was urged on behalf of the respondent that the fact of the acceptance being for the accommodation of the drawer makes a difference. It was said, and truly, that a man who has taken a bill from the drawer as security only, will hold for the drawer any sum recovered from the acceptor beyond the amount due on his security, and that when the bill has been accepted for the accommodation of the drawer, he (the drawer) would be liable to repay to the acceptor any part of the sum recovered from him which may be handed to the drawer by the holder of the bill.

But the acceptor has put it in the power of the drawer to make the bill in the hands of a holder for value available against the acceptor for its full amount, and although the holder may have taken it as security for a sum less than the amount of the bill, we are of opinion that such a holder is entitled to make the bill available against the acceptor in the way which will best produce the sums due to him, and that in the event of bankruptcy he is entitled to prove against the acceptor's estate for the full amount of the bill. It was argued that if the acceptor had not become bankrupt judgment in an action against him on the bill would be confined to the amount due on the security thereof from the drawer. But if the acceptor is solvent a judgment against him will realise the full amount for which it is obtained, and even if he is not solvent the amount to be recovered on the judgment will (to an amount not exceeding the sum for which the judgment is recovered) be limited only by the value of his estate

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which can be realised under the judgment. In case this is insufficient to pay the debt to the holder of the bill, the amount which he will recover will not be increased by giving him judgment for a larger sum.

It was, however, contended that there is authority in favour of the respondent. *Ex parte Blozham* was referred to. The decision of Lord Rosslyn there reported is in favour of the more limited proof. But the order was afterwards (see 6 Ves. 600) discharged, and an order made giving the bill-holder a right to prove for the full amount of the bill. This case, even if it is not (as we think it is) an authority in favour of the bill-holder in the present case, cannot be regarded as an authority against him.

We are of opinion that the appellants are entitled to prove for the full amount of the bills, with a restriction that they are not to receive dividends beyond the amount due to them.

Solicitors—Morley & Sherriff, for Newton; Williamson, Hill & Co., for Griffin; Hughes, Hooker & Co., for trustee.

JESSEL, M.R. }
1881.
Feb. 28.

KINSMAN v. ROUSE.

Mortgage—Possession by Mortgagee of part of the Mortgaged Property—Absence of Mortgagor beyond Seas—Statute of Limitations (3 & 4 Will. 4. c. 27. ss. 28, 16).

Possession by a mortgagor of part of the mortgaged property does not, since the passing of the 3 & 4 Will. 4. c. 27, operate to prevent his being barred by lapse of time from redeeming such part as is in the possession of the mortgagee. Absence beyond seas is not, under the same statute, a disability as between mortgagor and mortgagee.

By a deed made in October, 1847, the plaintiff Kinsman assigned certain leaseholds to the defendant Betsy Rouse and Mary Ann May, by way of mortgage.

By another deed, made in 1849, he mortgaged the same property to John Browne and Samuel Banbury, subject to the first mortgage. Shortly after executing the mortgage of 1849 he allowed Banbury to enter into possession of two fields, forming part of the mortgaged property. Banbury continued in possession of the two fields until his death in 1853, since which time Mary Banbury, his widow and administratrix, had remained in possession of them.

In 1849, shortly after executing the second mortgage deed, Kinsman emigrated to Canada, where he has since resided.

In 1855, the first mortgagees entered into possession of all the mortgaged property except the two fields in question. No interest was thenceforward paid on their debt, nor did they give any acknowledgment of Kinsman's title to the mortgaged property. In 1871 Mary Ann May died, having appointed as her executrix Betsy Rouse, who had, in the year 1855, married Eusebius Rouse.

This action was commenced before 1879, by Kinsman and the second mortgagees against the first mortgagees, and claimed the taking of the usual accounts against mortgagees in possession and redemption of the premises.

Mr. Bagshawe and Mr. Orackmall, for the plaintiffs.—The possession by the second mortgagee of the two fields was a possession under, and therefore by, the mortgagor. Before the statute 3 & 4 Will. 4. c. 27 it was the settled rule that so long as the mortgagor held possession of any part of the estate no lapse of time could bar his right to redeem all. For as to the part of which he kept possession his right remained. And, as he cannot redeem that separately, he was allowed to redeem all—

Rakestraw v. Brewer, Select Cas. in Chanc. 56;

Burke v. Lynch, 2 Ball & B. 426.

In all the text-books upon the subject it is stated that the same rule will apply under the statute—

Fisher on Mortgages, 735;

1 *Powell on Mortgages*, 388 a;

Oote on Mortgages, 930, 932.

Kinsman v. Rouse.

No doubt the 28th section of the statute bars the right of the mortgagor where the mortgagee has been, for the specified period, in the possession of "any land comprised in his mortgage;" but that is merely another way of saying, "the mortgaged property." Consequently the section does not apply unless the mortgagee has been in possession of all the mortgaged land.

Moreover, the mortgagor has been absent beyond seas since 1855, and his rights are therefore preserved by the 16th section of the Act.

Mr. Davey and *Mr. C. T. Simpson*, for the defendants, were not called upon.

THE MASTER OF THE ROLLS.—I must say that, in my opinion, whatever view might be taken by the Court of Appeal, there is no reasonable doubt as to the meaning of the 28th section of the statute. The section says this: "When a mortgagee shall have obtained the possession or receipt of the profits of any land"—"any" land, not "the" land—"or the receipt of any rent, comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage but within twenty years next after the time at which the mortgagee obtained such possession or receipt," and so on. Of course that means that the mortgagor shall not redeem the mortgage on the land of which possession is taken; it cannot refer to any other land.

Suppose a mortgagee, in taking possession, omits by mistake to take possession of a piece of land included in the mortgage, not knowing that it is comprised in the mortgage deed, and some other mortgagee takes possession of that piece of land, would the first mortgagee lose the benefit of the possession he had taken under his mortgage? Certainly not. In the present case, the first mortgagees have been in possession of part of the land for more than twenty years, which is a sufficient compliance with the section; for, in my opinion, it is sufficient if the mortgagee has taken possession of "any land" comprised in the mortgage. To my mind the meaning of the section is quite clear, and there is nothing in the

subsequent words of the section to interfere with the construction I have adopted.

Then it is said that, before the Act, the law was different, and that the mortgagor's right to redeem could not be barred so long as he held possession of part of the land. Whatever the law was before the Act, it does not, in my opinion, alter the proper meaning of the section, which is, that the moment the twenty years' possession by the mortgagee of any part of the land has run, the title of the mortgagee to the land of which he has taken possession is absolute.

Then it is said that the right of the mortgagor in this case to bring an action to redeem is saved by his "absence beyond seas," under the 16th section, but the 28th section contains no qualification of the mortgagee's title under it. The 16th section saves the right of any person "to bring an action to recover any land" where such person was under any disability, such as absence beyond seas, at the time the right first accrued; but that does not apply to a mortgagor. An action to redeem is not, properly speaking, an action to recover land—the section evidently refers to cases of ordinary ownership where the rightful owner of land has been dispossessed.

The 28th section contains no qualification of the rights of the mortgagee as against the mortgagor, and, in my opinion, for this reason, that it was not intended to put the rights of the mortgagee upon the same footing as the right of persons claiming under an ordinary disposition of land.

It appears to me that there is no reason for extending the meaning of the 16th section to the case of a mortgagor.

I therefore dismiss the action with costs.

Solicitors—A. F. Coe, agent for C. Smale, Bideford, for plaintiffs; R. B. Toller, for defendants.

HALL, V.C. }
 1881. } *In re* RICHARDSON. RICHARD-
 April 27. } SON v. PILLINER.

Will—Construction—"Stock-in-Trade"
—Bequest of Business—Business of Barge-Builder.

A testator, who was a barge-builder, specifically bequeathed to his son his business, "together with all and singular his stock-in-trade as a barge-builder." It is a custom in the testator's trade for a barge-builder when selling a new barge to accept an old barge in part payment, and to repair such old barge and let the same out on hire. At the testator's decease there were five old barges belonging to him which had been thus acquired, and were thus let out on hire:—Held, that these barges formed part of the testator's stock-in-trade as a barge-builder, and passed under the specific bequest.

Adjourned summons.

The testator, James Richardson the elder, by his will dated the 23rd of January, 1874, after making certain specific devises of freeholds, bequeathed to his son, the plaintiff James Richardson the younger, the testator's business of a barge-builder then carried on by him at Strand-on-the-Green, in the county of Middlesex, together with all and singular his stock-in-trade as a barge-builder, and also all his tools and utensils belonging to such trade, and also his boat and one punt for his own use and benefit absolutely, subject to the payment of a certain sum of 50*l.*, and after directing that in case the plaintiff should carry on the business he should pay a yearly rent of 18*l.* for the business premises, the testator declared that no barge, barges or other craft in the process of building or manufactory on his said premises at the time of his decease, or any material then in stock to be used for the purpose of building such new barge or craft, should be considered as stock-in-trade therein-before bequeathed to the plaintiff, but that the same should fall into and form part of the testator's residuary personal estate.

By a codicil of the same date as the will the testator bequeathed his barge

*Industry and his two other punts to his son Charles Richardson, and by a subsequent codicil he gave directions as to the payment of the sum of 50*l.* above-mentioned. The testator died on the 27th of March, 1880, and shortly afterwards this action was instituted by the plaintiff against the defendant, the executor of the will, for the administration of the testator's personal estate.*

It appeared that for about thirteen years prior to his decease the testator was in an infirm condition, and that his business was carried on by his son, the plaintiff, who in so carrying on the business acquired in connection with it five old barges under the following circumstances:—

It is customary with barge-builders on the river Thames, when they build a new barge for a barge-owner, to take an old barge in part payment, and if such old barge is fit for any more work they repair it and let it out to lightermen and others. In this way the five old barges had been acquired, and they had been from time to time let out for hire at weekly rents which had been treated as forming part of the profits of the testator's business.

It also appeared that upon one occasion the testator had taken a copyhold cottage in payment for a barge built by him.

The chief clerk by his certificate had found that the five old barges formed part of the testator's residuary personal estate, and this was a summons taken out on behalf of the plaintiff to vary the certificate by certifying that the five barges passed to the plaintiff under the specific bequest contained in the testator's will.

Mr. W. Pearson and Mr. W. Renshaw, for the plaintiff.—We submit that these five barges having been acquired by the testator or on his behalf, in and for the purposes of his business, formed part of his stock-in-trade, and passed to the plaintiff under the specific bequest. The only authority in point seems to be a *dictum* in

Elliot v. Elliot, 9 Mee. & W. 23; 11 Law J. Rep. Exch. 3.

That was the case of a carriage-builder at whose death there was in one of his manufactories an unfinished carriage which

In re Richardson.

was being built to the order of a purchaser, and Lord Wensleydale (then Parke, B.) said that if it had been necessary to decide the point he should have had no difficulty in holding that such carriages formed part of the testator's stock-in-trade.

Mr. Graham Hastings and Mr. Bush, for the defendant.—These barges were no more part of the stock-in-trade of this testator as a barge-builder than any other property—the copyhold cottage for instance—which he might have accepted as a matter of convenience in part payment of articles supplied by him. If they belonged to him in any business capacity at all, it was that of a barge-owner and not of a barge-builder. Moreover, the testator has expressly excluded from the term “stock-in-trade” barges in course of construction, and he must *a fortiori* have intended to exclude barges actually constructed. The effect of the first codicil makes the matter still more plain, because the testator recollecting that he had a barge and two punts, expressly bequeaths them.

No reply was called for.

HALL, V.C.—I am of opinion that the barges now in question must be taken to have passed under the specific bequest of stock-in-trade contained in the will of this testator. The testator's business was one which in its nature comprised and included the acquisition of these old barges as part of an arrangement with the person or persons for whom the new barges were made. They were kept in the same yard or dock with his other barges and property, and the general business carried on on those particular premises could be described as that of a barge-builder. The concern must be looked at as a whole. The testator was a barge-builder, and as such he took these barges instead of cash. They formed, as I consider, part of his stock-in-trade as a barge-builder, whether he chose to let them out on hire until he sold them, or determined to use them himself. As a barge-builder he acquired them, and according to common parlance and understanding they must be taken to be part of his stock-in-trade just as much as those

old carriages which coach-builders are in the habit of taking over from purchasers in part payment for new carriages—whether such old carriages are built by themselves or not—are part of their stock-in-trade as carriage-builders. The certificate must be varied in accordance with the summons, and the costs of all parties will be costs in the action.

Solicitors—Jones & Starling, for plaintiff; Woodbridge & Sons, for defendant.

FEX, J.
1881.
April 8.

FOX v. BEARBLOCK.

Evidence — Pedigree — Corporation — Minutes.

Entries of proceedings made in a “Liber Protocolorum” of a college which were not attested in the usual manner were not admitted in evidence on a question of legitimacy.

This was a summons to vary a certificate of the chief clerk made in two administration suits. The first suit was for the administration of the estate of Mary Ann Tyrell Bearblock, the other for the administration of the estate of Elizabeth Bearblock, each of whom had died a spinster, and had by will left her residuary estate to the other. Elizabeth survived, and the chief clerk had found that she was illegitimate. The summons was to vary that finding.

The plaintiff in each suit was Edward Fox, the executor of each testatrix, and the defendant, their niece, Mildred Silvan Bearblock, an infant, who, if Elizabeth Bearblock were legitimate, was her sole next-of-kin, and therefore entitled to the residue of the personal estate of both testatrices. The question depended on whether the Rev. James Bearblock was married to his reputed wife at the time Elizabeth Bearblock was born, which was in 1803.

For many years previously to that date, and down to the time of his death in 1841, he lived at Hornchurch, in Essex, with a lady who was his reputed wife; and he officiated as curate in the

Fox v. Bearblock.

adjoining parish at Upminster, and during the whole of that time they were received into society as married people.

The Rev. James Bearblock was fellow of King's College, Cambridge, though a married man could not hold such fellowship. He received his dividends as fellow down to the year 1803, when an enquiry was instituted by the provost and fellows of the college before their visitor, which resulted in his expulsion, on the ground that he was either married or living an openly immoral life.

It was sought on the part of the Crown to put in evidence certain entries in a book of King's College, which was called *Liber Protocolorum*. These entries related to the proceedings in the enquiry before the visitor, and extended from October, 1803, to March, 1804, and were written in the handwriting of George Yeo, the nephew of the registrar of the college, and appeared to be written at one time. They were not in any way attested, though all other entries in the book were attested by the registrar of the college, who was a public notary, and in attesting the entries he signed himself as a public notary. The entries about that period were generally in the handwriting of George Yeo, the nephew of the registrar, who was himself blind.

Mr. Joseph Brown (Mr. Higgins and Mr. Rawlinson with him) objected, on behalf of the defendant, to the admission of the entries, on the ground that they had not received the proper and usual attestation, and there was nothing to shew their authenticity or accuracy. He referred to *Burn's Canon Law* to shew that the attestation by a notary was formerly a natural and proper requisite to the authenticity of documents.

The Solicitor-General (Sir Farrer Herschell) (The Attorney-General (Sir H. J. James) and Mr. Rigby with him), for the Crown, contended that, as the entries were made in the proper books of the college, and were produced from the proper custody, and there were no other minutes of the proceedings which were known to have taken place, and there was no living witness who could give evidence on the subject, they were the

best evidence that could be procured on the subject and were admissible.

Mr. J. Pearson and Mr. Karslake, for the plaintiff.

Fry, J., said—Mr. Brown, my view is rather with you upon this point. It appears to me that this entry is not admissible. It is not suggested that an entry, which is merely that made by an uncertificated and uncertified person, not acting in any responsible character, in a book, can be given in evidence as evidence of reputation, still less of the facts stated in that entry. In the present case it appears that the course of the college was for the minutes to be entered in this book by the son or nephew of the registrar, who was a notary public, and for those minutes to be signed by the registrar as a notary public; and it appears that, for some reason which we cannot well learn, the whole of this body of proceedings with regard to Mr. Bearblock was not signed by the registrar, and that they are not in any way authenticated by him. That certainly leads to the inference that they were in some manner less regular or less authentic or less intended to bind the college than the ordinary entries in the book. The absence of his signature appears to me to have been very significant of some want of confirmation of the proceeding, or some defect which rendered it improper for him to attest them in the ordinary way, and therefore they cannot be treated as the minutes of the college. They are therefore a mere entry found in the book made by a nephew of the registrar, so far as I can tell without authority, and as such are not admissible. I therefore feel constrained to reject them. I ought to add that I cannot help attaching considerable weight to the fact that the practice was to employ a notary, and that a notary was a person of great significance in the canon law, as pointed out by the extracts which Mr. Brown has read from *Burn's Canon Law*.

Solicitors—Crosse, Sons & Riley, agents for Haynes & Clifton, Romford, for plaintiff and defendant; The Solicitors to the Treasury, for the Crown.

FRY, J. }
1881. } *In re* THE ELECTRIC AND MAGNETIC
May 20. } COMPANY.

Petition of Company—Wishes of Majority of Creditors—Companies Act, 1862, s. 91.

A company, admitting its present inability to pay its debts, presented a petition, asking to have the voluntary winding-up, which had been previously resolved upon, continued under the supervision of the Court. No creditor supported the petition. A majority of the creditors opposed, and asked for a compulsory order.

The Court, out of regard to the wishes of the majority (Companies Act, 1862, s. 91), adjourned the petition for a fortnight, in order to enable them to present a petition of their own asking for a compulsory order.

Where a petition is presented, asking for a supervision order, or "such other order as to the Court shall seem meet," the Court has the power, if the petitioner be willing, to make an order for a compulsory winding-up.

Petition.

On the 30th of March, 1881, the company passed a preliminary resolution, duly confirmed at a meeting held on the 19th of April, 1881, that the company be wound up voluntarily, subject to the supervision of the Court.

This was a petition by the company, stating that they had passed the above-mentioned special resolution for a voluntary winding-up, and that they were unable to pay their debts, and praying to have the voluntary winding-up continued under the supervision of the Court, or that such other order might be made in the premises as to the Court should seem meet.

No creditor supported the petition.

Mr. North and Mr. Lemon, for the petition.

Mr. Glasse and Mr. Cracknall, for a majority of creditors.—The company admit that they are insolvent, and they have appointed their own auditor as liquidator.

We ask to have the company wound up compulsorily. Our rights, as creditors,

will be prejudiced if the order asked for by the petition is made—

Companies Act, 1862, s. 145.

We have not presented a cross petition asking for a compulsory order, in order to avoid expense; but as part of our debts are admitted by the company, we shall be entitled, as of course, to a compulsory order, on presenting a petition of our own. The Court, in all matters relating to the winding-up, will have regard to the wishes of the majority of creditors—

Companies Act, 1862, s. 91.

Here no creditor appears to support the petition.

The petition asks for a supervision order, "or such other order as to the Court shall seem meet." The Court has therefore jurisdiction to make a compulsory order upon this petition.

Mr. Terrell, for three shareholders.

Mr. North, in reply.—An unpaid creditor is not entitled, ex debito justitiæ, to a winding-up order—

In re The Langley Mill Steel and Ironworks Company, 40 Law J. Rep. Chanc. 513; Law Rep. 12 Eq. 26.

Secondly, the Court has no power, upon this petition of the company, asking for a supervision order, to make a compulsory order at the instance of creditors.

FRY, J.—This petition asks that the voluntary winding-up may be continued under the supervision of the Court. The order asked for is opposed by a body of creditors: and—though there is no very distinct evidence on the point—I come to the conclusion that the opponents represent the majority of the creditors in value. That being so, I think I ought "to have regard to the wishes of the creditors"—Companies Act, 1862, s. 91. In my judgment, the wishes of the creditors are first to be consulted, where, as here, the company admits its present inability to pay. Also, it is to be borne in mind that no creditor supports the petition.

If the company had been willing, I should have had no hesitation in making a compulsory order upon this petition. But the company refuse to take a compulsory order. I think, therefore, I shall do justice by adjourning the petition until

In re Electric and Magnetic Co.

this day fortnight, in order to give the opposing creditors the opportunity of presenting a petition of their own, asking for a compulsory order.

May 27.—The petition having been by consent again in the paper,

Mr. North and Mr. Lemon, for the petitioner, asked for a compulsory order.

Mr. Glasse and Mr. Cracknall, for the creditors (who had opposed on the previous occasion), asked to have the carriage of the order.

His Lordship made the usual compulsory order on the original petition, but this was to give the petitioner no advantage over Mr. Glasse's clients as to the appointment of an official liquidator.

Solicitors—Campbell, Reeves & Hooper, for the petition; W. T. Manning, for creditors.

FRY, J. }
1881. }
April 11. }

EMDEN v. CARTE.

Bankruptcy Act, 1869, s. 15. sub-s. 3—Earnings—Architect—Parties—Order XVI. rules 2 and 13.

The remuneration of an uncertificated bankrupt architect belongs to the trustee of his estate.

An architect, an uncertificated bankrupt, sued for breach of contract and claimed an injunction to restrain the employment of other architects and the use of his plans, specific performance, remuneration for services performed and damages for wrongful dismissal:—Held, that the cause of action in respect of remuneration and damages accrued to the trustee of his estate.

An uncertificated bankrupt claimed in respect of causes of action, of which those appearing most substantial accrued to the trustee. The trustee was added as co-plaintiff and given the conduct of the action.

This action was brought by W. Emden, an architect, against R. D'Oyly Carte, in respect of an agreement by the latter to employ him as architect in building a

theatre. The plaintiff claimed—first, an injunction restraining the defendant from employing anyone else as architect in building the proposed theatre; secondly, an injunction restraining the use of plans, specifications, quantities and drawings prepared by the plaintiff, without his consent; thirdly, specific performance of the alleged agreement to employ him as architect; fourthly, 1,790*l.* for remuneration for work already done; and, fifthly, 3,000*l.* damages for wrongful dismissal and breach of agreement.

The statement of claim alleged that the agreement was come to between the plaintiff and defendant shortly after the month of April, 1877; that the site was purchased in or before August, 1879; that the plaintiff prepared plans and did other work as architect on behalf of the defendant, and did some extra work, for which 100*l.* was agreed as the remuneration; that on the 9th of June, 1880, the plaintiff was wrongfully dismissed by the defendant, and that a sum of 215*l.* had been paid on account.

On the 30th of April, 1878, the plaintiff had been adjudicated bankrupt, and was still uncertificated.

This was a summons by the trustee of his estate to be substituted as plaintiff in the action in the place of the bankrupt.

Mr. Francis Turner, for the summons, argued that the substantial part of the cause of action, any money in respect of damages for breach of contract and remuneration belonged to the creditors—

The Bankruptcy Act, 1869, ss. 15 (sub-s. 3), 17;

Wudling v. Oliphant, 45 Law J. Rep. Q.B. 173; Law Rep. 1 Q.B. D. 145;

Elliot v. Clayton, 16 Q.B. Rep. 581; 20 Law J. Rep. Q.B. 217;

In re Dowling; ex parte Banks, 46 Law J. Rep. Bankr. 74; Law Rep. 4 Ch. D. 689;

Seeer v. Lawson, 49 Law J. Rep. Bankr. 69; Law Rep. 15 Ch. D. 426;

and the trustee therefore had a right to the conduct of the action. Under Order XVI. rule 2 the trustee could be substituted as plaintiff. But if not, under

Emden v. Carter.

rule 13 of the same Order he could be joined as co-plaintiff and have the conduct of the action given to him.

[FRY, J.—The trustee cannot be entitled to an injunction or specific performance, and for the purpose of this application it must be assumed that the plaintiff may get the relief he asks for.]

That part of the relief the trustee does not claim, and it is manifest that in no case could the plaintiff succeed upon that part of his case.

Mr. Boddall, for the plaintiff, contended that the remuneration of an architect was in the nature of work done, which did not pass to the trustee—

Coles v. Barrow, 4 Taunt. 754;

Williams v. Chambers, 10 Q.B. Rep.

337; 16 Law J. Rep. Q.B. 230;

Beckham v. Drake, 2 H.L. Cas. 579;

Kilson v. Hardwick, Law Rep. 7 C.P. 473;

In re Wilson; *ex parte Vine*, 47 Law J. Rep. Bankr. 116; Law Rep. 8 Ch. D. 364;

Jameson v. The Brick, Stone and Lime Company, 48 Law J. Rep. Q.B. 249; Law Rep. 4 Q.B. D. 208.

The Court had no power, where an action was deliberately brought by a person who claimed relief in his own right, either to substitute some one else as plaintiff in his place, or against his will to add a co-plaintiff, especially a person claiming against him. If the plaintiff was not entitled to the relief he asked, that fact was a defence to the action. He believed himself entitled to the whole cause of action, and had a right to conduct his own action in his own way.

Mr. Higgins and *Mr. Everitt*, for the defendant.

FRY, J., stated the nature of the action and said—This is an application by the trustee to be substituted as plaintiff in this action for the present plaintiff. The first question I have to try is this, Did the right of action, or rather the right to this remuneration which the plaintiff says he is entitled to in respect of his services rendered, and the damages to which he is entitled, as he alleges, for the breach of the contract and for wrongful

dismissal—did those sums pass to the trustee, the bankrupt not having obtained his discharge? In my opinion they did pass to the trustee. I think that the principle is to be learned from such cases as *Elliot v. Olafson*. There an apothecary carried on the business which he had previously carried on. The personal labour and personal services of the apothecary were an important ingredient in the demand which he made, but nevertheless the fact that that money was the produce of a business which involved other matters than the mere exclusive personal services of the bankrupt was held to make such a difference that the money earned by him in carrying on that business passed to his assignee. The rule applicable to the case seems to be stated with great exactness in the extract from *Smith's Mercantile Law*, which was adopted by Mr. Justice Willes in *Kilson v. Hardwick*. "The trustee," he says, "takes not merely the bankrupt's personal property, but also all such as may be acquired by or devolve on him during the continuance of the bankruptcy. He has, however, an interest in it subject to this right, and is entitled to recover it from strangers if the trustee do not interfere, which he may do even after the bankrupt has commenced an action for the property. The trustee, indeed, has no right to the proceeds of his personal and daily labour, for that would be to deprive him of the means of existence, and it was held in one case that he might recover compensation for such labour against his assignee who had employed him; but a bankrupt who acts as a furniture broker and employs men and vans, or who attends as an apothecary and furnishes medicine, cannot be considered as merely using his personal labour in this sense."

There are two authorities which confirm me in the conclusion which I should otherwise arrive at, that an architect is to be likened to an apothecary for this purpose. One of them is the opinion of Lord Chief Justice Wilde, delivered in the House of Lords in the case of *Beckham v. Drake*, where he says this: "It is said that this is an action personal to the bankrupt, and in one sense it no doubt is so, but not in any

Emden v. Carte.

sense material to the question to be determined. It is personal in this sense, that it arose out of a contract founded in the personal confidence in the bankrupt, and which could only be performed by his personal labour and skill; and in the same sense contracts are personally made with factors, salesmen, agents of various kinds, masters of ships, bankers, attorneys, architects, engineers and various other persons whose personal skill, knowledge and integrity are the inducements to the contracts. In no such contracts could assignees claim to perform the contract if it remained open, unless the bankrupt would voluntarily assist them in so doing, and then not in every case; but surely it cannot be contended that the right of action for breaches of contract in relation to such employments accruing before the bankruptcy would not pass to the assignees." That was a case arising in respect to a breach of contract before the bankruptcy, but I cite the authority only as shewing that, in the view of that learned Judge, the architect stood in a like position to salesmen and other persons who cannot be said to give their mere exclusive personal services. The other case to which I refer as confirming me in this conclusion, is the case of *Jameson v. The Brick, Stone and Lime Company*, where the Court of Appeal had before them on appeal a claim by an architect and surveyor, and they evidently thought that the same rule would be applicable to that case.

The conclusion therefore at which I arrive is this, that although the personal services of the architect—the plaintiff in this case—were an inducement to the contract, the fruit of that contract, in the way of remuneration or the right to damages for wrongful dismissal, would pass to the assignee. With regard to the damages for wrongful dismissal, I cannot help observing that the other case of *Wadling v. Oliphant* is a strong authority to shew that that would pass to the trustee. The trustee, therefore, in my opinion, has the right to intervene.

And then arises the question; In what manner is the trustee to be allowed to intervene? He proposes that I should substitute him for the plaintiff. Now I

have great difficulty in doing that, and for this reason, that the orders do not in my judgment extend to a case of the substitution of one plaintiff for another plaintiff, except where the suit has been commenced in error. That I think is the clear result of the 2nd rule of Order XVI. and also the 13th rule of the same Order. Here there was no mistake at all, as I conceive, in the commencement of the action—that is to say, no *bona fide* mistake within the meaning of that rule. The plaintiff has chosen to insist upon his rights to this sum of money, and he still insists upon those rights. The next question then is, whether I can add the trustee as co-plaintiff with the architect under the 13th rule of Order XVI. The words, which are relevant, are these: "The Court or a Judge may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a Judge to be just, order that the name or names of any party or parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually or completely to adjudicate upon and settle all the questions involved in the action, be added." It is said for the present plaintiff that I cannot add any other person as co-plaintiff with him against his wish and his will. I do not take that view of the power of the Court. The intervention of the trustee is a matter of right, and the only question is in what manner I am to allow him to intervene. I think the proper and most convenient course in this case to promote this intervention is to add the name of the trustee as plaintiff with the present plaintiff, and to give to that person whose name is so added the conduct of the action. In doing that I am largely influenced by this consideration: The present plaintiff undoubtedly asks for a relief of a very extraordinary description, having regard to the nature of his cause of action. He asks for the injunctions and the specific performance. The probability of his getting any such relief does not seem to me to be great. If he has any substantial cause of action, it appears to me to be in respect to the

Emden v. Carr.

remuneration due to him, and the damages for wrongful dismissal. Both those, in my judgment, would come to the trustee. The trustee, therefore, is the person who has the substantial interest in this action, and although I do not think fit to exclude the possibility of the present plaintiff succeeding upon some other part of the action, I think that the just and right course will be to add the trustee as plaintiff and to give him the conduct of the action.

Then the only question is as to the costs. With regard to that it appears to me that the matter stands in this position: The trustee did not apply to be joined as co-plaintiff, but he applied to do that which I think he could not have done, and I shall therefore make the order without costs on either side.

Solicitors—J. J. Winsor, for the trustee; F. C. Tudor, for plaintiff; Beyfus & Beyfus, for defendant.

BACON, V.C. }
1881.
March 2. }

In re WILLIAMS.
WILLIAMS v. STRATTON.

Husband and Wife—Lunacy of Husband—Conversion of Husband's Property by Wife—Recovery from Estate of Wife.

An action was brought by the representative of a deceased husband against the representatives of his deceased wife, and the statement of claim stated that the wife during the lifetime of the husband (who was a lunatic, though not so found by inquisition) took possession of and sold certain of the husband's chattels and applied the proceeds of sale to her own use, and claimed to recover the proceeds from the wife's estate in the hands of her executors:—Held, on demurrer, that the action was sustainable.

This was an action by the administrator, with the will annexed, of John Williams, who died in February, 1878, against the executors and trustees of the will of Florence Williams, his wife, who died in

April, 1878. The statement of claim alleged that the husband became lunatic in 1872, though not so found by inquisition, and became the inmate of a lunatic asylum; and that the wife during his lifetime, without authority from him, took possession of his personal property to a considerable extent and sold the same, "and applied the proceeds of the sale to her own use," though possessed of ample separate estate; and claimed an account and payment of the proceeds of sale, and, if necessary, administration of the wife's estate.

The defendants demurred, on the ground that, as John Williams and Florence Williams were husband and wife when the alleged cause of action arose, no title to relief was shewn.

Mr. Olurch (with him *Sir H. Jackson*), for the demurrer.—The statement of claim claims the proceeds of sale, which it admits the wife has applied "to her own use." This was done during the husband's lifetime, whose insanity did not dissolve the marriage. This action, therefore, could not have been sustained by the husband against the wife, as the act of the wife was the act of the husband—

Stephen's Commentaries, 8th ed. ii. 259;

Bacon's Abridgment, "Baron and Feme" (G);

Phillips v. Barnet, Law Rep. 1 Q.B. D. 436.

Then the deaths of the husband and wife respectively cannot alter the rights that accrued during their lifetime.

Mr. Owen, for the plaintiff, was not called on.

BACON, V.C.—This demurrer must be overruled. The husband being insane his wife took possession of the property. There was no conversion in that. The goods remained the husband's goods, and therefore his executors would have been entitled to sue for them. Suppose they had been jewels or valuable chattels, there can be no doubt his executors would have been entitled to sue for them. Then if they have been sold, his executors have a right to follow the proceeds and to get

In re Williams.

them out of the wife's estate. Whether they were sold wrongfully or not wrongfully, still his executors are entitled to follow the proceeds. The demurrer must be overruled with costs.

Solicitors—Smith, Davies & Co., agents for David Hughes Brown, Pembroke Dock, for plaintiff; Prior, Bigg, Church & Adams, agents for James Price, Haverfordwest, for defendants.

BACON, V.C. }
1881. } FURBER AND PRICE v. KING
April 1. } AND OTHERS.

Practice — Interrogatories — Summons for Further Answer—Particulars—Whole Answer struck out—Rules of Court, 1875, Order XXXI. rule 10.

In a case where all the answers to interrogatories are properly objected to, the rule that a summons for a further answer ought to specify the interrogatories or parts of interrogatories to which a further answer is required, does not apply, and the summons may be in general terms.

The plaintiffs by their statement of claim alleged certain advances to King, the deposit by King of certain title-deeds with the plaintiffs by way of equitable mortgage, accompanied by a memorandum of agreement between King of the one part and the plaintiffs of the other part, to execute a legal mortgage; they also alleged a memorandum of further charge indorsed on the first memorandum; and they claimed an account and payment of principal, interest and costs, and, in default, a sale. King's defence was a denial of the deposit and of each memorandum, suggesting, however, that his co-defendant Ashwin, who had acted as his solicitor, might have deposited the deeds, but stating that if he did, he acted without King's authority, and that King himself might have signed the memoranda, but if so he signed them in ignorance of their contents.

The plaintiffs delivered interrogatories

to King, asking specifically, whether in fact the advances were not made to him, whether the deeds were not in fact deposited, and whether he did not in fact execute such memoranda in writing.

By his answer to these interrogatories King denied any deposit by him or advance to him, but stated that it was possible that the plaintiffs might have made such an advance to Ashwin, and that the latter might have deposited the deeds. In answer to the interrogatory as to the signature by him of the memoranda, King said that "it was possible that under such circumstances as aforesaid" he might have signed such memoranda, but that if he did, he was wholly ignorant of their nature, purport or effect; and continued, "Save as aforesaid I cannot set forth as to my belief or otherwise whether or not it is a fact that the alleged deposit was accompanied by" such memoranda as aforesaid.

An action was pending in the Rolls Court (*King v. Ashwin*) in which King sought to impugn these and other transactions by Ashwin.

The plaintiffs took out a summons to consider the sufficiency of the defendant King's answers, without stating in the summons to which interrogatories or parts of interrogatories a further answer was required. The summons was adjourned into Court.

Mr. Higgins and Mr. A. J. Leach, for the plaintiffs.

Mr. Stirling, for the defendant King, took the preliminary objection that the summons was bad in form, because it did not specify the interrogatories or parts of interrogatories to which a further answer was required—

Anstey v. The North and South Woolwich Subway Company, 48 Law J. Rep. Chanc. 776; Law Rep. 11 Ch. D. 439.

Mr. Higgins and Mr. A. J. Leach, for the plaintiffs.—It is not necessary to be thus specific where you object to the whole of the answers. In this case none of the answers are of any use to us, because such admissions as there are, are so interwoven with impertinent statements that we cannot read part of the answers with-

Furber v. King.

out the rest, and reading the whole they tell us nothing—

Peyton v. Harting, 43 Law J. Rep. C.P. 10; Law Rep. 9 C.P. 9.

Mr. Stirling, in reply.

BACON, V.C.—In my opinion these answers are an abuse of the practice of the Court, and they must all be struck out.

Solicitors—R. Furber, for plaintiffs; Rodgers & Clarkson, for defendants.

[IN THE COURT OF APPEAL.]

JAMES, L.J.
BRETT, L.J.
COTTON, L.J. } *In re THE BRITISH SEAM-
LESS PAPER BOX COMPANY
1881. (LIMITED).*
April 5.

Company—Private Partnership—Transfer of Shares by Vendor to Directors—Subsequent Allotment of Shares to the Public—Misfeasance—Liability of Directors—The Companies Act, 1862, s. 165.

In January, 1874, an agreement was entered into between the three owners of a patent and R., whereby R. was to assist them in forming a company to purchase the patent for 32,000*l.*, and R. was to receive 6,000*l.* out of the purchase-money in paid-up shares. This agreement was not registered. In March, 1875, a company was incorporated with a capital of 50,000*l.* in shares of 100*l.*, to adopt and carry into effect an agreement, dated the 27th of February, 1875, and made between the three patentees of the one part, and a trustee for the company of the other part, for the sale to the company of the patent for 32,000*l.* This agreement was registered. The company was incorporated, and adopted the agreement of the 27th of February, 1875. Eight persons signed the memorandum of association of the company, namely, the three patentees, R. and three other gentlemen, and the solicitor of the company, all of whom, except the solicitor, were named in the articles as the first directors of the company. In April, 1875, the assignment

of the patent to the company was executed, and thereupon the directors allotted and issued 320 fully paid-up shares to the patentees, one of whom the same day executed the following transfers for a nominal consideration: Thirty-five shares to R. in part payment of his 6,000*l.*, and fifteen shares to each of the other three directors, partly as a bonus and partly in payment of moneys advanced by them respectively to develop the patent. The above transactions were known to all the eight members of the company, and it was at first intended to carry on business as a private company, and not to admit any of the public, and the eight original members continued to be the only members of the company until July, 1876, when the directors, finding that more funds were required to further develop the patent, allotted shares to five persons who applied for them after investigating the position and affairs of the company; but the agreement of 1874, and the above transfers made in April, 1875, were not disclosed to them. On the winding-up of the company,—Held, that R. and the three directors could not be made liable under the 165th section of the Companies Act, 1862, to repay to the company the nominal value of the shares that had been transferred to them as above-mentioned.

The Society of Practical Knowledge v. Abbott (2 Beav. 559) distinguished.

This was an appeal from a decision of the Master of the Rolls.

In 1873 P. Mesick, S. Wheeler and E. Jerome, Americans, obtained English letters patent for an invention for making seamless paper boxes from paper pulp, and in December, 1873, P. Mesick came to England on behalf of himself and his co-patentees to form a company to purchase and work the English patent.

P. Mesick was introduced to one Ransome, and on the 7th of January, 1874, a written agreement was entered into between Wheeler and Jerome of the first part, Mesick of the second part and Ransome of the third part, whereby it was agreed that Mesick and Ransome should co-operate in forming or causing to be formed a joint-stock company, with a capital of 50,000*l.*, for acquiring and working the English patent upon the

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terms that 30,000*l.* in shares should be issued in payment of the patent, and 2,000*l.* in shares should be issued to Ransome in consideration of his finding 2,000*l.* to cover the expenses which would be incurred in relation to the construction and procuring of certain machinery, models and apparatus for shewing the working of the invention; and that the 30,000*l.* in shares should be allotted, as to four-fifths thereof, to Wheeler, Jerome and Mesick, and as to the remaining one-fifth, to Ransome; and that, if the company did not ratify the agreement, Ransome should be entitled to an assignment of one-fifth part of the patent.

Ransome then introduced the matter to W. Stevens, sen., W. Stevens, jun., and N. G. Stevens, and explained to them his position with regard to the patent and Mesick, under the agreement, and the three Stevenses agreed to advance 1,000*l.* each towards the expenses of developing the invention and the cost of the machinery, and that Ransome should transfer to each of them an equal amount of paid-up shares in the company which was to be formed.

By an agreement dated the 27th of February, 1875, and made between Wheeler, Jerome and Mesick (vendors), of the one part, and W. Bennett, as trustee, for and on behalf of the intended company, of the other part, the vendors agreed to sell to the company the English letters patent for the invention, with the machines, apparatus, &c., at the price of 32,000*l.*, of which sum 2,000*l.* was to be deemed to be the price of the machines, models and apparatus.

On the 4th of March, 1875, the company was incorporated, with memorandum and articles of association, for the purpose of adopting and carrying into effect the agreement dated the 27th of February, 1875, with a capital of 50,000*l.* in shares of 100*l.* each. The memorandum and articles were signed by the three Stevenses, Wheeler, Jerome, Mesick, Ransome and Tindell (who was the solicitor of the company), and these gentlemen, except Tindell, were named in the articles as the first directors of the company.

On the 15th of April, 1875, the purchase of the patents was completed pur-

suant to the agreement of the 27th of February, 1875, and the same day 320 fully paid-up shares were allotted and issued to Mesick, who the same day executed the following transfers: Fifteen shares to each of the three Stevenses, and thirty-five shares to Ransome.

Ten of the fifteen shares to each of the Stevenses was in satisfaction of the 1,000*l.* advanced by each of them as above stated, and the remaining five shares to each of them was a bonus or compensation for the trouble and expense they had been put to in forming the company. The thirty-five shares transferred to Ransome were the balance of the eighty shares representing the 6,000*l.* (one-fifth of the purchase-money of the patent), and the 2,000*l.* advanced for machinery, to which he was entitled under the agreement of the 7th of January, 1874. All these transfers were known to, and the consideration or reasons for them understood by, all the eight persons then interested in the company, and they were all present when the transfers were executed, except Jerome and Wheeler. No prospectus or advertisement of the company or notice inviting subscriptions for shares in the company or for any debentures or securities of the company were ever issued or intended to be issued. The company was formed and was intended to be carried on as a private company, and not as a company in which the public or any person except those by whom it was formed were intended to have any interest; and from the incorporation of the company down to the 3rd of July, 1876, all the money which was required for the company was provided by the three Stevenses and Ransome, and no person had, either as subscriber or transferee of shares, become a member of the company, other than the eight persons by whom the memorandum of association was signed.

In 1875 and 1876 general meetings of the company were duly held, and the usual returns made to the Registrar of Joint-Stock Companies.

In 1876 further capital was required for the company, and the Stevenses not being disposed to provide alone all the money required, negotiations took place between the directors of the com-

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pany and certain other persons for the introduction of further capital, and ultimately, on the 3rd of July, 1876, five persons applied for and were allotted thirty shares between them. This application and allotment of shares was made after full investigation, information and examination of the affairs and position of the company; but the agreement of the 7th of January, 1874, was not disclosed to them, nor was their attention drawn to the transfers made to the directors on the 15th of June, 1875, although such transfers appeared on the register of the company.

The company ultimately proved a failure, and was ordered to be wound up.

On the 11th of May, 1880, the official liquidator took out a summons asking for a declaration that Ransome and the three Stevenses, as directors of the company, were respectively guilty of a misfeasance and breach of trust in relation to the company in obtaining or accepting the shares allotted to them respectively by Mesick, on the 15th of June, 1876, and in adopting and carrying out the secret agreement of 1874, and might be jointly and severally held liable and ordered to pay to the company the nominal value of the shares which had been so allotted to them.

In support of the summons several of the new shareholders deposed that they were induced to take shares in the company by the representations made by the directors that the company had paid Wheeler, Jerome and Mesick, the patentees, the said sum of 32,000*l.* for the patents and machinery, and that the same were worth that sum and formed a valuable asset of the company, and that had they been aware of the agreement of January, 1874, and the transfers of shares by Mesick on the 15th of June, 1875, they certainly would not have taken any shares in the company.

THE MASTER OF THE ROLLS, in dismissing the summons, said—I do not think it necessary to hear the respondents, as they do not ask for costs. First of all, as far as I know, there is no case like this. If there were I should be only too glad to follow it. It is an entirely new case, and en-

tirely distinguishable from *The Society of Practical Knowledge v. Abbott*, which was simply this: it was a chartered company, and by the terms of the charter the shares were to be paid for in cash, and in no other way. The four gentlemen who obtained the charter allotted the shares to themselves without paying for them in cash, and sold them to other people, and then the corporation sued them for the balance of cash due on their allotments; and Lord Langdale held that, having regard to the terms of the charter of the corporation, these four gentlemen had no right to allot the shares to themselves except for cash, and therefore that the claim made by the bill was well founded. That case does not appear to me to have the slightest application to a company formed like this is. The other case of *The New Sombrero Phosphate Company v. Erlanger* (1) appears to me also to have no application. I quite agree to this, that if promoters make an arrangement to get a profit for themselves out of what is apparently paid to the vendor, it is immaterial whether the contract with the vendors is approved of by the directors of the company, who are the promoters, just before the allotment or just after. In both cases it is intended to cheat the future shareholders; and of course it makes no difference whatever that the persons, who, at the time the allotment was made, were in fact the promoters, or their nominees, knew of the fraud. You can defraud future allottees as well as actual allottees; therefore that case appears to me to have no direct bearing upon this case. Now what is this case? I must say I am convinced of the thorough honesty of all parties engaged in the transaction. Of course that to a certain extent must naturally affect the case in the mind of every Judge, but, as far as I am concerned, I always endeavour to administer the law fairly according to law, even if it should bear hardly on people, as it sometimes does. I say "fairly," because my mind is affected, and I hope everybody's mind must be affected to some extent, at all events, by what I will call the morality of the transaction. I am more anxious to find

(1) 48 Law J. Rep. Chanc. 73; Law Rep. 3 App. Cas. 1218.

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reasons to trounce a rogue than I should be to find reasons to rob an honest man. The present question is this: Three Americans, who appear to be inventors, were possessed of certain patents. Whether they are valuable or not I do not know—they have not been successfully worked in this country, but they were supposed to be valuable. An English engineer of the name of Ransome appears to have had some faith in them, and, at all events, he advanced 2,000*l.* for the purpose of getting a machine into this country to make seamless paper boxes according to the patents. This he did under an agreement in writing of a very curious character, the effect of which is very difficult to state in a few words. It is an agreement dated the 7th of January, 1874. In substance it was this, I think—that he was to advance 2,000*l.* to get the machine at work. If he got it to work satisfactorily the company was to be formed; he was to get 2,000*l.* worth of shares for his 2,000*l.* advanced; the three Americans were to get 32,000*l.* in shares, out of a total capital of 50,000*l.*, and out of those shares Mr. Ransome was to receive 6,000*l.* in shares; but if the thing broke down, and it was no fault of Mr. Ransome's, he was then to be entitled to have a fifth of the patents, so that the moment this agreement was signed he was to be treated as substantial owner of one-fifth part of the patents. That was the substance of the agreement. Then a meeting was called at which three other gentlemen divided the interest with the Englishman: they were present at a meeting of promoters and they agreed to get up a company on the footing of this agreement of 1874. They not only knew all about it, but their arrangement was to form a company on that footing; and having arranged to form what I will call for this purpose a private company (for it was not intended to come before the public at all), they made a formal agreement on the 27th of February, 1875, between the three Americans of the one part, and a Mr. Bennett, who was their nominee, of the other part, for the nominal sale to the company of the patents for 32,000*l.* in shares. Of course this was a mere bit of form with the

view of launching the company. The company, I think, was registered on the 4th of March, 1875, and contemporaneously they make a memorandum of association to carry out the formal agreement with articles of association making all the members of the company directors, with the exception of the solicitor, who knew all about it, and who was the only other person who came in to sign the memorandum of association. The result was, that at the time of the formation of the company the company consisted of eight men, and it was not intended to consist of any more. There was power, of course, to issue the remainder of the shares, but their intention was to carry on the company with these shares; and accordingly we find this, that there is a meeting of directors after the company is formed ratifying the formal agreement of 1875, a subsequent meeting allotting the vendors shares, and allotting them on the principle of recognising the agreement of 1874, which they all knew, and which is actually mentioned by its date in one of the early meetings of the directors; so that they recognise Mr. Ransome's right to be treated as one of the vendors and to be paid his share of the purchase-money. Then the same day it seems that five shares apiece were given to each of the Messrs. Stevens (I will assume that it was a bonus), apparently with the knowledge of everybody, in consideration of their having furnished the capital which they did. Now if this had been intended to be formed as a company by the shares of the public, and a prospectus had been issued immediately after these transactions, concealing them from the allottees, and the allottees had come in and afterwards with reasonable promptitude repudiated the contract, I think there would be a great deal to be said in favour of their view of the transactions; but that is not so. The company went on, as they intended to go on, with these eight people. In June, 1875, there is a regular general meeting of the company, and the seal of the company was put to the register of shareholders treating it as then complete. What was the state of the register? It appears they allotted 36,100*l.* in shares out of 50,000*l.*—that is,

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32,000*l.* in original vendor's shares, and 4,100*l.* besides—and they put the seal of the company to the register. They then go on to 1876, and I find another regular meeting of shareholders held on the 30th of June, 1876, and at that time there are only eight shareholders; so that the position of the company up to June, 1876, was this, that every member of the company knew perfectly well the whole of the transaction. The thing at the time of the sale was confirmed and they carried on business for that whole period—that is, from March, 1875, to June, 1876—without attempting to repudiate the transaction, even if they could have repudiated it.

Now what was the position of the company (not the promoters only) as regards the vendors, and as regards Mr. Ransome. They are actually the same people, with the exception of Mr. Tindell. The company itself had adopted this contract with full knowledge of every member of it, which is a case I never heard of before, without any intention of bringing in any other shareholder or of defrauding any future allottee, and made this bargain with knowledge of the facts. Is it possible to say that a company is not bound by that? It would be impossible so to say. It was entirely *bona fide* in every respect. What occurred subsequently was this: In June, 1876, the company wanted more capital. The Messrs. Stevens and the other English shareholders were willing to contribute a little more, but not enough. Some five gentlemen, who were strangers, then came in and joined the company, and they had an allotment of shares to a considerable amount, no doubt, but not to a large amount. I agree it would have been right that the agreement of 1874 should have been stated in the memorandum and articles of association, and that is one reason why I am not disposed to give costs to these gentlemen, because I think their neglect in not so stating it has induced the liquidator to bring forward this application. But even assuming (and this is a point upon which I give no opinion, because I have not heard the evidence fully) that the people who came in did not know what the original trans-

action was, they would have no right to bring an action against the company on the facts and say that they were thereby induced to become members of the company. I mean if they were defrauded at all. I give no opinion as to what their state of knowledge was, because there is a conflict of evidence about it, but I cannot see that that would make these gentlemen guilty of misfeasance. It appears to me that on the 30th of June, 1876, the company having acted on the contract with full knowledge of all the facts, the subsequent allotment of a portion of the shares not being part of the scheme originally contemplated, were not bound to alter the relations between itself and the vendors; and consequently that this application, being made by the liquidator under the 165th section, must fail.

The official liquidator appealed.

Mr. J. O. Whitehorne, for the appellant.
—The agreement of January, 1874, was never registered, and was not mentioned in the provisional agreement nor in the memorandum or articles of association. We should never have known of it but for its being incidentally referred to in a minute of one of the early meetings of the directors. The sale of the patent to the company was a sham sale, a mere contrivance, and the directors allotted shares to themselves as vendors when they as directors were standing in a fiduciary position to the company. Assuming that they did not intend at first to offer shares to the public how can that affect the rights of the shareholders who were afterwards brought in. There never was a *bona fide* contract or purchase between independent parties. The case is within the principle of

The Ambrose Lake Tin and Copper Mining Company (Limited); 49 Law J. Rep. Chanc. 457; Law Rep. 14 Ch. D. 390;

The Gold Company, 48 Law J. Rep. Chanc. 281; Law Rep. 11 Ch. D. 701;

The New Sombrero Phosphate Company v. Erlanger (*ubi supra*);

The Society of Practical Knowledge v. Abbott (*ubi supra*).

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If the judgment of the Master of the Rolls is affirmed, at any rate as to the five shares given as a bonus to the three Stevenses, it will be contrary to all authority.

[BRETT, L.J.—How was that a misfeasance against the company?]

I submit that the purchase-money was loaded to that extent so as to enable the patentees to make the transfers. They were presents by the vendors to the directors out of vendors' shares allotted to them. As to the ten shares apiece, they were mere payments out of purchase-money which should not have been made, and should have been explained to those whom they subsequently induced to come in and take shares. If this transaction is upheld, it will serve as a precedent to promoters and open a door to great fraud.

Mr. Chitty and Mr. Sangster Green, for the Messrs. Stevens; and *Mr. E. W. Byrne*, for Ransome, were not heard.

JAMES, L.J., said—It appears to me that the Master of the Rolls has really put the matter on its true footing in the opening remarks of his judgment, namely, that the question resolves itself into a question of honesty or dishonesty. He found that these gentlemen from the first were and intended to be thoroughly honest. They intended to be and were the sole members of the company and the sole proprietors of the patent; and what arrangements they chose to make as between themselves only concerned them, because they comprised the whole of the company at that time. Now, that being so, that distinguishes the case from *The Society of Practical Knowledge v. Abbott* and *The New Sombrero Phosphate Company v. Erlanger*, because the burden of proof in all these cases where any division of profits or bonus has taken place—such as can be called in question—is thrown upon the persons who have received that profit or bonus to satisfy the Court that the transaction was in intention and in fact honest. In my opinion, the present respondents have discharged that burden. But if they had intended, being then the sole members of the company, that other people afterwards should come in against

whom what they then did would be an injury, this Court would find no difficulty in following the two cases I have mentioned, and saying, as Lord Langdale said in *The Society of Practical Knowledge v. Abbott*, "You did intend a fraud on the public." But here it is not so. Therefore we ought not to punish an honest man, because it is said that our decision may enable dishonest men afterwards to avoid liability by doing something similar to it.

BRETT, L.J., said—This is an application under the 165th section of the Companies Act, 1862, to make the respondents pay to the company the full nominal value of the shares that were allotted to them under the circumstances that have been mentioned, and the only words in the section that justify this application are that these persons have been "guilty of a misfeasance or breach of trust in relation to the company." Now the chief charge against them is that at the time they were proposing to purchase the patent for an intended company they were themselves interested in the sale to the company, and intended to get an advantage to themselves, and intended to keep that advantage secret as against the company. That is the charge. If, when parties who are promoters and directors of a company are making a contract, not only for all existing shareholders but for all future shareholders, they are intending to keep the transaction a secret, they are liable for a misfeasance under the 165th section—that has often been held. But if when they enter into the transaction they really intended that all persons should know of it, and were acting for persons to whom all the circumstances were known, then there cannot be a fraud against the company. The judgment of the Master of the Rolls is founded on this, that at the time this transaction was carried out and completed not only every member of the company knew of the whole transaction and adopted it, but it was not intended that any other person should become a member of the company. Therefore, he says, that being the intention, there was no secrecy, because it was not intended, and everybody knew of the transaction.

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That is a perfectly good ground for upholding his decision. To hold otherwise would be to say that a transaction which was at first honest and intended to be final, can after a lapse of time be attacked and made dishonest by what has taken place afterwards. It is said that if we uphold this decision it will open the door to fraud. From that I respectfully beg leave to dissent. I quite agree that when new shareholders are called in shortly after a transaction of this kind, that that is strong evidence from which to infer fraud, and unless the transaction was disclosed to the new shareholders the directors would be guilty of misfeasance, because it must be inferred that they intended to take in and intended to act for the new shareholders.

CORROD, L.J., said—I am also of opinion that the decision of the Master of the Rolls is right. Two questions have been raised, but only one of them has been really pressed, namely, that the respondents may make good to the company the value of the vendors' shares that were transferred to them. Now, if this had been an ordinary company, possibly the liquidator would have succeeded in making these respondents liable for the value of the shares. But upon what principle? It is this—that promoters and directors stand in a fiduciary position to the company—that is, not only to the shareholders who come in and sign the memorandum of association, but to all those who come in afterwards and take shares. Here it is an established fact that at the time the company was formed it was intended to be formed as a private company without calling in any of the public, and that the parties who signed the memorandum of association did not contemplate any shareholders other than themselves, and that all the intended *cestui que trusts* knew of the transaction and adopted it. Therefore, the whole foundation of this application falls to the ground. Now if shortly after the transaction a prospectus had been issued to the public, and they had been invited to come in and take shares, no Court would listen to promoters or directors who said, We did not intend to invite the public to come in when the

company was formed. Here there were general meetings which actually recognised the whole transaction. It is therefore impossible for those who came in afterwards to rip open all the proceedings. There is one point I ought to mention. The affidavits say that the directors misrepresented the facts to those shareholders who subsequently came in, and that but for that misrepresentation they would not have taken the shares. Now even if that were so, in my opinion, you cannot infer that the original transaction was dishonest because in subsequent representations there was dishonesty. I do not say there was any dishonesty. I am also reminded that if there was any misrepresentation in 1876 there would be a right of action to each individual who had been induced to take shares or to have his name removed from the register of the company if it were in existence. Here it is not an individual seeking to get rid of his shares, but the company itself which is seeking to get relief. In my opinion, the circumstances of this case entirely distinguish it from *The Society of Practical Knowledge v. Abbott* and the other cases that have been cited, and therefore our present decision is not opposed to those cases. The appeal must be dismissed with costs against the liquidator personally.

JAMES, L.J. — In my opinion, these gentlemen are entitled to be placed in the same position as if this was an ordinary company, and as if a general meeting had been held at which everything that had taken place had been then stated and made known to the shareholders, and had been then sanctioned by them.

Solicitors—Ramsden & Austen, for official liquidator; Benham & Tindell, for Messrs. Stevens; W. Butcher, for respondent Ransome.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
BAGGALLAY, L.J. } RUDOW v. THE GREAT
LUSH, L.J. } BRITAIN MUTUAL LIFE
1881. } ASSURANCE SOCIETY.
April 26.

Action against Unregistered Company—Winding-up Petition—Order for Payment of Costs of Action—Stay of Execution refused—The Companies Act, 1862, ss. 85, 119, 199, 201, 204—The Judicature Act, 1873, s. 25, sub-ss. 4 and 5—Practice—Jurisdiction.

Where the plaintiff in an action obtains judgment with costs against the principal defendant, and a formal but necessary party to the action has been made a co-defendant and is entitled to his costs of the action, the proper practice now is to make a direct order on the principal defendant to pay the costs of such co-defendant, and not to direct the plaintiff to pay such costs and to have them over again against the principal defendant.

The words "being wound up" in the 204th section of the Companies Act, 1862, mean "in course of being wound up," and the effect of that and of the 199th section is to import into the winding-up of an unregistered company all the provisions of the Act relating to the winding up of companies by the Court.

Where, therefore, there was a pending winding-up petition against an unregistered company, the Court, in the exercise of its judicial discretion, under the 85th section, allowed an execution for costs against the company to be proceeded with, the order for payment having been made after the presentation of the petition through the laches of the company, and the position of the execution creditor having been materially affected by the order.

This was an appeal from the decision of Bacon, V.C.

The action was by the mortgagees of a policy of 100*l.* in the company, which had become a claim by reason of the death of the assured. The mortgagor, Wurth, was made a co-defendant.

The company paid the 100*l.* into Court, and on the 6th of August, 1880, it was paid out to the plaintiff on her application, and an order was then made for payment

of her costs of the action by the defendant company. On this occasion Wurth asked that his costs might be provided for, on the ground that he was a necessary party to the action; but this was disputed by the company, and in consequence no order was then made for the payment of Wurth's costs, but the matter stood over.

On the 6th of November, 1880, the company paid the plaintiff her taxed costs of the action. Meanwhile, in October, 1880, a petition was presented for the winding-up of the company, on which a winding-up order was made on the 19th of November; but on the 24th of November the Court of Appeal discharged the winding-up order, retained the petition as a pending winding-up petition, and postponed the further hearing of the appeal until the wishes of the policy-holders could be ascertained.

On the 3rd of December, Wurth's application again came before the Court, and an order was made directing the plaintiff to pay Wurth's costs and to have them over again from the company. On this occasion the company did not raise the objection that the pending winding-up petition was an answer to Wurth's application, and did not appeal against the order.

The plaintiff paid Wurth's costs; and, having failed to obtain payment of them for the company, issued execution. The company then moved to stay execution, but the Vice-Chancellor refused the motion, with costs, on the ground that, the company being an unregistered company, and not having been ordered to be wound up, sections 85 and 204 of the Companies Act, 1862, did not apply; and therefore he had no jurisdiction.

The company appealed.

Mr. Hemming and Mr. Speed, for the appellants.—Even if Wurth had got his order in August last, the plaintiff did not levy execution until after the presentation of the winding-up petition, and therefore loses the benefit of it.

[JESSEL, M.R.—The matter should have been disposed of on the 6th of August last. All the costs of the action should then have been provided for. The order of the 3rd of December appears to have been

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made according to the old practice. The proper practice now is, not according to the old practice, to direct a plaintiff to pay the costs of a necessary but formal defendant, and to have them over again against the principal defendant, but to pay such a defendant his costs by a direct order. Both the Lords Justices now sitting with me agree with me that that is now the proper practice.]

The Vice-Chancellor did not purport to exercise his discretion under the 85th section of the Companies Act, 1862, but held that he had no jurisdiction at all until a winding-up order had been actually made. It is a question of construction of the concluding words of the 204th section of the Act. We submit that "being wound up" means "in course of being wound up," and that there being a pending petition the Court had jurisdiction to entertain the application. If that be so, we submit there is an end of the case.

[JESSEL, M.R.—Not so. You might have stayed the order for the payment of these costs and you did not, but allowed Wurth on the 3rd of December to get an order on the plaintiff to pay his costs.]

We submit that Wurth was not really in the position of a hostile defendant. The plaintiff and Wurth were mortgagee and mortgagor, and were practically suing as co-plaintiffs. There is nothing to show that the plaintiff cannot get these costs back from Wurth. There is no case where an execution has been allowed to be proceeded with after the commencement of the winding-up, although it has sometimes been allowed where execution issued before the petition was presented and was delayed by the fraud or misrepresentation of the company. There is nothing of that kind here, but there is still a pending winding-up petition, and it is on that ground that we ask this execution to be restrained—

Buckley on Companies, p. 186 (and cases there cited).

Mr. Marten and *Mr. Pugh*, for the respondent, were not called upon.

JESSEL, M.R. (after stating the facts, continued).—The result, therefore, was that by virtue of that order of the 3rd

of December the plaintiff became liable to pay Wurth's costs in full, and was made liable on the terms of the company paying her over again. It was, in fact, the machinery which was adopted by the old Court of Chancery, and which is no longer either necessary or useful, but which is mischievous, and, as this Court has already laid down in the early part of to-day, is no longer to be used. That being the position of matters, the plaintiff would remain liable to pay Wurth's costs in full, and, if this application were to succeed and a winding-up order were eventually to be made on the petition against the company, would only get a dividend on the costs she so pays to Wurth. Of course it is manifest that would be doing the plaintiff a great injustice. She would not have agreed or allowed the order to go to make her liable to pay costs to Wurth, except on the condition that she was to be indemnified by being paid over again the same sum by the company; and therefore, by allowing that order of the 3rd of December to go, her condition has been materially changed by the act of the company. The company was entitled under the 24th section of the Judicature Act, sub-section 5, to avail itself of the right conferred by that section which says that no cause or proceeding at any time pending in the High Court of Justice shall be restrained by injunction, "but every matter of equity on which an injunction against the prosecution of any such proceeding might have been obtained, if that Act had not passed, either conditionally or on any terms or conditions, may be relied on by way of defence thereto," and consequently might have objected to the order going; or the company might have applied under the latter part of the same sub-section for an order to stay proceedings. But they did neither, and allowed the litigation to proceed to judgment on the 3rd of December in the way I have mentioned, and then afterwards—the time for appealing against that order having expired—apply to restrain the plaintiff, who has paid Wurth, from proceeding to execution on the order she has obtained to indemnify herself by being repaid the amount she has

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paid. It is manifest that, if the Court has a discretion, it ought to exercise the discretion, not in favour of the company, but in favour of the plaintiff; and it is clear that under the 85th section the Court has such a discretion. It is not obligatory upon the Court to make the order, but it is discretionary, and such discretion has been repeatedly exercised. I admit there must be some judicial grounds for its exercise, but in this case the position of the plaintiff has been so changed by the action of the company that it would not, in my opinion, be just to allow the company now to restrain proceedings on this judgment. I have a word or two, however, to say on the ground upon which the Vice-Chancellor decided this case, for I am unfortunately unable to accede to it. He did not decide it on the merits, but by reason of his opinion being that the Court had no jurisdiction to make the order, this being an unregistered company. It is necessary to look at one or two sections of the Act of Parliament to see, as I think we shall clearly see, with all respect to him, that he had jurisdiction. The 85th section is general: "The Court may at any time after presentation of a petition for winding up a company under this Act, and before making an order for winding up the company, upon the application of the company . . . restrain further proceedings in any action, suit or proceeding against the company."

Then the 199th section does this: It says that unregistered companies, subject to certain restrictions, may be wound up under the Act, and that all the provisions of the Act with respect to winding-up shall apply to such companies, with certain exceptions and additions, which I need not read for this purpose. Therefore there is a general rule that, subject to what follows, all the provisions shall apply. That, of course, would import the 85th section, if it stood alone. Then the 201st section says that the Court may at any time after the presentation of a petition for the winding up of an unregistered company, and before making the order, upon the application of any creditor of the company, restrain proceedings in any action against any con-

tributory of the company or against the company. That 201st section was necessary, because in the case of an unregistered company you might sue the contributory as well as the company. That section, when it is looked at, applies only to an unregistered company, and standing alone, without the subsequent section which I am going to mention, would, I think, be held not to interfere with the application of the 85th section. But any question on that part of the Act is got rid of by the provisions of the 204th section, which enacts that "the provisions made by this part of the Act with respect to unregistered companies shall be deemed to be made in addition to, and not in restriction of, any of the provisions thereinbefore contained." Therefore it is quite plain that the 85th section applies to an unregistered company. But there are these latter words at the end of the section, upon which the Vice-Chancellor relied: "But an unregistered company shall not, except in the event of its being wound up, be deemed to be a company under this Act, and then only to the extent provided by this part of the Act;" and he read "being wound up," as if it had been "having been wound up," which would make the Act absolutely unworkable. You must have the provisions anterior to the actual order for winding-up apply, and that he seems to have forgotten. It is plain that "being wound up" means "in course of being wound up," and imports the provisions as to winding-up; and, reading it in that way, the whole of the Act becomes sensible, and the 85th section applies, therefore, as much to the winding up of an unregistered company as to the winding up of a registered company. It appears to me, therefore, that the order made by the learned Vice-Chancellor ought to be affirmed, though not for the same reasons which he gave in pronouncing it.

BAGGALLAY, L.J.—I am of the same opinion. I am unable to agree with the view taken by the Vice-Chancellor, that he had no jurisdiction to make such an order as was asked in this action. It appears to me that, apart from the observations that have been made by the

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Master of the Rolls on the provisions of the Judicature Act, the 5th sub-section of the 24th section of the Judicature Act of 1873, and the next sub-section, give ample jurisdiction to the Vice-Chancellor in whose branch of the Chancery Division the action was pending. As regards the merits of the case I have but few observations to make. [His Lordship then stated the facts, and continued:] On the 3rd of December an order was made that the plaintiff should pay the defendant Wurth's costs, and that the defendant company should pay to the plaintiff what the plaintiff should so pay to the defendant Wurth. All the parties interested were then before the Court, and the facts were known to the parties, or must be presumed to have been known. It has been suggested that there was some doubt as to whether a winding-up order had been discharged and the proceedings had been got rid of, but if parties come before the Court, and come under a mistake of that kind, it is their duty, as soon as they find there has been some surprise or mistake, to consider whether it may form a ground for appeal against the order, because it is suggested that there is something like collusion between the plaintiff and the defendant Wurth. That, again, was either a sufficient reason for objecting to the order made on the 3rd of December or appealing against it. We must assume that, there being no appeal against the order of the 3rd of December, 1880, that order was properly made, and was binding between the parties. It has been admitted that there has been no change as far as regards the winding-up proceedings since the 3rd of December down to the present day. If the order which was made by the Vice-Chancellor on the 3rd of December was right then, why should it be wrong now? If we assent to the application of the present appellant it can only be on some ground which was inconsistent with that order made on the 3rd of December. There is no suggestion made on the part of the appellant which would be a full and sufficient reason why the order of the 3rd of December should not be made. It appears to me that the appeal should be dismissed.

LUSH, L.J.—I am of the same opinion on both points; and, as regards the immediate subject of this application, I think it would be most unjust indeed to accede to the request which is made to us. The order was merely the machinery by which Wurth's application was acceded to. Instead of making an order, which I quite agree is the proper one now to be made, for the company to pay Wurth, the Court adopted the old practice and ordered the plaintiff to pay Wurth in the first instance, the company to repay the plaintiff. It would be most unjust, after the plaintiff had paid, to prevent the plaintiff having recourse over, because that was a part of the intention, and the mode by which the payment was to be made. That the company might have prevented, if they had chosen, and, letting that opportunity slip, they have entirely altered the position of the plaintiff, and it would be most unjust to prevent the plaintiff from having recourse over for the repayment of the costs which she has had to pay.

Appeal accordingly dismissed with costs.

Solicitors—Prideaux & Son, for the appellants;
Greenfield & Abbott, for the respondent; Betteley & Co., for the mortgagee.

FRY, J. }
1881. } *In re BROWN.*
March 12, 19, 23. }

Will—Construction—Infant—Marriage—Consent—Guardian.

A testator gave legacies to his daughter E. if she attained twenty-one or married under that age with the consent of her guardian or guardians. The testator's widow, the sole testamentary guardian, died; no other was appointed. E. married and died under age:—Held, the legacies did not vest in E.

By a settlement made in 1847 on the marriage of William Brown and Charlotte Isabelle, his wife, certain funds were settled upon trust after the decease of

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the husband and wife, and in default of the exercise of a power of appointment (which was not exercised) on trust for all and every the children and child of the marriage, who being a son or sons should attain twenty-one or die under that age leaving issue, or who being a daughter or daughters should attain that age or marry with the consent of her or their parents or guardians.

There was issue of the marriage five children, all of whom, except one, Charlotte Emelina, attained twenty-one.

William Brown died in 1871. By his will he bequeathed to each of his daughters, Sabina, Henrietta, Caroline and Charlotte Emelina, upon her attaining the age of twenty-one years, or on her marriage with the consent of her guardian or guardians, which should first happen, the sum of 5,000*l.* He gave his residue to trustees on trust, after the death of his wife, to raise and pay to each of his children (except his daughter Constance) who should survive him, and should have attained, or should attain, the age of twenty-one years, or, in the case of daughters, should be, or have been previously married, with the consent of her guardian or guardians, and to the issue (if any) of any child of his who should die in his lifetime leaving issue, the sum of 3,000*l.* He gave his wife a power of appointment among his children of his ultimate residue, which, in default of appointment, he gave to them equally. He appointed his wife guardian of his infant children, and he gave a power of maintenance and education out of the income of each child's presumptive share, to be paid after the death of his wife to his or her guardian or guardians.

Charlotte Isabelle Brown survived her husband and died in March, 1874. Their daughter, Charlotte Emelina, in April, 1880, being then of the age of eighteen, married Mordaunt George Dundas, who was also an infant. This marriage took place without the knowledge of any of the lady's family. She had no guardian at the time. She had been living in the care of her elder sister, Sabina Isabella, who had been designated guardian by the will of their mother so far as she lawfully could be.

Mrs. Dundas died before she attained twenty-one, leaving issue.

The trustees of the settlement of 1847 paid into Court the sum Mrs. Dundas would have been entitled to under that settlement if she had attained twenty-one or married with the consent of her guardian or guardians. And the trustees of the will of Mr. Brown also paid into Court the sum of 5,000*l.* and 3,000*l.* she would have been entitled to in a similar way and accrued interest.

There were three petitions for payment out of the funds: one by the persons who would be entitled to the share of Mrs. Dundas in case it did not vest in her, for the payment out of the money paid in by the trustees of the settlement; a second by the person who would be entitled to the legacies of 5,000*l.* and 3,000*l.* paid in in case they did not vest in Mrs. Dundas, for payment out of the money paid in by the trustees of the will of Mr. Brown; and the third was by Mr. Dundas, for payment of both funds to himself. The rights under the will were first argued.

Mr. Glasse and *Mr. Bagnold*, for the petitioners on the second petition, contended that neither of the events on which alone the testator had given the legacies to his daughters had occurred, and the daughters, therefore, took no interest. The case was different from one where the consent of a parent was required, because a guardian would be appointed for the purpose of giving the necessary consent, and therefore the principles of

In re Woolscombe, 1 Madd. 213;

Dawson v. Oliver Massey, 45 Law J. Rep. Chanc. 519; Law Rep. 2 Ch. D. 753,

did not apply. The testator had shewn that the consent required was not confined to the actual guardian appointed by the will by his using the words "guardian or guardians."

Mr. J. Pearson and *Mr. Tucker*, for Mr. Dundas, contended that the consent contemplated by the testator was that of the guardian appointed by himself. The power to grant or refuse consent was a matter of personal confidence reposed in

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the particular individual appointed guardian; the expression "guardian or guardians" was a mere conveyancing phrase in a will that was not in all matters consistent and did not mean more than guardian. The actual guardian appointed by the will having died, it was impossible to obtain her consent, and therefore, on the principle of

Dawson v. Oliver Massey (*ubi supra*), the gift would not fail.

In the second place, they contended that the event on which the testator intended the gift to take effect, namely, marriage, had happened; it was not essential but only directory that the consent of the guardian should be obtained.

And, in the third place, they said there were different modes of obtaining the appointment of a guardian, and, it being ambiguous which would be the right way to get such guardian appointed, the gift could not fail for want of appointment.

They cited also, as shewing that the power to give consent was personal,

Green v. Green, 2 J. & Lat. 529;

Booth v. Meyer, 38 Law Times, N.S. 125;

Grant v. Dyer, 2 Dow, 87;

Graydon v. Hicks, 2 Atk. 16;

Clarke v. Parker, 19 Ves. 1, 16;

Collett v. Collett, 35 Beav. 312; Law Rep. 2 Eq. 203;

Roper on Legacies (4th ed.) 803;

Peyton v. Bury, 2 P. Wms. 626;

Worthington v. Evans, 1 Sim. & S. 165; 1 Law J. Rep. (o.s.) Chanc. 126;

The Attorney-General v. Doyley, 7 Ves. 58 n; 4 Vin. Abr. 485;

Jones v. The Earl of Suffolk, 1 Bro. C.C. 528;

Ewing v. Addison, 7 W.R. 23;

Oole v. Wade, 16 Ves. 27.

Mr. Holt, for the trustees of the will.

FRY, J., said—In this case I have formed an opinion, which I need not say may be erroneous, but certainly is strong.

The testator appointed his wife the sole guardian of his children, and he gave to each of his daughters, Sabina, Henrietta, Caroline and Charlotte Emelina, upon her attaining the age of twenty-one

years, or on her marriage with the consent of her guardian or guardians, whichever shall first happen, the sum of 5,000*l.* Charlotte Emelina contracted what has been described by the counsel for her legal representative as a runaway match, under the age of twenty-one, and she has died before attaining the age of twenty-one. She has not, therefore, satisfied either of the expressions contained in the will of attaining the age of twenty-one years, or marriage with the consent of her guardian or guardians at an earlier age. The question is, whether she is nevertheless entitled to this legacy. In my judgment she is not; because, I conceive, she is only entitled to it upon the happening of one or other of those two events.

Several arguments have been adduced to induce one to come to the conclusion that she is nevertheless entitled. In the first place, the case of *Dawson v. Oliver Massey* has been naturally and very properly pressed upon my attention. It is said that that is an authority which really concludes the case. In that case, the consent required was that of the parents, and one parent being dead, the Court said that, by the act of God, and without the default of the legatee, the consent of parents in the plural had become impossible, and they, no doubt, in that decision intimated the opinion that if both parents had been dead the same result would have followed. That is, of course, the logical result of holding that the consent of one parent is sufficient. That case, in my judgment, proceeds upon this principle, that when the consent required is that of a class of persons who, without the fault or default of the legatee, have ceased to exist, and cannot be brought into existence, the consent is not required, the act of God having rendered the consent impossible. That the case does not go beyond that, in point of principle, appears to me to be clear from the reliance which the Lords Justices placed upon the opinion of Mr. Justice Story, which they quoted at full length, and which is in part in these words: "Where a literal compliance with the condition becomes impossible from unavoidable circumstances, and without any default of

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the party, it is sufficient that it is complied with as nearly as it practically can be, or, as it is technically called, *cypres*."

Now here the circumstances are by no means the same as in *Dawson v. Oliver Massey*. Parents cannot be appointed by the Court, parents cannot be appointed by the child; but the testator contemplated the possibility of there being guardians other than the sole guardian named in his will—the wife—and guardians or a guardian can be appointed by the child, and can be appointed by the Court; and if the child therefore chooses to marry without the consent of a person whom she herself might bring into existence, it appears to me it is her own fault, or her own default, and she is not within the principle of the case of *Dawson v. Oliver Massey*.

Now in the next place it is said that the will, when looked at in its entirety, throws a different light upon the meaning of those words, and shews that although the testator described the marriage which was to precede the gift as a marriage with consent, marriage was the main thing to be looked to, and consent was, in his judgment, an immaterial or secondary thing.

[His Lordship, in examining the scheme of the will, expressed his opinion that the testator, in giving a share in the ultimate residue to his daughter without any condition, strengthened and emphasised the expression, "with consent of the guardians." He considered an authority given to his trustees in certain events to pay income for maintenance to the guardian or guardians afforded another indication that the testator contemplated the existence of guardians other than his wife; and continued:]

The result, therefore, of my investigation into the provisions of the will is, that I am confirmed in the conclusion that the testator desired the marriage on which the daughter was to take the legacies in question to be a marriage with the consent of her guardian or guardians, and that he did contemplate the existence of guardians other than his wife.

The next argument which has been adduced is this: It is said that a consent

of this sort is a personal power, and so personal that it can only apply to the person named, and therefore, as Mr. Pearson put it, the consent to be given by the guardian or guardians is consent by the guardian named, namely, the wife. I am bound to say that that appears to me a totally untenable argument. That a man should say, I allow the marriage to be with the consent of the guardian whom I appoint, and of the guardians other than the one I appoint, and shall at the same time say that the consent of no other guardian shall avail, seems to me to be contradictory. The argument, therefore, cannot weigh with me.

In the next place, it has been said that it is impossible that the guardian other than the guardian named in the will could consent, and for this reason, that a guardian may be appointed either by the Court or by the infant, and unless you can see how the guardian is to be appointed, the consent of the guardian will not do. I have attended to that argument to the best of my ability, and I am unable to follow it. What the testator has said is this: I require that there shall be some guardian whose consent shall be given, and although the infant might be able to appoint a guardian herself, or to get a guardian appointed by the Court, that does not prevent the existence of the guardian. It only points out the abundant means which the infant had, and in respect of which she has made default, and intensifies, therefore, the default of which she has, so to speak, been guilty.

No doubt it may well be said that a young lady under age is not likely to know what she might do, or what her powers were as to appointing a guardian, and that to expect her to take that course is irrational and absurd. It appears to me that the answer to that is this: In the first place, the testator has said that the guardian's consent is necessary; in the next place, if this young lady, instead of being minded to contract with another infant a runaway marriage, had been minded to contract a marriage with the consent of her friends, no doubt her friends would have put her in communication with the solicitor, and by some other means enabled her to do that which

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was an actual compliance with the terms of the will.

The result, in my judgment, is, that the testator has required that marriage to vest the legacy shall be a marriage with consent. That is not got rid of by the fact of the sole guardian having died, because other guardians might have been appointed, and the marriage that has been contracted is not one that vests any interest in the child.

It was conceded on behalf of Mr. Dundas that the rights under the settlement were covered by this decision.

Solicitors—Simpson, Hammond & Co., for the petitioners; Emmet, Son & Stubbs, agents for Griffith & Eggar, Brighton, for respondent.

FRY, J. }
1881. }
May 12. }

USIL v. WHELPTON.

Practice—Trial—Order XXXVI. rules 3 and 26—Specific Performance.

An action for specific performance was directed, against the desire of the defendant, to be tried without a jury.

This was an action brought by one clergyman of the Church of England against another to compel specific performance of an agreement to concur in effecting the formation of a new ecclesiastical district, to be formed partly out of the district belonging to the church of which the defendant was incumbent.

The defendant had given notice under Order XXXVI. rule 3 that he desired to have the issues of fact tried before a Judge and jury. This was a motion on the part of the plaintiff for a direction, under rule 26 of the same Order, that the trial might be taken without a jury.

Mr. Yate Lee, for the motion, said the action was of a class that before the passing of the Judicature Act would have been tried in the Court of Chancery without a jury, and was therefore within the class of action where the Judge has a

discretion to direct the mode of trial and exercise the right given by the 3rd rule for either party to have a jury. And it was eminently a case where the facts were complicated and mixed with law, and which it would be difficult to reduce to simple issues, and therefore was a good case for the Judge to exercise the discretion given by the 26th rule.

Mr. J. Pearson and *Mr. Currey*, for the defendant, contended that the case depended in a great measure on conflict of evidence, which a jury was the best tribunal to sift, and there were no special reasons why the defendant should be deprived of his right to go to the jury—

West v. White, 46 Law J. Rep. Chanc. 333; Law Rep. 4 Ch. D. 631;

Bordier v. Burrell, 46 Law J. Rep. Chanc. 615; Law Rep. 5 Ch. D. 512;

Clements v. Norris, 26 W.R. 94.

FRY, J., said—In my opinion this application must be acceded to. The principles on which the Court proceeds seem to me to be settled in the case of *Bordier v. Burrell*, in a way which I am bound to follow, even if they did not meet with my entire approval as they do. The 26th rule of Order XXXVI., which is relied upon by the applicants, is spoken of by the Master of the Rolls in that case in these words: "The rule was intended to apply to that class of action which a jury is not as a rule competent to deal with, either from their great complexity as regard facts, or from fact and law being so intermingled together that it would be difficult, if not impossible, to direct a jury by separating the law from the fact, or because the questions as regards the law are of such delicate nature and require a knowledge of such refined law that they could not conveniently be presented to a jury. In all these cases the Judge would say, 'These are not cases which I should be justified in sending to a jury.' But when it is a simple case of this kind, I am of opinion that the Judge would be repealing the Act if he declined to send it to a jury." Now it appears to me that actions for specific performance of contracts are generally of a kind which are not convenient for a jury to try, and for

Usil v. Whelpton.

this reason, that the law which relates to them is what the Master of the Rolls has said is such refined law that they cannot be conveniently presented to a jury, and also from the close intermixture of law and fact in such cases. Such cases have on one or two occasions been tried before a jury, and I have had the opportunity of seeing the results of such trials, and they have not induced me to think that it is a convenient mode of hearing such actions. Furthermore, I will take the observations of Vice-Chancellor Hall, which met with the approval of the Master of the Rolls in the same case. He says, "This rule was formed expressly to meet cases which would under the old system have been tried in the Chancery Division, and which might be considered, by reason of involving a mixture of law and fact, or from great complexity, or otherwise, not capable of being tried by a jury." I will also observe that the Judicature Act has appropriated and assigned actions for specific performance to the Chancery Division, because they are generally of that very character of action which the Vice-Chancellor Hall referred to. They involve a mixture of law and fact and questions of very great complexity and nicety.

I think, therefore, that this is a case in which I should not be repealing the statute if I did not send it to a jury. It is a case which this Court would have tried before the Judicature Act without sending any issue to the jury, and I think it would be tried with great inconvenience and considerable difficulty if I did send it to the jury. Under those circumstances I will allow the application. The costs will be costs in the action.

Solicitors—T. H. Devonshire, for plaintiff; Currey, Holland & Currey, for defendant.

HALL, V.C. }
1881.
April 28. }

ELLIS v. ROBBINS.

Practice — Motion for Judgment — Evidence by Affidavit — Rules of Court, 1875, Order XXXVII. rule 1; Order XL.

On motion for judgment the Court has no power, under the Rules of Court, 1875, to order that the evidence shall be taken by affidavit. Accordingly, where a consent action, in which an infant and a married woman were defendants, and in which the evidence had been taken by affidavit, was set down on motion for judgment, the Court gave judgment, but directed that notice of trial should be given to the infant and married woman, and that the action should be placed in the paper again pro forma.

This was an action for the purpose of rectifying a mistake in a settlement, made by the plaintiff on the occasion of her daughter's marriage, upon the usual trusts in favour of the daughter and her husband successively for life, and, after the decease of the survivor, for the children. There had been only one child of the marriage, who was an infant. The trustees of the settlement, the plaintiff's daughter and her husband, and their infant child were defendants. A statement of claim was delivered, but no statements of defence were put in, the action being in effect a consent action, and it being conceded that there had been a mistake which ought to be rectified as asked by the statement of claim.

Evidence by affidavit had been given in support of the allegations contained in the statement of claim, and the action had been set down on motion for judgment.

On the action coming on for hearing,

Mr. Graham Hastings and Mr. Whately submitted the question to the Court, whether the Court had power on motion for judgment to accept evidence by affidavit, so as to make a judgment, in default of pleading, which would be binding on the married woman and infant defendants. They pointed out that Order XXXVII. rule 1 of the Rules of Court, giving power to the Court to order the evidence to be taken by affidavit, relates only to the trial

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or hearing of an action, while Order XL., which relates to motion for judgment, is silent on the subject of giving evidence by affidavit.

Mr. H. N. Rooper, for the defendants.

HALL, V.C., gave judgment for rectification of the settlement, but directed that notice of trial should be given to the defendants, the infant and married woman, and that the action should be placed in the paper again on the application of any party *pro forma*, in order to be finally disposed of.

Solicitors—Roopers & Co., for all parties.

[IN THE COURT OF APPEAL.]

JAMES, L.J.	} THE GREAT WESTERN RAILWAY COMPANY v. THE WATERFORD AND LIMERICK RAILWAY COMPANY.
BRETT, L.J.	
COTTON, L.J.	
1881.	
April 5, 9.	

Railway Companies—Statutory Traffic Agreement—Arbitration Clause—Jurisdiction of Railway Commissioners to decide Points in Difference—Injunction—Prohibition—Regulation of Railways Act, 1873, ss. 8 and 9—The Railway Companies Arbitration Act, 1859, s. 2.

An injunction will not lie to restrain the railway commissioners from arbitrating on matters in difference between two railway companies on the ground of want of jurisdiction, but the objection, if well founded, is good ground for setting aside the award when made.

The Railway Companies Arbitration Act, 1859, does not confer on railway companies any powers to refer to arbitration not theretofore possessed by them, but is merely a statutory embodiment of a code which prescribes the manner in which, when railway companies agree to arbitrate subject to its provisions, the arbitration shall be conducted.

The Regulation of Railways Act, 1873,

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s. 8, does not apply to all differences of whatever kind that may arise between railway companies, but only to certain particular differences, which in any special or general act are required or authorised to be referred to arbitration.

A special Act empowered two railway companies to enter into statutory traffic agreements, but contained no clause authorising or requiring differences to be referred to arbitration. The two companies entered into a statutory traffic agreement, which contained a special arbitration clause directing that matters in difference, if any should arise, should be referred to an arbitrator to be named and appointed in a particular manner.

A difference having arisen as to the mode in which accounts should be taken under the agreement, one company applied ex parte to the railway commissioners, under the 8th section of the Regulation of Railways Act, 1874, to determine the matter, who thereupon cited the other company to appear before them:—

Held, on writ for prohibition, that the railway commissioners had no jurisdiction to determine the matter in difference.

The Stokes Bay Railway and Pier Company v. The London and South Western Railway Company (2 Nev. & Mac. 144); and The Port Patrick Railway Company v. The Caledonian Railway Company (3 Nev. & Mac. 189) overruled.

This was an appeal from the decision of the Master of the Rolls.

By the Waterford and Limerick Railway Arrangements Act, 1866, The Great Western Railway Company and The Waterford and Limerick Railway Company were authorised to enter into working agreements for through traffic. The Act contained no provision requiring or authorising disputes between the two companies to be referred to arbitration.

On the 18th of April, 1876, the two companies entered into a working agreement under the powers of the Act, which provided (art. 40) that every difference which should arise between the two companies under the agreement should be referred to arbitration "in accordance with the provisions of the Railway Companies Arbitration Act, 1859, and this

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article shall accordingly be and have effect as an agreement between the two companies for and a reference to arbitration under that Act"; and (art. 41) that the arbitrator for the purposes of the agreement should be appointed in writing by the respective chairmen of the two companies, or, failing their agreement thereon, then by the Board of Trade.

Disputes having subsequently arisen between the two companies as to the mode in which accounts should be taken under the agreement, and no arbitrator having been appointed under articles 40 and 41, the defendant company applied *ex parte* under section 2 of the Railway Companies Arbitration Act, 1859, and section 8 of the Regulation of Railways Act, 1873 (1), to the railway commis-

sioners to determine the difference in question, and thereupon the plaintiff company were cited to appear before the commissioners. The plaintiff company then issued the writ in this action claiming an injunction to restrain the defendant company from proceeding with their application before the railway commissioners, and moved for an injunction accordingly.

On the 14th of February, 1881, the motion came before the Master of the Rolls, who held that want of jurisdiction in an arbitrator was not a ground for restraining persons from proceeding before him; since, if his award was invalid by reason of his having no authority to act, that objection could be taken when it was sought to enforce the award. He therefore refused the motion, but gave the plaintiffs leave to amend their writ, and ask for a prohibition against the commissioners, and granted a rule *nisi* for a prohibition returnable in four days.

Feb. 18.—*The Attorney-General (Sir H. James) and Mr. Rigby*, for the railway commissioners, who had been served with the rule *nisi*.

Mr. Chitty and Mr. Pembroke Stephens, for the defendant company, shewed cause against the rule.

Mr. Davey and Mr. B. S. Wright supported the rule.

THE MASTER OF THE ROLLS.—This case affords a strong illustration of the difficulty of dealing with questions of this kind. It is fairly admitted by the Attorney-General that a good deal of the 8th section of the Regulation of Railways Act, 1873, is utterly useless, and has no particular meaning if I decide with him, and, on the other hand, it cannot be denied on the part of the applicants that there is a good deal of inconsistency in the provisions contained in the section, having regard to the actual course of legislation, if I decide with them. It is really very difficult to know what the meaning of

(1) The Railway Companies Arbitration Act (22 & 23 Vict. c. 59), 1859, enacts—Section 2: "Any two or more railway companies, whether already or hereafter incorporated (in this Act called 'the companies'), from time to time, by writing under their respective common seals, may agree to refer and may refer to arbitration, in accordance with this Act, any then existing or future differences, questions or other matters whatsoever in which they then are or thereafter shall be mutually interested, and which they might lawfully settle or dispose by agreement between themselves, and may delegate to the person or persons to whom the reference is made any power to determine all or any of the terms of any contract to be made between the companies which the directors of the companies respectively might lawfully delegate to any committees of themselves respectively."

The Regulation of Railways Act (36 & 37 Vict. c. 48), 1873, enacts—Section 8: "Where any difference between railway companies or between canal companies, or between a railway company and a canal company, is, under the provisions of any general or special Act passed either before or after the passing of this Act, required or authorised to be referred to arbitration, such difference shall, at the instance of any company party to the difference and with the consent of the commissioners, be referred to the commissioners for their decision in lieu of being referred to arbitration: provided, that the power of compelling a reference to the commissioners in this section contained shall not apply to any case in which any arbitrator has in any general or special Act been designated by his name or by the name of his office, or in which, a standing arbitrator having been appointed under any general or special Act, the commissioners are of opinion that the difference in question may more conveniently be referred to him."

Section 9: "Any difference to which a railway company or canal company is a party may, on the application of the parties to the difference and with the assent of the commissioners, be referred to them for their decision."

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the section is. I must also consider this, which is a very important point, that this is a motion for a prohibition made before a single Judge. It is, in fact, asking me to overrule two reported decisions of the railway commissioners, and it would be a very strong measure on the part of a single Judge to do that unless he were clearly convinced that the railway commissioners were wrong. But I am not convinced that the construction which has been adopted by the commissioners is not the one intended by the Legislature. When I say "intended" I mean fairly within the purview of the language used. We must consider what that language is. [His Lordship read the 8th section of the Regulation of Railways Act, 1873, and continued:] Now I am told that there is no instance of a specific difference between any two such companies being referred to the arbitration of a named arbitrator by any general or special Act, and I am willing to accept that assertion, because if there is any such case it has not been produced before me. What then is the literal meaning of the words? The literal meaning of the words is "any difference under the provisions of any general or special Act required or authorised," and it is clear from the terms of the Railway Companies Clauses Act, 1859, that any possible difference between two or more railway companies, at all events, may be referred to arbitration, and, consequently, as far as the railway companies are concerned, there is some sense in supposing that the general Act applies to all of them. The words are not entirely vague and useless; they may be superabundant, and they may not be required, the effect may be the same as if we left them out, but still reading that word "difference" to mean a difference referred in general Acts to arbitration, and as a rule there not being any special difference whatever in any general Act, I think the literal meaning of it is "any difference properly so called." Then it is said, and said very fairly, "What a singular proviso you have at the end, if that is the meaning of the section." Well, it is admitted that this section is exceedingly difficult to make anything of at all. The

proviso enacts that the power contained in the section "shall not apply to any case in which any arbitrator has by any special or general Act been designated by his name or by the name of his office, or in which, a standing arbitrator having been appointed under any general or special Act, the commissioners are of opinion that the difference in question may be more conveniently referred to him." The first observation one would make is this: I do not pretend to know the contents of every general Act of Parliament, and I don't think Judges can be expected to do so. I have always said that I can only know those to which I am referred. With that limitation there is no general Act of Parliament in which an arbitrator is designated by his name, or in which a standing arbitrator is appointed, or, as far as I can see (that is the meaning I put on the cases referred to before me), where he is designated even by the name of his office. It is a very singular thing, if there is no such thing in any general or special Act, that we have the words "has in any general or special Act," but the answer is, that although those words were repeated, and although it only applies to special Acts, it shews that the Legislature has put in those words *ex abundanti cautela* to provide for the accident that there may be some general Act, although not known then to the Legislature, and it may exist although it is not known to me or any of the counsel in the case. It is put in to provide for that accident and not with any view of limiting the purview of the section. It is said again, and the argument has considerable force, "What a singular result it is that although the commissioners may be of opinion that the question may be more conveniently disposed of by the arbitrator named in the agreement, they cannot leave it to him, although they can if he is named in the Act of Parliament." It is very singular. I do not think the answer made that they are not to take any reference without their consent is a complete answer, because we shall have the difficulty that that applies also to every case, and therefore the latter proviso would not be wanted. If they were entitled to refuse their consent on any reasonable ground whatever,

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surely the ground mentioned is a reasonable ground. There again I think you have the rule of abundant caution that the Legislature has pointed out a ground on which they might refuse, but it does not mean that they may not consider other grounds, but that this ground is to be treated as sufficient. Of course it leaves them in this position, that they are at liberty to say, "We will not consent to take this arbitration because you have a better arbitrator already agreed upon." There is this also to be considered: The Legislature by this Act of Parliament, the 10th section, gives to the railway commissioners the powers which were formerly possessed by the Board of Trade under part iii. of the Railway Clauses Act, 1863, or under any special Act, with respect to the approval of working agreements between railway companies, and then an Act passed in the next year—the Board of Trade Act, 1874, s. 6—gives, as I read it, the Board of Trade power to decline to accept arbitrations. That section applies not merely to a difference between railway companies and canal companies, but "where any difference to which a railway company or canal company is a party is required or authorised under the provisions of any general or special Act to be referred to the arbitration of, or to be determined or settled by, the Board of Trade, or some person or persons appointed by the Board of Trade," there the Board of Trade have a power of declining the arbitration and of sending it over to the railway commissioners. If you were to limit the section in the way proposed, it would have the singular result that where the Board of Trade is required by a public or special Act of Parliament—that is, required by the Legislature—to undertake the duty of an arbitrator, they are at liberty to send it to the railway commissioners; but where it is only required by the consent of the parties, that is, they are not obliged to undertake it, they cannot send it over to the railway commissioners—that would be a very singular result. In other words, where the Board of Trade has to name its arbitrator it may name anybody but the railway commissioners. I do not think that is a fair construction of the section,

and being a statute *in pari materia*, it seems to me I may fairly call it in aid. But without saying that I am quite confident that the opinion which I have arrived at is the correct opinion, I will say this, that fortified as I am with the opinion of the railway commissioners as to the reading of the 8th section of the Regulation of Railways Act, 1873, I ought to decide that this is the proper reading of it, and therefore I refuse this application.

The plaintiffs appealed.

Mr. Davey, Mr. Webster and Mr. R. S. Wright, for the appellants.—When arbitration is authorised by an Act, there, if no requisition has been made before action brought, the clause would not afford a good plea to the action, but where the Act requires the arbitration, there the clause would be a good plea to the action. But this is not a difference which under any special or general Act is required or authorised to be referred to arbitration. It is not within the Railway Acts at all. It is an agreement to refer to an arbitrator to be specially named, and it is part of the contract between the parties that differences should be settled in this particular way. It is said that railway companies have no authority to agree to arbitration except by statute; but, if that be so, then in every case you may strike out the special words in the agreement and say that either party may apply *ex parte* to railway commissioners to arbitrate. Reliance is placed by the respondents on

The Stokes Bay Railway and Pier Company v. The London and South Western Railway Company (*ubi supra*)

and

The Port Patrick Railway Company v. The Caledonian Railway Company (*ubi supra*);

but we submit that those decisions are erroneous and must be overruled. Then it is also said that our authority is derived from the Railway Clauses Act, 1859; but railway companies could agree to arbitrate before that Act, and it confers no new powers on them in that respect. It is only an incorporation of clauses pre-

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scribing how a reference is to be conducted, and enables railway companies to adopt the machinery of the Act, just as, in ordinary partnership deeds, the machinery of the Common Law Procedure Act, 1854, is adopted for the purposes of a reference to arbitration. But even assuming that the capacity to agree to enter into the arbitration may flow from that Act, the powers of the arbitrator are derived from and governed by the contract itself. Lastly, the writ was properly indorsed with an injunction in the first instance—

The Malmesbury Railway Company v.

Budd, 45 Law J. Rep. Chanc. 271;

Law Rep. 2 Ch. D. 113;

Beddow v. Beddow, 47 Law J. Rep.

Chanc. 588; Law Rep. 9 Ch. D. 89.

[The respondents were not called upon to argue the question of the injunction.]

Mr. Bigby (*The Attorney-General* with him), for the railway commissioners.—The true effect of the 8th section of the Regulation of Railways Act, 1873, is that all differences which railway companies are capable of referring to arbitration are within the Act, which is a general Act, except where the Legislature has in a general or special Act named some person as an arbitrator, or where there is a standing arbitrator under some Act. The Legislature did not suppose that a railway company could agree to arbitrate except under the powers of some general or special Act, and section 9 of the Regulation of Railways Act seems to support that view, because the commissioners cannot have jurisdiction under that section unless both parties consent. But even assuming that they could agree to arbitrate without statutory authority, still the case is within the Act of 1859.

Mr. O'hilly, *Mr. Pembroke Stevens* and *Mr. Synnott*, for the defendant company.

—The railway commissioners are a high Court for determining the disputes between railway companies, and this is an attempt to substitute an arbitrator in their stead. The 8th section of the Regulation of Railways Act, 1873, refers to all disputes between railway companies and gives the commissioners jurisdiction in every case except the two named in the proviso at the end of the section. But

assume it does not include every case, yet it includes every case in which an agreement has been entered into under a special Act in which no arbitrator is named. The agreement must be read as though it were part of the Act. This is not a case of a named arbitrator. No application has been made to us to appoint an arbitrator, and we do not intend to appoint one. We prefer to go before the commissioners. This is in fact only a general agreement to refer with certain stipulations as to the method of reference made in pursuance of the special Act, and is within the 8th section of the Act of 1873, because by the 40th clause of the agreement it is to have effect as a reference under the Act of 1859, which is a general Act.

No reply was called for.

JAMES, L.J.—We need not trouble about the question of injunction. With regard to the question of prohibition, having listened with the greatest possible care and attention to the judgment of the Master of the Rolls, and to the arguments which have been addressed to us at great, but not inordinate length, having regard to the difficulties of the case with which the counsel have had to struggle, I must say I cannot bring my mind to entertain anything like a shadow or colour of a doubt. The words of the section seem to me to be as reasonably plain as it is possible for a section of an Act of Parliament, as Acts of Parliament nowadays are, to be. We are asked to alter what seems to me to be the very plain and clear meaning of an Act of Parliament for the purpose of doing something (which we should be very slow to do) which it is not usual for the Legislature to do—that is, preventing people from entering into agreements between themselves with regard to their own interests, or for the purpose of destroying the agreements which they have thought fit to enter into. It appears to me that the 8th section really is very plain. It says that where any difference between railway companies is under the provisions of any general or special Act required or authorised to be referred to arbitration, such difference shall at the instance of any

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company party to the difference be referred to the commissioners for their determination, instead of being referred to arbitration—that is, where there is a difference which under the provisions of any general or special Act is required or authorised to be referred. The plain meaning of that seems to me to be that where there is a special statutory provision by which a reference to arbitration is substituted for a reference to the ordinary tribunals—as between companies where there is such special and express statutory provision with reference to any particular difference or with respect to any differences arising under the particular Act of Parliament, or anything of that kind, first of all the difference may be one which the Legislature has itself taken care shall be referred to somebody as an expert to decide; for instance, such as the working arrangements, the arrangements for joining one railway with another, which are things not fit for an ordinary Court of justice to deal with. In such a case as that there often is a provision in an Act of Parliament that it shall be referred to that particular individual or to a particular person to be named in a particular manner. Then the other is where, under the provisions of the Act of Parliament, either one of the parties has a right to compel the other to go to arbitration. It seems to me the thing which is provided for is, where there is a compulsory arbitration imposed on the parties by a statutory provision. That is what seems to me to be the plain meaning of the section, and it does not extend in words, certainly not in spirit or meaning, to an agreement between the parties by which the parties choose between themselves to provide for a particular mode of reference; and the Legislature did not intend, as it seems to me, to interfere with agreements which companies had been minded to make, or which they might be afterwards minded to make, between themselves for the regulation of their powers. The construction there leaves out all the words, it seems to me, “under the provisions of any general or special Act,” and resolves itself into this—“where any difference shall arise between two railway com-

panies,” without any limitation whatever. It is said that the proviso put at the end of the 8th clause tends to shew that is the general purview of the first part of the 8th section. It seems to me the other way provided that a power of compelling a reference to the commissioners shall not apply to any case in which any arbitrator has under a general or special Act been designated, or in which a standing arbitrator has been appointed under a general or special Act. If it were intended to have the general effect which is contended for on the part of the respondents, beyond all question that proviso would have applied also to where there had been a special arbitrator designated by agreement, or where by agreement a standing arbitrator has been appointed. I really cannot come to the conclusion in any way that a reference to arbitration in an agreement authorised by an Act of Parliament is a reference to arbitration by or under the provisions of any general or special Act of Parliament.

BRETT, L.J.—In this case a difference has arisen between two railway companies, which difference they themselves have by an agreement under their own hands provided for. They have by an agreement under their own seals agreed that, in case of such a difference as this, the matter should be settled by an arbitrator to be appointed in a particular way, and with particular powers, but it is said that, notwithstanding that agreement to which the two parties have come, one of them, upon application to the railway commissioners, may force the other to have that difference decided by the railway commissioners. It is said that that power is given to one party by the 8th section, to which we have been referred, and the argument was necessarily carried to this extent, that the 8th section includes all differences of whatever kind which may arise between two railway companies. In other words, it is suggested that the proper reading of that section is, “Where any difference arises between two railway companies, such difference shall, at the instance of any company party to that difference, be referred with their consent to the railway commissioners.”

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Suppose that had been the intention of the Legislature, how exceedingly easy it would have been for the Legislature to have said so. What an extraordinary involution of phrase have they entered into in the first part of section 8 if it were intended to mean what I have said. There is that objection therefore to such a reading. It is necessary to consider what would have been the result of such a reading. The result of such a reading, it could not be denied, must have been this— that even although the parties should by agreement determine that a difference which had already arisen between them should be decided by an arbitrator named by them in that agreement, and that there should be contained in that agreement a clause that neither party would apply to the railway commissioners, and that the only person who should decide between them should be the person named by them both, by virtue of this 8th section one of them might break such an agreement, and the commissioners would have jurisdiction, without the consent of the other party, to entertain and determine the difference. It seems to me almost impossible to suppose that the Legislature would have so enacted. But when we look at the terms of the section there are three phrases which are used in the section oddly enough, as is so often the case. In the first part it is, "Where any difference is under the provisions of any general or special Act required or authorised to be referred;" in the second part they use the terms, provided that it shall not apply to any case in which any arbitrator has in any general or special Act been designated. There, instead of the words "under the provisions of," it is "in any general or special Act." There is the third case, "or in which a standing arbitrator having been appointed under any general or special Act." It seems to me, on looking at that clause, that the two first phrases are identical, but that the third one is different from the other two. It seems to me that the phrase, "under the provisions of any general or special Act required or authorised," is really just the same as if they had put it, "in any general or special Act required or authorised." It

is the same phrase as the second. The real meaning of the word in one case and the phrase in the other is, "Where any difference is by the terms of any general or special Act required or authorised." If that be the true meaning of it, then there is nothing in the terms of any special Act in this case which requires or authorises a reference. I take the real meaning of the 8th section to be that it applies to certain particular differences which may be pointed out in distinct terms in the special Act or in the general Act, and which then requires or authorises that particular difference in terms, if it arises, to be referred to arbitration. But it is said, as to all differences arising between railway companies, after all if there is to be an arbitration, that arbitration must be under the authority of an Act of Parliament. At first it struck me that it might be so, but I have come to the conclusion upon consideration, that, with regard to any differences arising in the course of their business, railway companies have power to agree to a reference without any authority of any Act of Parliament at all. It was suggested that was not so, and that there must be an authority given to them to agree to arbitration, either in some special Act, or that it is given by the general Act of 1859, section 2. I cannot think that is the meaning of the statute of 1859. If I am right in the first proposition it would be a superfluous enactment. I think that the reading of the Act of 1859 is that which was suggested by Mr. Webster, namely, that it does not give power to railway companies to agree to a reference, but that in a succession of clauses it shews the particular mode or manner in which an arbitration is to be conducted, and that the intention was to draw up a code of such an arbitration, which by reference to that statute may be at once shortly incorporated into every special Act. That Act gives no authority to railway companies to agree to a reference, which authority was not wanted, but it does point out to railway companies how they may agree to a reference in a particular form and manner. Section 9 of the statute seems to me to be very strong to shew that the construction which I have

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put on section 8 is the right one, because I cannot by any mode or rule of construction suppose that the 9th section does not include the case of a difference between two railway companies. If it does, then there are cases evidently in the mind of the Legislature where the commissioners may have the power of determining a dispute between railway companies with the consent of both companies, and that would go to shew that the differences which are mentioned in section 8 are not all differences, but only the differences, as I have said, which are mentioned in the terms of any general or special Act. We are then met by the decision of the railway commissioners themselves. In 1875 is the first case which is cited to us, and strangely enough, notwithstanding the argument we have heard, on the first occasion when this question of their jurisdiction was challenged before them they hardly entered upon the matter. They did not hear or call upon the counsel who were to support their jurisdiction, but at once, and without giving any reasons at all, determined that they had this jurisdiction. That being so in 1875, in 1878 they seem to have been called upon to listen to counsel—the Lord Advocate and Mr. Kay—who, I suppose, did that which I think all counsel ought to do, insisted upon being heard. They no doubt produced an elaborate argument before the commissioners. Then the commissioners decided this question, but I think their judgment contains the decision and not the reasons for it. Therefore it hardly helps one. We still have to consider the decision in this case of the Master of the Rolls himself. I cannot help thinking that upon this occasion the Master of the Rolls was as nearly as possible deciding the case in the way in which we now decide it. He seems to have had the greatest possible doubt, but, if I may venture to say so, I am perfectly certain if he had been here, with one little push from my brother Cotton which he would have received, he would not have had any doubt at all, and he would have decided just as we are deciding.

COTTON, L.J.—In this case two railway

companies, plaintiffs and defendants, have entered into an agreement with reference to certain matters connected with their lines in which there is a clause providing for reference to arbitration. They could not have entered into that agreement as regards their lines without an Act of Parliament, and there was an Act of Parliament which authorised them to enter into the agreement as to matters relating to their lines, but that Act said nothing at all about any reference to arbitration. The question is this, whether one of those parties has power against the will of the other to go before the railway commissioners, and that depends simply upon the 8th section of the Act as compared with the other sections. I say "depends on the 8th section," because it is the construction of that section, helped by other parts of the Act, under which the respondents seek to go before the railway commissioners. The question is, whether the railway commissioners have, under the circumstances, any jurisdiction; and, as I understand the Master of the Rolls—and certainly it was the argument for the commissioners—it was contended that under that section the railway commissioners, at the instance of one party only, and against the will of the other, have a right to entertain the question in any difference capable of being referred. That is how it was put in argument by Mr. Rigby, and in substance I think it was what was said by the Master of the Rolls. It is sufficient to say upon the first part that omits a large portion of the section, because section 8 is not "where any difference arises between two railway companies such difference shall, at the instance of either party," but there follow words to which some effect must be given—"where any difference between a railway company or canal company is under the provisions of any general or special Act, passed either before or after the passing of this Act, required or authorised to be referred, such difference shall, at the instance of any company party to the difference, be referred to the commissioners." Now Mr. Rigby says that that reference to the special or general Act which follows the word "is" is intro-

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duced in this way, as meaning "notwithstanding any provisions in any special or general Act." It is curious, if that is so, that they should not have said it in those words, which are much easier. But it is against the frame of the sentence. "Such difference" points to certain differences. What is the difference previously described? It is not "any difference between railway companies," but "any difference which is under the provisions of any general or special Act authorised or required to be referred," although that is not the exact form, the "which" not occurring, but "where" occurring at the beginning of the sentence, instead of the relative in the middle of it. The meaning of it, in my opinion, is, by introducing the words which follow, to qualify the words of difference; and the power at the instance of one party to go before the commissioners is only where the "such difference" is within the entire description in the previous part of the sentence. One must consider what is the meaning of those words, "under the provisions of any general or special Act required or authorised to be referred." From what I said it will appear that, in my opinion, those words are restrictive, not having the effect of getting rid of the provisions of any general or special Act, but as descriptive of the kind of difference which may be compulsorily referred, and we have to consider what it is. I think it means this, that where in the Act of Parliament itself there is a provision which requires or authorises a difference therein mentioned to be referred to arbitration, then they may go before the commissioners; and there are plenty of instances, if that is necessary in Acts of Parliament, where the reference may be compulsory on both. As I mentioned, in the Lands Clauses Act one railway company may wish to take the surplus land of another, and so there may be other cases where the reference is compulsory, and so there may be many cases where, as between railway companies, there is a provision in an Act of Parliament which authorises either party against the will of the other to withdraw the matter from any other mode of settle-

ment, and to require the other party to go to arbitration. That, in my opinion, is the meaning of these words, not "where under any Act of Parliament power is given to the railway company to contract to go to reference," and even then, subject to what I shall say presently, it would not meet this case, because, as has been mentioned, the Act of Parliament which authorised the agreement with reference to the working between these two railway companies did not contain any clause which gave them power or authority to contract with reference to going to arbitration. It is said that every railway company which is authorised to go to reference must do so under some Parliamentary powers, because the railway company is a creature of Parliament. That means that every difference between railway companies may be compulsorily taken before the commissioners at the instance of either party. That is not the wording of the section, and although it is very true that the railway companies are the creatures of the statute, it is hardly to be said that they are authorised by the statute to go to arbitration. It is this: they are created with all the powers incident to the purpose for which they are created, except so far as their Act by inference or expressly stops them; but the answer, to my mind, to any such suggestion is, that if that were so it would be "any difference between any incorporated company may be compulsorily referred." Then there is another matter which one should refer to, although it has been to some extent dealt with by the Act of 1859. It is said, at least that is a Parliamentary authority to go to arbitration. The words of the very Act, section 2, are against the notion that that Act of Parliament gives power not otherwise possessed by railway companies generally to go to arbitration, because it says that they "may agree to refer, and may refer, to arbitration in accordance with this Act," and the Act in question contains a number of clauses as to the appointment of arbitrators when the parties cannot agree, and giving the reference under it effect which it would not have unless it were under the Act. So the power there given is simply to avail themselves of the

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provisions of the Act with reference to arbitration not generally giving them power to refer to arbitration. There is one other matter which one should mention as shewing to what an absurd conclusion, in my mind, the contention of the other side would go, namely, that where Parliament has named an arbitrator, there it is not to be taken before the railway commissioners. But if parties contracting between themselves have named an arbitrator, then the contract between the parties can be set aside. Now it seems to me, although I like to determine cases on the construction of Acts of Parliament, not having any other means of knowing what the Legislature means than by looking to see what the reason of the thing is, it is very reasonable for Parliament to say, when parties have, without contracting between themselves, got in a clause of an Act of Parliament that which authorises or requires them to go to arbitration without any further contract as regards the matters dealt with by the Act of Parliament, they having come to Parliament, and having either had forced upon them, or asked for the clause, Parliament for a sufficient reason should alter what it-self had done by imposing a fetter or an obligation, or by giving that power. But the contract between the parties is a very different thing, and one would expect, where it provides for one exception in favour of the special provision in an Act of Parliament, that it should at least have made an exception where the parties by contract have done the same thing for themselves. There is one other matter which I referred to in the argument, and which I will mention again, namely, the 8th and 9th sections of the Act are very different in language, and if there is a meaning to be given to the 8th section—if the 8th section was intended to deal with all differences between railway companies—it is extraordinary that there should be that difference of language between the 8th and 9th sections. No doubt the 9th section does include cases where both parties are not railway companies or canal companies, and does include cases of difference between an individual and a railway company or between an individual

and a canal company; but, in my opinion, it will be straining the construction of that section to say that it will not apply to a case where both parties were railway or canal companies, because it is impossible to say in such a case the railway company or canal company is not a party to the difference. Probably what was contemplated there was, in the first instance, differences between railway companies and individuals; but, in my opinion, it extends to and applies to all differences where a railway company or a canal company is a party, notwithstanding that the other party may also be a railway company or canal company.

Appeal accordingly allowed with costs.

Rule nisi for prohibition made absolute with costs. Appeal as to injunction dismissed with costs. One set of costs to be set off against the other.

Solicitors—R. R. Nelson, for plaintiffs; Terrell & Atkinson, agents for J. O'Connor, Dublin, for defendants; Walter Murton, for the Board of Trade.

FRY, J. }
1881. } BAINBRIGGE v. BROWN.
May 17, 18. }

Parent and Child—Undue Influence—Purchaser for Value—Notice.

A mortgage by persons over age but not fully emancipated to secure a debt of their father, the same solicitor acting for parent and children, was upheld in favour of the mortgagees, but was declared not binding in favour of the father.

The plaintiffs in this action were Emma Maria Bainbrigg, William P. Y. Bainbrigg and Joseph H. Bainbrigg, the three children of William H. Bainbrigg, a physician at Droitwich, the last defendant on the record. The other defendants were three persons—Messrs. Brown, Rogers and Rock—who had advanced large sums to the defendant William H. Bainbrigg, to assist him in a speculation in respect of certain brine

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baths which he had bought, and who held two mortgages from him.

The three plaintiffs were entitled under the settlement executed on the marriage of their father and mother in 1851, and by virtue of an appointment, to the reversion of the trust fund subject to the settlement, after the life interests of their parents.

On the 30th of June, 1877, they joined their father and mother in executing a security to the defendants Brown, Rogers and Rock, by which they made themselves liable to pay interest on the debt of their father, the rate of which was at the same time reduced, and charged their reversion, over which a power of sale was given. The plaintiffs claimed to have the mortgage of the 30th of June, 1877, set aside as having been obtained from them when under the influence of their father, and in ignorance of what they were doing, and without separate legal advice. It was alleged that they had been induced to assent to the laying out of the trust funds, which were then represented by railway stock, in the purchase of a piece of land near the salt baths of their father, and that they executed the deed of 1877 in the belief that it was merely for the purpose of giving their consent to the change of investment.

The only witnesses called were the three plaintiffs. From their evidence it appeared that the daughter was twenty-five years of age when she executed the mortgage, and had always lived with her parents, but that she executed the deed when away on a visit to her aunt; that the eldest son was twenty-four, was a medical student, and executed the deed when at home for the long vacation; that the younger son was an undergraduate at Oxford, and also executed the deed at home in the long vacation. There was also in evidence certain correspondence, including letters from Mr. Collis, the solicitor of the defendant William H. Bainbrigge, and who also purported to act for the plaintiffs, the details of which are sufficiently referred to in the judgment.

Mr. Glasse and *Mr. Freeman*, for the plaintiffs, contended that the *onus* lay on

the mortgagees of proving that the plaintiffs were acting with full knowledge and under proper independent advice; and that in the absence of such proof the mortgage would be set aside—

Maitland v. Irving, 15 Sim. 437; 16

Law J. Rep. Chanc. 95;

Archer v. Hudson, 7 Beav. 551; 15

Law J. Rep. Chanc. 211;

Berdoo v. Dawson, 34 Beav. 603;

Kempson v. Ashbee, 44 Law J. Rep.

Chanc. 195; Law Rep. 10 Chanc.

15;

Sercombe v. Sanders, 34 Beav. 382;

Rhodes v. Bate, 35 Law J. Rep.

Chanc. 267; Law Rep. 1 Chanc.

252.

Mr. North and *Mr. Rigby*, for the defendants, the mortgagees, contended that they had taken every reasonable precaution, and had a right to assume that the plaintiffs, who were of full age, were acting on the knowledge and under the independent advice of the solicitor who was acting not only for their father but for themselves in a transaction which, on the face of it, was not otherwise than for their benefit.

The defendant William H. Bainbrigge did not appear.

Mr. Glasse replied.

Fry, J., stated the facts, and remarked on the absence of the evidence of persons, other than the plaintiffs, who must have known some of the circumstances and said there were many material facts which must have escaped the memory of the plaintiffs, and that they were confused in their minds as to the transaction relating to the deed of June, 1877, and an earlier deed, and said—I think, therefore, that it is extremely difficult to set aside this transaction on the strength of their evidence with regard to the state of knowledge in which they were at the time they executed the deed.

Now what are the admitted facts of the case? It appears to me to be plain that the plaintiffs had not been entirely emancipated from their father's control at the time of the execution of this deed, and although there is, it seems to me, no direct evidence upon which I can rely as proving undue pressure, yet I think that

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as against the defendant William Henry Bainbrigge, the father of the plaintiffs, they have shewn that a state of circumstances existed from which the Court will infer pressure and undue influence. In my judgment, as I have already said, they were none of them emancipated entirely from their father's control. None of them appear to me to have been persons conversant with business. The young lady had been residing in her father's house, and had not in any way apparently mixed in the world, except under his control or under his roof; at all events, she had not resided apart from him. The two sons were students in the Universities, and were not familiar with legal matters at that time. I think, therefore, that as against the father the circumstances are such as to cast upon him the burden of shewing that this instrument was executed by his children after receiving some independent advice, and that the instrument was executed by them with the full knowledge of its contents; and the free intention to give him the benefit which they did confer upon him by that instrument makes it the more incumbent upon him to satisfy the Court that they had some kind of proper independent advice. That burden he has not attempted to discharge, because, in fact, he has not thought proper to appear at all, and therefore as against him it appears to me the judgment must go.

Then the next point which arises is this: Against whom is this inference of undue influence operative? Now it clearly is operative against any person who has exercised the influence; in this case it was the father. It clearly, in my judgment, would be operative against every volunteer who claimed under the person who exercised the influence. It would also clearly be operative against every person who claimed under the father with notice of the equity thereby created, or with notice of those circumstances from which the Court infers the equity, but in my judgment it would be operative against no others, and it would not be operative against those who are not shewn to have taken with such notice of the equity under which the deed was executed. That notion appears to me to

be entirely consistent with the cases which have been cited—*Maitland v. Irving, Archer v. Hudson, Berdoe v. Dawson and Kempton v. Ashbee*. In that last case it is Lord Justice James who gives judgment, and he puts the question which the Court had to decide in a manner which entirely confirms me in the conclusion I have come to. "The first question," the Lord Justice says, "is whether the bond of 1859"—that was the security in that case—"was obtained by the undue exercise of the influence of the stepfather, and was it obtained under such circumstances as that the knowledge of it can be imputed to the defendants?" I therefore proceed to enquire whether the defendants Brown, Rogers and Rock had notice or knowledge of the circumstances upon which the equity which is insisted upon against them arose.

Now with regard to that I must observe that I have no evidence affecting them except that which arises from the contents of the deed itself, and from certain portions of the correspondence which has been put in partly by the plaintiffs and partly by the defendants. In the first place, did they know of any actual improperly exercised or undue influence in fact? I have no evidence whatever to fix them with such knowledge, because I have in fact, as I have said, no evidence upon which I can rely to shew that there was undue pressure. Did they know the ages of the plaintiffs? There is no evidence with regard to that at all except that they knew they were issue of the marriage which followed upon the marriage settlement of June, 1851, and therefore it may be said that they probably knew about what was the age of the plaintiffs. Did they know that they were resident under their father's roof, or that they were in any way under his control, or that they were not emancipated from his control? It appears to me that in that respect there is nothing whatever to shew they had knowledge. On the contrary, I observe that the letters referred to a meeting of the family and friends which was to take place about Easter of that year, at which the father expressed his intention of endeavouring to arrive at some decision upon a proposition which

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was to be made on his and their behalf—that is, his creditors. If that suggestion were a true one it would seem to the defendants that the plaintiffs were assisted not merely by the solicitor who appeared to act for them, but also by certain family friends.

Now, again, with regard to the legal advice which the plaintiffs had. It is quite plain that Mr. Collis purported to act for them, and that he not only did that but the letters shew that he fully realised the nature of the duty which he had undertaken, because in one of the early letters he refers to this matter as being one of a delicate description. Finding, therefore, that a solicitor was purporting to act for the plaintiffs, that they did according to their own evidence see him on some occasions with regard to business, when he appeared to have conversed with them upon some subject, they say they think it was upon that transaction about transferring the money from one security to the other, seeing that he had realised the nature of the duty which he had undertaken, am I to come to the conclusion that he did not perform his duty to them? I cannot come to any such conclusion; and therefore, unless I were prepared to hold that it is absolutely necessary that the solicitor advising the children should be a separate person from the solicitor advising the parent, I am unable to find that the defendants had notice of any of the circumstances from which undue influence can be inferred. For aught they knew, they were children acting independently in the matter, and so indeed the father stated they were—that is not to be passed over. In one of his letters he stated that they were each of them acting independently. I say, therefore, that the defendants were entitled to come to the conclusion that the children were resident away from their father, not under his control—fully emancipated from him, assisted by the advice of their friends, and assisted by the advice of a solicitor who was bound to do his duty by them.

I come, therefore, to the conclusion that the plaintiffs have not brought home to these defendants knowledge of the circumstances from which the equity invoked

arises, and as against them therefore the action must be dismissed with costs.

As against the father I must make a declaration, with costs, that the deed is not binding in any way upon the plaintiffs.

There was one additional fact which I should have mentioned. I have intended to advert to the circumstance that in the description given of the children in the deed there is no place of residence given, and therefore there is nothing to shew where they were at the time.

Solicitors—J. H. Lydall, for plaintiffs; Roberts & Barlow, for defendants.

FRY, J. }
1881. }
May 19, 20. }

In re MIDDLETON.
THOMPSON v. HARRIS.

Administration Action—Costs—Will—Intestacy as to Real Estate.

A testatrix gave certain legacies, and died intestate as to her residuary personalty, and as to her real estate:—Held, that the entire costs of an action, brought by the heir-at-law, to administer the real and personal estate, were payable, primarily, out of the residuary personal estate.

Further consideration.

This was an action brought by Myra Thompson, one of the co-heiresses-at-law of Elizabeth Middleton, against the surviving executor of her will for the administration of her real and personal estate.

Elizabeth Middleton, by her will dated the 11th of February, 1868, gave certain specific and pecuniary legacies.

She died in June, 1876, intestate as to her real estate and as to the residue of her personal estate.

The statement of claim alleged that the plaintiff Myra Thompson was one of the co-heiresses-at-law, and (contrary to the fact) that she was also one of the next-of-kin of the testatrix.

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On the 12th of January, 1877, the usual administration decree was made, and enquiries were directed who were the heirs-at-law, and who were the next-of-kin of the testatrix living at the time of her death. Considerable difficulty arose in finding the other co-heiress-at-law. It appeared from the chief clerk's certificate, dated the 11th of March, 1881, that the plaintiff (then Myra Thompson, widow) was one of the two co-heiresses-at-law of the testatrix; and that Thomas Petchey was the only next-of-kin.

A question now arose on further consideration, whether the costs of the action (including the costs of the enquiry as to who were the heirs-at-law) ought to be apportioned between the real estate and the residuary personal estate, or whether they ought to be borne by the residuary personal estate exclusively.

Mr. Cookson and *Mr. Nalder*, for the plaintiff.—The residuary personal estate is the primary fund for the payment of the costs of an administration action—

Pickford v. Brown, 2 Kay & J. 426;
25 Law J. Rep. Chanc. 702;

Stringer v. Harper, 26 Beav. 585; 28
Law J. Rep. Chanc. 643;

Randfield v. Randfield, 11 W.R. 847.

Mr. E. Beaumont, for the legal personal representatives of Thomas Petchey, the only next-of-kin.—These costs ought to be apportioned, and not thrown entirely on the personal estate—

Christian v. Foster, 2 Ph. 161; 16
Law J. Rep. Chanc. 119;

Johnston v. Todd, 8 Beav. 489;

Sanders v. Miller, 25 Beav. 154;

[*Fry, J.*—In

Morgan on Costs, p. 117,

it is stated that the decision in

Sanders v. Miller (*ubi supra*)

is contrary to the current of authority.]

There was no necessity for this action. All the cases in which the costs have been thrown on the personal estate have proceeded upon the assumption that an administration suit was necessary.

In

Stringer v. Harper (*ubi supra*),
relied on by the plaintiff, the intestacy was only as to a small part of the real estate.

He also referred to

Bipley v. Moysey, 1 Keen, 578.

Mr. Dunn, for the defendant, the executor.

Mr. Cookson was not called upon to reply.

Fry, J.—In this case the testatrix gave certain specific legacies, but died intestate as to her residuary personalty and as to her real estate. One of the co-heiresses-at-law has commenced an administration action, suggesting (contrary to the fact) that she was one of the next-of-kin. The Court has thought fit to pronounce judgment for the administration of the real and personal estate; and the question now arises, whether the entire costs are to be borne by the residuary personal estate, or whether they are to be apportioned between the real and the residuary personal estate.

If the matter were *res integra*, I should be inclined to hold that the costs should be paid rateably. But this question has been the subject of a series of decisions; and I should be merely making new law if I were not to follow them. In many respects the law favours the heir; and one of the benefits enjoyed by the heir is, that, when an action is brought to administer the real and personal estate, the costs are to be borne by the personal estate in the first instance. For that *Pickford v. Brown* is a very strong authority. There two suits having been instituted to obtain the decision of the Court upon the construction of a will—one as to the testator's real, and the other as to his personal estate—it was held that the costs of both must be borne by the personal estate in the first instance.

And that it makes no difference that the real estate is real estate descended seems certainly to have been decided in *Stringer v. Harper*. And, independently of that decision, I cannot think that that fact would make any difference.

In my opinion, Vice-Chancellor Kingsley was well founded in the observation he made (in *Randfield v. Randfield*) that "there was no case in which, there not being a mixed fund by conversion, the Court had determined there should be an apportionment." No doubt, in

In re Middleton.

Sanders v. Miller, the Master of the Rolls apportioned the costs; but I cannot help thinking that, in that case, his Honour proceeded upon the mistaken impression that there was a trust for conversion. Whether that be so or not, that case is contrary to the current of authority.

It is said that this action is unnecessary; but the answer to that is, that the Court has thought fit to pronounce judgment for the administration of the real and personal estate. I think there is nothing in the circumstances of this case to make it an exception to the usual rule, that the costs are payable out of the general personal estate only.

Solicitors—E. Woodard, for plaintiff; W. C. Clennell, for defendant; Beaumont & Son, for next-of-kin.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.	} ROBINSON v. PICKERING.
JAMES, L.J.	
LUSH, L.J.	
1881. Feb. 23.	

Married Woman—Separate Estate—Injunction to Restrain Dealing with—Judicature Act, 1873, s. 25. sub-s. 8.

The Court will not, in an action by a creditor who has dealt with a married woman on the faith of her separate estate, grant an injunction to restrain her from parting with that estate until the creditor has established his right by obtaining judgment.

Appeal from a decision of Malins, V.C.

The plaintiff, a linendraper, brought an action against Mr. and Mrs. Pickering and the trustees of their settlement for a declaration that he had a charge upon the separate estate of Mrs. Pickering in respect of goods supplied to her, and to obtain an injunction to restrain the trustees of the settlement under which certain chattels and furniture were held upon trust for her separate use absolutely,

from selling or dealing with that separate estate pending the trial of the action.

The plaintiff by his affidavit stated that he had supplied the goods to Mrs. Pickering on the credit of her separate estate and with the intent to charge the same.

Upon the motion of the plaintiff, Malins, V.C., granted the injunction until judgment in the action or further order.

The husband and wife appealed.

Mr. A. a'B. Terrell, for the appellants, contended that the plaintiff having obtained no charge on the separate estate could not have such an injunction as he asked, and referred to

Johnson v. Gallagher, 3 De Gex, F. & J. 495; 30 Law J. Rep. Chanc. 298;

Owens v. Dickenson, Cr. & Ph. 48;
Murray v. Barlee, 4 Sim. 82; 3 Myl. & K. 209; 3 Law J. Rep. Chanc. 184.

Mr. Dundas Gardiner, for the plaintiff.—
The Judicature Act, 1873, s. 25. sub-s. 8,

authorises the Court to grant an injunction whenever expedient. A married woman is not subject to the bankruptcy law, and therefore her property cannot be preserved, as in the case of an alleged debtor, by the creditor issuing a debtor's summons and taking proceedings in bankruptcy against the debtor.

JESSEL, M.R., thought, with great respect to the Vice-Chancellor, that the order had been made improvidently, without regard to the settled law on the subject. The general engagements of a married woman, contracted on the faith of her separate property, no doubt bound that property in this sense, that the creditor could obtain a judgment against the separate estate and could then obtain payment out of it. The married woman stood in much the same position as a man did who under the old law could not be made a bankrupt. The creditor could not get meane process against the property until he had established his right by a judgment. If this were not so, every married woman who depended on her separate estate would be left to starve if somebody alleged that she was indebted

Robinson v. Pickering, App.

to him. According to well-established principle and settled law creditors of a married woman who had obtained no judgment could not interfere with her right to deal with her separate property.

JAMES, L.J., was entirely of the same opinion. At one time there was a notion that the engagements of a married woman were in the nature of charges on her separate estate. But it was afterwards pointed out that the relation was only that of debtor and creditor with a right to go against the particular fund. If there was a charge, then, as was pointed out by Lord Cottenham in the case of *Owens v. Dickenson*, different creditors would have priority in the order of date of their charges. The creditor's only right was to get judgment for his debt, and then execution would go against the separate estate. He agreed with the Master of the Rolls that a creditor could no more obtain such an injunction against a married woman than against a man.

LUSH, L.J., concurred, holding the law to be quite settled on the point.

Solicitors—Elmalie, Forsyth & Sedgwick, for appellants; T. A. G. Powell, for plaintiff.

FRY, J.
1881.
May 3. }

BROOKE v. BROOKE.

Evidence—Improvement of Jurisdiction of Equity Act, 1852, s. 22.

The attestation of execution of an instrument in a colony necessary to make it receivable as evidence need not have been made for the purpose.

Mr. Cookson (Mr. Nalder and Mr. Hubert Lewis with him), for the plaintiff, tendered in evidence a release executed in Montreal, Canada, signed and attested under seal by a notary public, in accordance with the law of the colony.

Mr. Westlake (Mr. Bradford with him) objected, on the ground that there was no evidence that the person professing to

act as notary was a notary, or of his handwriting.

Mr. Cookson.—It is under section 22 of the Chancery Procedure Act, 1852, that the application is made, and any document can be used as evidence if bearing the seal of a notary—

Armstrong v. Stockham, 24 Law J. Rep. Chanc. 176.

Mr. Westlake.—In that case the document in question, a power of attorney, was made for the purpose of being used in the proceeding, and here the document is not *ejusdem generis* with those specified in the section.

FRY, J., said—A document is tendered to me which bears a notarial seal. The only objection to that evidence is, that the person appearing to act as a notary is not shewn to be a notary. The enactment under which it is sought to put the document in is the 22nd section of the Chancery Procedure Act, 1852. Now the words of that section are somewhat peculiar. It provides that the Court "shall take judicial cognisance" of pleas, answers and certain enumerated matters, "and all other documents to be used."

In my judgment, the only true construction of the section is that it includes all documents to be used in the Court, and that this is a document to be used in the Court.

I will only make this further observation, that it would appear to me somewhat absurd if two documents could be certified by the same notary and the seal affixed on the same day, and I could look at one but could not look at the other. That is a conclusion I should not willingly arrive at and it appears to me the statute did not mean. I shall therefore admit the document.

Solicitors—W. H. Nicholls, for plaintiff; C. E. Goldring, for defendant.

[IN THE COURT OF APPEAL.]

JAMES, L.J.
COTTON, L.J.
LUSH, L.J.

SALT v. COOPER.

1880.

Dec. 18, 21.

Equitable Execution—Delivery of Debtor's Lands in Execution—Appointment of Receiver—Prior Appointment of Receiver by Bankruptcy Court—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 12, 13, 95, sub-s. 2—Practice—Appointment of Receiver after Final Judgment—"Cause or matter pending"—Judicature Act, 1873, s. 24, sub-s. 1, 4, 6, 7—Rules of Court, 1875, Order XLII.

S., having obtained final judgment in an action against C. for a debt and costs, issued an *elegit*. C. having only some leasehold property which was in mortgage and the mortgagees in possession, the sheriff returned that he had no lands, goods or chattels which could be seized. On the 14th of September, S., not earlier than 4 P.M., obtained from a Judge in chambers the appointment of a receiver. At 3.45 the same day a receiver and manager was appointed of C.'s rents and profits by the Court of Bankruptcy, upon a petition for adjudication in bankruptcy filed on that day against C. upon an act of bankruptcy committed on the 13th of September. S. had not, prior to the appointment of the receiver on his application, any notice of any bankruptcy proceedings against C., or of any act of bankruptcy committed by him.

Subsequently the bankruptcy proceedings were turned into proceedings for liquidation by arrangement, and trustees were appointed.

The mortgagees having sold the mortgaged property, there remained a surplus in their hands:—

Held (by the Court of Appeal, affirming the MASTER OF THE ROLLS), that the receiver of the Court of Bankruptcy having legal, although not actual, possession from the moment of his appointment, the subsequent equitable execution obtained by S. was ineffectual; and that the seizure by the sheriff, after the Court of Bankruptcy had taken possession of the property by its receiver, was not such a lawful seizure as is protected by the 95th section of the Bank-

ruptcy Act, and therefore the trustees in the liquidation were entitled to the surplus. Held (by the MASTER OF THE ROLLS), that the receivership in bankruptcy was a good receivership until the receiver was discharged, and that the conversion of the bankruptcy proceedings into proceedings for liquidation by arrangement did not in any way affect his appointment. Held (also by the MASTER OF THE ROLLS), that after final judgment in an action a receiver may be appointed (although the writ contains no claim for a receiver) without the issue of any fresh writ, so long as the judgment remains unsatisfied, the action being in such a case "a cause or matter pending" within the meaning of the Judicature Act, 1873, s. 24, sub-s. 7.

On the 2nd of September, 1880, judgment was given in this action (an action in the Queen's Bench Division for goods sold and delivered) for the sum of 165l. 14s. and costs. On the same day a writ of *elegit* was issued and lodged with the sheriff of Yorkshire. On the 7th of September the sheriff returned that there were no lands, goods or chattels which he could seize—all Cooper's property being in mortgage.

On the 14th of September a petition for adjudication in bankruptcy against Cooper was filed in the Huddersfield County Court by a creditor on an act of bankruptcy committed the day previous, and at 3.45 of that day Carter was appointed by that Court a receiver and manager.

On the same day (not earlier than 4 P.M.) an order was made in the action by Mr. Justice Stephen, sitting in chambers, appointing Corbidge a receiver of the rents and profits of Cooper's leasehold property, such appointment to be without prejudice to the right of any prior incumbrancers, and if any prior incumbrancer was in possession, then without prejudice to such possession.

Both receivers gave the mortgagees notice of their appointment.

The mortgagees soon afterwards sold the property and realised more than enough to satisfy the mortgage debt.

On the 24th of September Cooper presented a liquidation petition, and on

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the 25th Carter was appointed receiver in the liquidation.

At a meeting on the 18th of October resolutions were passed for liquidation of Cooper's affairs by arrangement, and trustees appointed, and all further proceedings on the bankruptcy petition were stopped.

On the 23rd of October the action was transferred to the Chancery Division and attached to the Court of the Master of the Rolls, and on the 29th of October the trustees in liquidation were, by an order, added as parties to the proceedings.

The plaintiffs had no notice until the 29th of September of the bankruptcy petition, or the liquidation proceedings, or of the committal by Cooper of an act of bankruptcy.

The plaintiffs moved on the 4th of December, before the Master of the Rolls, that the order appointing Corbridge receiver might be extended so as to enable him to receive all surplus moneys in the mortgagees' hands arising from the sale of Cooper's leasehold estates, and that the receiver might be directed out of such moneys to pay the plaintiffs the debt and costs, and pay the balance to the trustees under the liquidation.

The writ in the action did not ask for the appointment of a receiver.

An objection was raised before the Master of the Rolls by the trustees in liquidation that the plaintiff having obtained final judgment in the action, the appointment of a receiver afterwards in the action was irregular, and that the writ not asking for a receiver, a new action was necessary for the purpose of obtaining a receiver.

Mr. Ince and *Mr. W. O. Fooks*, for the plaintiffs.

Mr. Macnaghten and *Mr. Oswald*, for the trustees in liquidation.

The Master of the Rolls dismissed the motion.

THE MASTER OF THE ROLLS (on Dec. 4).—The present motion raises points of great importance and, I must say, also of very great difficulty.

The first question is, Whether, in an action brought in the High Court of

Justice, where judgment has been obtained against a debtor and it appears that the debtor is possessed of property—either freehold or leasehold, here it is leasehold—which, by reason of the existence of a prior mortgage vesting the legal estate in some prior mortgagee, cannot be taken by the sheriff under a writ of *elegit*, the Court or the division of the Court in which the action is brought can give what is called equitable execution—that is, can grant a receiver, on motion only in the original action; or whether it is absolutely necessary and indispensable that, before making a motion for a receiver there should be another piece of paper issued called a writ, with the same plaintiff and the same defendant, but indorsed with a claim for that equitable execution. That is the question I have to decide. It is by no means so trivial as it looks when so stated, because we must not forget that in our law in former times, and not so very long ago, formality produced enormous effects on men's rights. So that it by no means follows that this is an unimportant question, although, if decided one way, the only result would be that practitioners in future would expend the necessary 5s. for the purpose, and issue a second writ; and, indeed, until the question is decided by the Court of Appeal, I should advise practitioners to do so, although my own opinion is that it is not necessary (1).

The question really depends, in my opinion, upon the construction to be put on the Judicature Act, 1873, and in putting a construction upon that Act one must have regard to the purview of the Act and especially to the expressed intention of the Legislature in passing it.

I do not think Order XLII. of the Rules of Court, 1875, affects this question at all. I think this order meant to prescribe how execution may be issued by the parties. Though the Order does not say so in so many words, you will see at once, on looking at it, that execution may be enforced in any of the modes in which

(1) See a decision of the Court of Appeal in *Smith v. Cowell* (50 Law J. Rep. Q.B. 38; Law Rep. 6 Q.B. D. 75), where it was held unnecessary.

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the judgment might have been enforced at the time of the passing of the Act. Then you find what those modes of enforcement are—writ of possession, writ of sequestration, writ of attachment or committal. Then, under rule 6, writs of execution are to include *fiery facias, elegit*, and all subsequent writs which may be issued for giving effect thereto; and then the rule goes on to say “any such process,” and so on, evidently referring, in my opinion, to the writs.

Then we are thrown back upon the Act itself, and we must recollect what the main object of the Act was, which is, to assimilate the transaction of equity business and common law business by different Courts of judicature. It has been sometimes inaccurately called “the fusion of law and equity;” but it was not any fusion or anything of the kind—it was the vesting in one tribunal the administration of law and equity in every cause, action or dispute which should come before that tribunal. Then as to that very small number of cases in which there is an actual conflict, it was decided that in all cases where the rules of equity and law were in conflict the rules of equity should prevail. That was to be the mode of administering the combined jurisdiction.

That being the position of the tribunal, let us see what directions were given it as to the mode in which it should administer the combined jurisdiction. The new tribunal consisted of two divisions—the High Court of Justice and the Court of Appeal.

[His Lordship then read section 24, which is the main section as to the combined jurisdiction, referring to sub-sections 1, 4 and 6, and read sub-section 7, as having an important bearing on the question before him, and proceeded:]

The clause clearly applies to any remedy whatever. The claim must be brought forward in the cause, and must relate to the matter in dispute in the cause; but beyond that I see nothing to qualify the clear indication of intention that multiplicity of legal proceedings is to be avoided. Again, it is not merely the original claim; it is “any” claim that may be brought forward in the matter;

that is to say, any claim as regards the “cause or matter,” pending.

A cause is still pending even though there has been final judgment given, and the Court has very large powers in dealing with a judgment until it is fully satisfied. It may stay proceedings on the judgment, either wholly or partially, and the cause is still pending, therefore, for this purpose, as it appears to me, and must be considered as pending, although there may have been final judgment given in the action, provided that judgment has not been satisfied. And, indeed, an interpretation has been put by the Court on the word “proceedings” in sub-section 5 of the same section with regard to a “stay of proceedings in any cause or matter pending:” namely, that that must, of course, be construed to mean a stay of execution on a judgment, although that judgment might not be satisfied; so that the party must apply in the cause or matter pending, and cannot bring a new action for the purpose. I think, therefore, that the words of sub-section 7 are large enough to include the case before me.

That case is simply this: It is an action for a money demand, in which the plaintiff asks a Court of justice to compel the defendant by means of legal process to pay what is due to him. The plaintiff comes to Court for no other purpose than to ask the Court to use that constraint which the law can impose upon the defendant to compel payment to the plaintiff of his money demand. The question in dispute in such an action may sometimes be the amount due, but it more often is the mode of obtaining payment. That being so, the Court gives judgment against the defendant, by which it declares and ascertains the amount due and orders the defendant to pay it. The defendant disobeys the order of the Court, and then the Court is asked to compel him to pay; and the only mode, which, as a general rule, the law now recognises of compelling him to pay, is by taking away his property, realising it and applying the proceeds in payment of the plaintiff's demand. I leave out of consideration the exceptional case of attachment, because, as a general rule, that is not the mode

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necessary to be adopted. The mode I have stated of compelling payment we call execution; it is the obtaining in some shape or other, by legal process, possession of the defendant's lands or goods, selling them, paying the consequent expenses, and out of the proceeds paying the demand. This mode of enforcing payment seems to me to be plainly "a proceeding in the cause or matter;" and the claim brought forward by the plaintiff that he may be paid the amount of his demand out of the proceeds of the goods or lands of his debtor, when the possession of or title to those lands or goods is disputed, is certainly a "claim brought forward"—and I should say properly brought forward—"in the cause or matter." Then there were various modes of attaching the lands or goods of the defendant known to the law and within the jurisdiction of the Courts, which jurisdiction was amalgamated by the Judicature Act, and made exerciseable by any single Court. One of the modes was by writ of *feri facias*; another mode was by writ of *elegit*; a third by the appointment of a receiver by the Court of equity, when the other modes proved ineffectual by reason of the imperfection of the statutes which authorised the sheriff to deal with the property of the debtor. This mode of proceeding by the appointment of a receiver was called equitable execution. It was a mere mode of doing that which the plaintiff asks the Court in every action to do, namely, to realise the debtor's property, so as to produce the sum demanded. Prior to the Judicature Act, the Courts of equity, before granting equitable execution, required to be satisfied of two things: first, that the plaintiff in the action had tried all he could to get satisfaction at law, and then that the debtor was possessed of that particular equitable interest which could not be attached at law. As a rule your money demand could only be fully recognised in a Court of law. Most money demands were only cognisable there; and therefore, as a rule, when you had a mere money demand, you were compelled to bring an action in a Court of common law to recover it; and then, when you had got your judgment, you were com-

pelled to bring a new action—then called a suit in equity—by bill to enforce the judgment.

Now that appears to me to be the very imperfection which the Judicature Act was intended to remedy. You were not to be obliged to go from one Court to another upon such a simple matter as the enforcement of a judgment, but the Court is to grant all such remedies as the parties may be entitled to in the matter pending, "so that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided."

The very object of transferring the jurisdiction to one Court was that it might do everything without the necessity of going to another Court; and that being so, where is the necessity of going to another Court when you find that the Act itself not only prevents another Court interfering in the action after judgment, but drives you to apply to the Court in which the original action was brought, even though the ground of the application may be a subject of equity? Before the Judicature Act, if there was an equity which could only be brought before a Court of equity, you could file a bill to restrain judgment, and that might have been done even after judgment recovered; but that has been put an end to, and you must now go to the same Court to deal with the judgment. Upon the same principle you ought to go to the same Court to deal with its own judgment, when you are not staying it, but seeking to carry it out and enforce it.

Upon the whole I think that I should be deciding against what appears to me to be the plain view of the Act of Parliament were I to decide that the issuing of another writ was essential in order to obtain the full effect of a judgment of the Court which originally pronounced it.

Passing from that I come now to another question, which is one of some singularity. The creditors in the action issued their writ of *elegit*, and they could get nothing by it, because the land in question was vested, as to the legal estate, in the mortgagee. Thereupon they applied to Mr. Justice Stephen in chambers sitting as a

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Judge of the Queen's Bench Division for a receiver, the application being made upon an affidavit of facts. There can be no doubt that, before the Judicature Act, if the plaintiffs had filed a bill stating those facts, they would have got their receiver; nor is it suggested that except for this ceremony of issuing a writ between the same persons and asking for a receiver, there was anything that was wanting. But they only got this receiver about, but not earlier than, four o'clock in the afternoon of the 14th of September, and it is proved by affidavit that on the very same day, at a quarter to four o'clock, the Huddersfield County Court, which had jurisdiction over the matter, had made an order granting a receiver and manager; so that that order was quite complete about a quarter of an hour before the order of Mr. Justice Stephen was made, and the debtor was liable to be committed if he interfered with the receiver appointed under that order, he having committed an act of bankruptcy on the 13th of September. What then was the effect of the receivership so created by the County Court? It appears to me it gave that receiver a legal right against everybody except the mortgagees who were in actual possession. If Mr. Justice Stephen had been made aware that a receiver had been appointed at a quarter to four on the same day by the County Court of Huddersfield, that Court having jurisdiction to make the order, he would have been bound to refuse, and would have refused, to make the order he did; he could not have made an order for a receiver to interfere with the receiver of the Court of Bankruptcy—the order would not have had any effect whatever. A receiver was sometimes appointed by the Court of Chancery, and I suppose may still be appointed by the Chancery Division, not to act until some other receiver who has been appointed in some other proceeding was discharged. That might perhaps have been done in this case, and that would still have been equitable execution in the way of seizing the property. Still nothing of the kind was done, and Mr. Justice Stephen's order was properly made on the information before him, because it saved the rights of

the prior incumbrancers. That being so, if the bankruptcy proceedings had gone on, there could, in my opinion, have been no question at all. The bankruptcy receiver was in possession, and properly in possession, before the appointment of a receiver in the action; and it is impossible therefore that the receiver in the action could have got possession under Mr. Justice Stephen's order, or that it could have amounted to an equitable execution against the receiver in bankruptcy.

[His Lordship then adverted to the fact of the bankruptcy proceedings having been turned into proceedings for liquidation by arrangement, and to the argument raised by the plaintiffs, that the effect of those liquidation proceedings was to destroy the appointment of a receiver in the bankruptcy, and proceeded:] In order to try that question one must ascertain for whom the bankruptcy receiver would have received under the existing circumstances. He was not appointed until the 14th of September. There was an act of bankruptcy committed by the debtor on the 13th of September, and the title of the trustee under the liquidation proceedings therefore related back to the 13th of September, and he would consequently be entitled to take from the bankruptcy receiver anything he received or might have received from and after that date. Can it be possibly said that the jurisdiction in bankruptcy is so absurd, that when a receiver has been appointed in the proceedings in bankruptcy to protect the property of the debtor for the creditors, and those proceedings are turned into liquidation proceedings giving a title to the trustees to the very property so protected, that is to operate, not as a discharge of the receiver from the time the trustees were appointed—as it does—but as a discharge of that receiver *ab initio*, so that the property which he was appointed to preserve shall not pass to the creditors whose title was intended to be protected and maintained by that very appointment? Independently of the rule in bankruptcy which says that the Court may adopt the bankruptcy proceedings—and of course it may—I think the facts themselves shew an adoption. The moment the receiver is discharged he has

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to pass his accounts to the Court which appointed him, and that assumes that he is to pay the balance to the person to whom it belongs. If he had received the money from the mortgagees under the notice to them, it would have belonged to the trustees in the liquidation; he would have passed his accounts in the bankruptcy, and would have paid over the balance to them. Can it be said that by the mere fact that the sale did not take place till subsequently the rights of the parties changed, and that the rights of the receiver in bankruptcy therefore ceased? I should be casting ridicule upon the procedure in bankruptcy if I were so to decide.

I think, therefore, it must be held that the receivership in bankruptcy was still a good receivership until the receiver was discharged, and that all the property of which he took actual or legal possession, or such possession as he could obtain, as he did by the simple notice to the mortgagees to pay, would be received by him and held by him for the benefit of the persons entitled to these proceeds—in this case the trustees. Consequently the trustees must be held entitled to the surplus moneys in question.

The plaintiffs appealed.

Mr. Winslow and Mr. W. O. Fooks, for the appellants.—The appointment of the receiver in the action was a good equitable delivery in execution under 27 & 28 Vict. c. 112. s. 1—

Hatton v. Haywood, 43 Law J. Rep. Chanc. 372; Law Rep. 9 Chanc. 229;

The Anglo-Italian Bank v. Davies, 47 Law J. Rep. Chanc. 833; Law Rep. 9 Ch. D. 275;

Ex parte Evans; in *re Watkins*, 48 Law J. Rep. Bankr. 97; 49 *ibid.* 7; Law Rep. 11 Ch. D. 691; *ibid.* 13 Ch. D. 252.

Before delivery in execution or taking possession there must be seizure in fact or law. The appointment of a receiver operates in this case as a seizure in law, and we are therefore protected under the 95th section of the Bankruptcy Act, 1869 (sub-section 2), it being an execution executed by seizure before adjudication,

without notice on our part of any act of bankruptcy committed by the debtor.

The receiver in the Court of Bankruptcy is only appointed to hold the property until it is determined whether or no there will be an order for adjudication made or whether a trustee will be appointed, and the appointment of a receiver in no way interferes with the right of judgment creditors.

They referred to

Ex parte Locke & Co.; in *re Hall*, 40 Law J. Rep. Bankr. 70; Law Rep. 6 Chanc. 795;

and

The Bankruptcy Act, 1869, s. 12, as protecting the rights of secured creditors, and section 16 (sub-section 5) as giving the definition of "secured creditor."

Mr. Macnaghten and Mr. Oswald were not called upon.

JAMES, L.J.—I am of opinion that the decision of the Master of the Rolls was right.

The question is, whether a receiver appointed by an execution creditor can lawfully seize property which the Bankruptcy Court has already taken hold of by the appointment of a receiver. The very object of appointing a receiver in bankruptcy is to prevent the seizure of the bankrupt's assets by the execution creditors. When the 95th section of the Bankruptcy Act (sub-section 2) speaks of an execution executed by seizure before the date of the adjudication, it must be taken as meaning only an execution which could have been lawfully executed by lawful seizure; but this being a seizure by the sheriff after the Court of Bankruptcy has taken possession of the property by the appointment of its receiver, is not such a lawful seizure as is governed by the 95th section.

COTTON, L.J.—There is here no question under the 95th section. The execution creditor obtained, on the 14th of September, an order for the appointment of a receiver of the rents and profits of the debtor's leasehold property which was subject to mortgages. That would have been a good equitable execution but for

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this, that earlier on the same day the Court of Bankruptcy had appointed a receiver. The very object of enabling the Court of Bankruptcy to appoint a receiver is to prevent other persons seizing the debtor's property. Under these circumstances the Court of Bankruptcy held the property, and thus prevented the execution creditors getting what they would otherwise have got. There is no reason why the receiver appointed by the Bankruptcy Court should be postponed to the receiver appointed at the instance of the execution creditors. The receiver of the Court of Bankruptcy had legal though not actual possession from the moment of his appointment, and the property being thus in the hands of the Court of Bankruptcy, the subsequent equitable execution was ineffectual. I am of opinion that the decision of the Master of the Rolls is right, and that the 95th section has no application.

LUSH, L.J.—I am of the same opinion. The very object of appointing a receiver in bankruptcy is to protect and preserve the property for the benefit of the creditors in case the proceedings should terminate in bankruptcy. The 2nd clause of the 95th section must be read in connection with the other parts of the Act, and it assumes that the Bankruptcy Court has not got possession of the property. Here, by the 13th section, the act of the Court had already put this property into the Court's hands, and the equitable execution cannot affect it.

Solicitors—Stevens & Co., agents for E. K. Binns, Sheffield, for appellants; Layton & Jaques, agents for Ainley & Hall, Huddersfield, for respondents.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.

BRETT, L.J.

COTTON, L.J.

1881.

March 30.

CHATTERTON v. WATNEY.

Mortgage to three successive Mortgagees—Assignment of Third Mortgage—Sale by First Mortgagee—Judgment Creditor of Third Mortgagee—Garnishee Order against Mortgagor—Right to surplus Proceeds of Sale—Common Law Procedure Act, 1854, ss. 61 and 62—Rules of Court, 1875, Order XLV. rules 1 and 2—27 & 28 Vict. c. 112. s. 1.

A mortgaged leaseholds to B, C and D successively. X, a judgment creditor of D, obtained a garnishee order against A, attaching all debts due from A to D, to answer his judgment. Subsequently D assigned his mortgage to E. B, the first mortgagee, sold the property under his power of sale, and paid off himself and C; and there remained in his hands a surplus insufficient to satisfy the third mortgage. Upon the question of who was entitled to the surplus proceeds of sale,—Held (affirming the decision of BACON, V.C.), that X was not entitled, as against E, to the surplus proceeds of sale in B's hands, inasmuch as the liability of A as mortgagor to D, as third mortgagee, did not constitute a debt due from the garnishee to the judgment debtor within the meaning of section 61 of the Common Law Procedure Act, 1854, and Order XLV. rule 2 of the Rules of Court, 1875.

This was an appeal from the decision of BACON, V.C., reported *ante*, p. 227.

Mr. Horton Smith and Mr. Vernon Smith, for the appellant, the judgment creditor of the third mortgagee who had obtained the garnishee order against the mortgagor, urged the same arguments as in the Court below.

Mr. Macnaghten and Mr. Terrell, for the respondent, the assignee of the third mortgage, were not heard.

JESSEL, M.R., said—This is an appeal from a judgment of Vice-Chancellor BACON, deciding that a garnishee order

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against a mortgagor did not bind the proceeds of the sale of the estate in the hands of the mortgagee, and I think he was quite right. The order on which the question turns is the 45th Order of the Rules of Court, 1875, which gives a judgment creditor a right to attach debts due to his judgment debtor from third parties. The 3rd rule of that Order provides that the service of the garnishee order shall bind the debt in the hands of the garnishee—it is the debts that are to be bound—and then, under the 4th rule, if the garnishee does not pay, the Court may order execution against him to issue. Now the effect of those rules is simply that the attached debt is bound in the hands of the garnishee, and that he is liable to have execution levied for the amount of the debt; nothing more. Now at the time this garnishee order was obtained, Budden (the judgment debtor of the appellant) was third mortgagee of certain leaseholds of Margetts, the garnishee. If no other Act of Parliament had any bearing upon the matter, the question would have arisen, What was the effect of binding a mortgage debt? But the Act 27 & 28 Vict. c. 112. s. 1 says that no judgment shall affect any land until the land has been actually delivered in execution; and by the 2nd section, “judgment” includes “orders of Courts of equity and all other orders having the operation of a judgment,” and “land” includes “all hereditaments corporeal or incorporeal, or any interest therein.” The interest of the third mortgagee here is an interest in land, and the judgment against him cannot affect the land or his interest in it until it has been actually delivered in execution. It is clear, therefore, that the judgment against him did not affect the leaseholds of which he was mortgagee. But it is said that the service of the garnishee order on the mortgagor transfers the mortgage debt and carries with it the benefit of the security—in other words, operates as a transfer of the mortgage. That is a very bold suggestion and simply amounts to saying that the land can be got at before it is given in execution. But the object of the Act 27 & 28 Vict. c. 112 was not to assist creditors at all,

but was intended to deprive them of some of their rights, in order to make land more easily transferable, unless they got the land actually delivered in execution. In my opinion, therefore, the judgment creditor of Budden cannot get at the land by service of a garnishee order on the mortgagor, nor enquire what has become of it or the proceeds of the sale of it.

BRETT, L.J., said—I am of the same opinion. The whole argument of the appellant is founded on the assertion that the mortgage debt is transferred by the service of the garnishee order on the mortgagor, and that again is rested on the suggestion that that was the meaning of Lord Justice James in *Ex parte Jose-lyne* (1), where he says (p. 330), “The moment the order of attachment was served upon the garnishee, the property in the debt due from him was absolutely transferred from the judgment debtor to the judgment creditor. The garnishee could then only pay his debt to the judgment creditor of his original debtor. The property in the debt was transferred, and there was a complete and perfect security the moment the order of attachment was served.” Now there is no such word as “transfer” in Order XLV.; the words are, “shall bind such debt” in the hands of the garnishee; and although Lord Justice James used the word “transfer” in the passage I have read, in my opinion he must be taken to have used it colloquially with reference to the particular facts of that case, and only meant to say the same thing as is said in rule 3 of Order XLV., namely, that the debt was bound in the hands of the garnishee.

COTTON, L.J., said—I am of the same opinion, and am quite content to rest my judgment on the garnishee rules and orders, because they give the appellant no right to stand in the shoes of his judgment debtor so as to affect the land held by him as mortgagee. Well, now, what is the effect of a garnishee order? From the time it is served it binds the debts in the hands of the garnishee and

(1) 47 Law J. Rep. Bankr. 92; Law Rep. 8 Ch. D. 330.

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prevents him from paying it over to the judgment debtor of the garnishor, and if he will not pay it, the garnishor has the right to enforce payment by levying execution; and the 8th rule of the 45th Order says that payment to the garnishor is a good discharge to the garnishee. Therefore there is nothing in the rules of that order which can effect any security which the judgment debtor may hold for the debt that is attached. If the debt is paid by the garnishee, of course the mortgage debt is discharged *pro tanto* or altogether, as the case may be, and the mortgagee is thereby prevented from enforcing his security. But that is no transfer of the debt. In my opinion, therefore, the decision of the Vice-Chancellor was quite right.

JESSEL, M.R.—I wish to add that I quite agree that the garnishee rules do not operate to transfer the debt attached.

Appeal accordingly dismissed.

Solicitors—Peacock & Goddard, agents for W. H. Rowland, Croydon, for appellant; H. W. Chatterton, respondent, in person.

JESSEL, M.R. }
1881. } *EAGER v. FURNIVALL.*
April 4. }

Will—Devise to Daughter—Death before Testator—Curtesy—Wills Act (1 Vict. c. 26), ss. 3 and 33.

A testator, by a will made since 1834, devised freeholds to his daughter in fee simple for her separate use. She died before him, intestate, and having had issue capable of inheriting the freeholds:—Held, that her husband was entitled to an estate by curtesy in them.

W. H. Furnivall, by will made in 1872, devised a freehold estate to his daughter, Grace Eager, her heirs and assigns, for her separate use. She died intestate before the death of the testator (who died in 1875), having had issue a daughter, who was her heiress-at-law and was living

at the death of the testator. The husband of Grace Eager brought this action against the trustees of the testator's will who had received the rents and profits of the estate on behalf of the daughter, who was still an infant, and against his daughter, claiming to be tenant by curtesy of the estate and to be entitled to the rents and profits of it as from the death of the testator.

The defendants demurred.

Mr. Macaskie, for the trustees.—The case of

Cooper v. Macdonald, 47 Law J. Rep. Chanc. 373; Law Rep. 7 Ch. D. 288,

has decided that the fact of land being given to a married woman for her separate use preserves it from the interference of the husband, and enables her to dispose of it so as to deprive him of an estate by curtesy. Here she had no opportunity of disposition, and I submit that the principle of that case is that the husband is only to have curtesy when the wife, by not making any disposition, has shewn an intention that he is to have it. Assuming, however, that the Court is against me on that point, I say that the plaintiff cannot have an estate by curtesy, because the conditions necessary to entitle him to it have not been fulfilled. There has been no vesting of the land in the wife during the coverture, neither has there been any seisin in deed of it, both of which are essential.

The plaintiff relies on the 33rd section of the Wills Act. That, no doubt, makes a fictitious survivorship in such cases as the present, but it is not a survivorship for all purposes. Thus, in

Pearce v. Graham, 32 Law J. Rep. Chanc. 359,

a testator by his will, dated since the Wills Act, gave a legacy to his daughter, a married woman, who predeceased him, leaving issue and also her husband her surviving. The settlement made on her marriage contained a covenant that all property coming to her or her husband in her right during the coverture should be settled. Vice-Chancellor Kindersley held that notwithstanding the fictitious survivorship created by the 33rd section

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of the Wills Act for the purpose of preventing a lapse, the legacy was not acquired during the coverture within the meaning of the covenant, and was therefore not bound by the will.

[THE MASTER OF THE ROLLS.—Suppose a gift by will to a son who predeceased the testator but saved from lapse by the 33rd section: would not the son take as a purchaser?]

Possibly he would; but the section, though it treats a child as surviving for his own benefit, does not do so for the benefit of other persons. It does not do away with the necessity for anything else which the law requires in order to give a title. Here there has been no seisin either of the wife or of the husband in her right, which is a circumstance absolutely required—

1 *Cruise's Digest* (White's ed.) 140.

Mr. Cotterell, for the daughter.—The effect of the Act ought not to be extended beyond its object, which was only to prevent lapse in certain cases. In

Winter v. Winter, 16 Law J. Rep.

Chanc. 111; 5 Ha. 306,

Vice-Chancellor Wigram, speaking of this section, said, "The construction of the Act which alone will include all the cases which the Act must presumably be intended to include is that which makes the time of the legatee's death unimportant, provided he died after the Act came into operation, and the bequest is to him by a will made after that date; and, as far as I can see, that construction cannot possibly include any case not obviously within the purposes of the Act."

Mr. Warmington, for the plaintiff.—The Wills Act, in such a case as this, says in effect that the child shall be deemed to have survived the parent. Supposing that event had actually occurred, and then the daughter had died, the plaintiff would clearly have been entitled to an estate by curtesy; and I submit that the object of the Wills Act is to put matters on precisely the same footing in every respect as if she had survived.

[THE MASTER OF THE ROLLS.—I wish to hear you only on the question of seisin. There can be no curtesy without seisin, and how can there be seisin without entry?]

Your Lordship's decision in

Pickersgill v. Rodger, Law Rep. 5 Ch. D. 163,

shews that this property fell into the estate of the daughter so as to enable her to dispose of it. And such a power of disposition is a sufficient seisin to give the husband an estate by curtesy. In

The Executors of Perry v. The Queen, 38 Law J. Rep. Exch. 5; Law Rep. 4 Exch. 27,

it was held that personal estate, a gift of which was saved from lapse by virtue of the Act, was liable to probate duty as part of the child's estate.

[THE MASTER OF THE ROLLS.—In

Gibbins v. Eyden, 38 Law J. Rep.

Chanc. 377; Law Rep. 7 Eq. 371,

I find that Vice-Chancellor Malins said that "there can be no inchoate right to curtesy until the wife becomes entitled to an estate of inheritance in possession."]

When the 33rd section says that "such devise or bequest shall take effect as if the death of such person had happened immediately after the death of the testator," it must mean that it shall take effect for all purposes. The Act therefore either dispenses with seisin, or else supplies a seisin for this purpose.

He referred also to

Johnson v. Johnson, 3 Hare, 157; 13

Law J. Rep. Chanc. 79.

Mr. Macaskie, in reply.

THE MASTER OF THE ROLLS.—This is undoubtedly a new case, and, like most new cases under the statute, it is one which does not appear to have been foreseen by the draftsman or, as we generally say, the Legislature; and therefore one has to find out the meaning of the Legislature, or of the Act of Parliament, from the words used, and from the general purview and intent of the statute.

Now, decisions help one to a certain extent. In the first place, it is settled by *Johnson v. Johnson*, and a great many other authorities which have followed it, that though a gift by will to a child who predeceases the testator only takes effect in the event of there being issue of the devisee living at the testator's death, it is not a gift to the issue, but is to take effect exactly as if the actual death of

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the devisee had happened immediately after the death of the testator, and with all the consequences.

I cannot do better than quote the words of Vice-Chancellor Wigram in his judgment in that case. He says, "I stated my opinion at the conclusion of the argument that upon the construction of the 33rd section of the statute 1 Vict. c. 26, taken alone, a legatee within that section would take the same provision under his father's will and with the same powers and incidents of property as if he had actually survived the testator." Then he goes on to consider another question which is a very curious one and which was settled by that case—whether the words of the 3rd section, which only enable a testator to dispose by will of all that to which he was entitled at the time of his death, are extended constructively by the operation of the 33rd section, so as to make him entitled at the time of his death, and therefore to make the property pass by his will; and he held that it did. No doubt literally he was not entitled at the time of his death, but the Vice-Chancellor said that the section postponed his death, so to say, for this purpose, and in that way made him entitled at the time of his death. It put his death a day after the other testator's death, and therefore, if it was to take effect as if his death had happened immediately afterwards, it took effect with all its incidents, and among other incidents was the right to dispose by his will of the property he was entitled to at the time of his death.

That, therefore, decides that the property is either disposable by will, or descends in the case of an intestacy, as there is in this case. That being so, there is no doubt that the person to take would be the heir of the devisee, who under the Inheritance Act takes as a purchaser. All that is clear enough. But in the case of husband and wife it is by no means so clear. In the case of a husband, this being a devise of legal estate with a superadded direction as to separate use (which, as I held in the case of *Cooper v. Macdonald*, does not affect a devise of the legal estate), the husband would take under his legal rights, with-

out those legal rights being cut down by the superadded direction as to separate use.

Then the question arises whether, according to the law of curtesy as to legal estates, the husband is entitled to curtesy at all. Now, if you read the words of the section liberally, and read them as they have been read in the cases cited, it will be exactly the same as if the lady had died immediately after her father (the words of the statute are "immediately after"), and then the question comes as to whether the husband could have taken an estate by curtesy. Now, I consider it is settled law that, as a general rule, the husband cannot take an estate by the curtesy in property which was the fee-simple of the wife in possession unless there has been either entry or something equivalent to entry—such as a receipt of rent—to entitle the wife to be described as being seised in fee of the property. If it descends to the wife, for instance, and the husband does not enter in her right before her death, he does not get an estate by the curtesy; but though that is settled law there is a reason for the law, namely, that it is considered to be the husband's own fault for not entering. He had an estate during the coverture, and he has not taken due advantage of his opportunities of becoming seised. But where he cannot become seised owing to the nature of the estate, a seisin in law is sufficient, and he is not therefore deprived of his estate by the curtesy, because he could not possibly have obtained a legal seisin by any act of his own.

Now, let us apply that doctrine to the case before me. The wife having died in the testator's lifetime, by no possibility could the husband have obtained seisin during the lifetime of the testator, because the estate was not in his wife, and he could not have obtained seisin even under the section, because there was only a moment in which he could have done so. The effect of the Act is as if she had died immediately after—that is, a moment after her father. During that moment, the husband could not have obtained seisin—there was not time enough, and therefore by no possibility could he have obtained seisin. Therefore, if the rule is

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really a punishment on the husband for his negligence in not obtaining seisin where seisin could have been obtained by some act of his, and if that rule is modified where by no possibility could he have obtained seisin, it appears to me that the same rule should apply in a case like this where, by reason of the peculiarity of the estate of the wife, there was no possibility of obtaining such seisin.

Now that that is the law I think is pretty plain if you look at what perhaps is the best authority on the subject—*Coke upon Littleton*. At 29a there is this passage: "And first of what seisin a man shall be tenant by the curtesy. There is in law a twofold seisin, namely, a seisin in deed and a seisin in law. And here Littleton intendeth a seisin in deed if it may be attained unto." Now, those are not the words of Littleton, but Littleton says this: "Tenant by the curtesy of England is where a man taketh a wife seised in fee-simple or in fee-tail general, or seised as heir in tail especial, and hath issue by the same wife male or female born alive, albeit the issue after dieth or liveth, yet if the wife dies, the husband shall hold the land during his life by the law of England." So what I read before is not Littleton, but Coke's comment upon Littleton. He says, "If it may be attained unto." It is not an absolute rule, but only if he can get seisin. Then he gives an example: "As if a man dieth seised of lands in fee-simple, or fee-tail general, and these lands descend to his daughter, and she taketh a husband and hath issue, and dieth before any entry, the husband shall not be tenant by the curtesy, and yet in this case she had a seisin in law; but if she or her husband had during her life entered, he should have been tenant by the curtesy. A man seised of an advowson, or rent in fee, hath issue a daughter, who is married and hath issue, dieth seised; the wife, before the rent became due or the church became void, dieth; she had but a seisin in law, and yet he shall be tenant by the curtesy, because he could by no industry attain to any other seisin. *Et impotentia excusat legem.*"

Now that exactly applies here. There

is no possibility by which he could have obtained seisin *et impotentia excusat legem*, and consequently the seisin is not required.

That being my opinion, I think the husband is entitled for his life as tenant by the curtesy, and therefore the demurrer will be overruled.

Solicitors—Blanco White, for plaintiff; Rogers, Sons & Russell, and W. H. Herbert, for defendants.

[IN THE COURT OF APPEAL]

BANKRUPTCY.

JAMES, L.J.

BRETT, L.J.

COTTON, L.J.

1881.

March 17.

In re SNOWDON;
ex parte SNOWDON.

Sureties — Payment by one Surety of half of Debt—Right to Contribution from Co-surety—Petitioning Creditor's Debt.

A surety, unless he has paid the whole of the principal debt, or a part in satisfaction of the whole debt, or more than his share of the principal debt, is not entitled to sue his co-surety for contribution.

Davies v. Humphreys (6 Mee. & W. 153; 9 Law J. Rep. Exch. 263) approved and followed.

This was an appeal from the decision of Mr. Registrar Pepys, sitting as Chief Judge. On the 9th of December, 1876, T. Snowdon, the appellant, and one J. Hall executed a bond whereby they became jointly and severally bound to the National Provincial Bank of England as sureties for one R. Hall. The bond contained a provision that the sureties should not be called upon to pay more than a principal sum of 1,000*l.* in addition to interest, commission and other lawful charges.

In June, 1879, R. Hall, the principal debtor, became bankrupt, and there was then due to the bank the principal sum of 1,000*l.* and some interest. J. Hall, on the application of the bank, paid them 54*l.* 2*s.* 1*d.*, being half the principal and half the interest.

In re Snowden ; ex parte Snowden (App.), Bankr.

T. Snowden having refused to pay J. Hall half the amount he had paid the bank, J. Hall issued a debtor's summons against him claiming payment of 270*l.* 1*l.* 0*d.* the half of the 541*l.* 2*s.* 1*d.*

T. Snowden did not oppose the summons, and thereupon J. Hall presented a bankruptcy petition against T. Snowden founded on the debtor's summons.

At the hearing of the petition T. Snowden appeared by his solicitor and opposed the petition on the ground that the petitioner as surety could only recover against his co-surety the excess paid by him beyond his aliquot share of the loan, but the Registrar made an order of adjudication.

T. Snowden appealed.

It did not appear that the bank had called upon T. Snowden to pay his share of the debt and interest.

Mr. Horton Smith and *Mr. E. C. Willis*, for the appellant.—We say the debtor's summons was not grounded on a good petitioning creditor's debt, because J. Hall was only a co-surety of Snowden's and was not entitled to sue for contribution unless he had paid the whole debt, or a part of the debt in satisfaction of the debt, or more than his half share of the debt—

Davies v. Humphreys (ubi supra) ;

Robson on Bankruptcy (3rd ed.) p. 269.

If this adjudication stands, not only will the bank prove against us for 541*l.* 2*s.* 1*d.*, but also J. Hall for 270*l.* 1*l.* 0*d.* That is inequitable.

Mr. E. Linklater, for the respondent.

Davies v. Humphreys (ubi supra)

is a case at common law, but in equity a surety so soon as he has paid anything on account of the joint debt, can at once go against his co-surety and compel him to go hand in hand with him in contributing to the payment of the debt. The principle on which contribution in equity is enforced as between co-sureties is laid down in

Dering v. The Earl of Winchelsea,
White and Tudor, L.C. 89.

In

Ex parte Gifford, 6 Ves. 805, 808,

Lord Eldon distinctly says that if one

surety pays more than the other he is entitled to contribution ; and in

Oraythorne v. Swinburne, 14 Ves. 164,

he says, "It has long been settled that if there are co-sureties by the same instrument, and the creditor calls upon either of them to pay the principal debt, or any part of it, that surety has a right in this Court, either upon a principle of equity, or upon contract, to call upon his co-surety for contribution." That case was followed by Vice-Chancellor Malins in

Whiting v. Burke, Law Rep. 10 Eq.

539 ; affirmed, *ibid.* 6 Chanc. 342.

Spottiswoods's Case, 6 De Gex, M. & G. 345 ;

Lawson v. Wright, Cox C.C. 275 ;
are also in my favour.

I submit, therefore, that, having regard to the authorities,

Davies v. Humphreys (ubi supra) is no longer law and must be overruled, and that the respondent was entitled to contribution directly he had paid something on account of the common burthen.

No reply was called for.

JAMES, L.J.—I think that in this case there is no sufficient petitioning creditor's debt. There is no legal debt, and there is no equitable debt at present sufficient for the purposes of an adjudication. Now the right of contribution between sureties of course is that they shall bear the whole burthen of the debt equally, unless they have made themselves liable for it in unequal proportions. But there must be a legally ascertained debt before there can be any proceedings in bankruptcy by one surety against his co-surety. The proper course when a surety is called upon to pay the whole debt, for which he is liable with his co-surety, is to call upon his co-surety for contribution and to indemnify him against paying the whole ; and the only mode in which in equity you can compel a co-surety to pay his proportion of the debt is to shew that you have paid your proportion, or more than your proportion, of the debt, and are liable for the residue. Therefore, until a surety has paid the whole debt, or so much of it that it is clear he has paid more than his share, there can be no ascertained debt

In re Snowden; ex parte Snowden (App.), Bankr.

which will give him a right to sue his co-surety for contribution.

BRETT, L.J.—When parties are co-sureties for the debt of another, and are called upon to pay it, if the debt does not amount to the sum for which they had made themselves liable upon their bond, they are only liable to pay the amount actually due and no more. But if the debt exceeds the sum to which they have limited their liability in the bond, their liability is only to pay the amount mentioned in their bond. That is the limit to which they are sureties. When the amount of debt between the original creditor and debtor is ascertained, the amount may be the sum which the sureties are jointly liable to pay in the whole; but as between the sureties themselves, if one has paid the whole amount, then the claim for contribution against his co-surety arises. The claim against the co-surety does not arise when one has paid only his own half of the limit for which he signed the deed originally, but when he has paid on behalf of his co-surety some portion of the co-surety's part of the whole debt. That is the doctrine which was laid down in *Davies v. Humphreys*, which was a doctrine taken from the courts of equity and adopted by the courts of law. The doctrine laid down in *Davies v. Humphreys* has never been questioned, and it seems to have been absolutely in accordance with what Lord Eldon said in *Ex parte Gifford*. Therefore the decision in the case of *Davies v. Humphreys* remains untouched, that a co-surety has no claim against his co-sureties until he has paid more than his share of the debt due to the principal creditor. The debt in this case has not arisen under those circumstances, and therefore there was no claim by the petitioning surety against his co-surety for a liquidated sum, and therefore there was no good petitioning creditor's debt.

COTTON, L.J.—I am of the same opinion. The neat point here is, can a surety who has not paid more than his proportion of the debt for which he is liable with his co-surety, present a petition in bankruptcy against his co-surety? In my opinion he cannot. If he has paid more

than his proportion, then he can call upon his co-surety for contribution although the amount may be nothing like the total sum which the debt of the principal debtor has amounted to. In the case of *Lawson v. Wright* the co-surety guaranteed a liability of 320*l.* when the only sum due by the debtor was 100*l.*, and the surety claimed contribution; but in that case he had paid more than his proportion of the debt. In this case, in my opinion, no equity can arise against the co-surety while the creditor can still call upon him for his proportion of the principal debt.

Adjudication accordingly annulled.

Solicitors—Willoughby & Cox, for appellant
Linklaters, agents for F. T. Steavenson, Darlington, for respondent.

JESSEL, M.R. } *In re E. WARNER'S SETTLED*
1881. } *ESTATES. WARNER to STEEL.*
June 2. }

Succession Duty—Sale of Settled Estates by Authority of the Court—Settled Estates Act, 1877, s. 22—Succession Duty Act, s. 42.

The 42nd section of the Succession Duty Act applies to a sale of real estate under the Settled Estates Act as well as to a sale of such estate under a power in a settlement so as, in either case, to discharge the estate in the hands of the purchaser from any liability to succession duty.

Edward Warner, by will made in 1873, devised all his real property to his widow upon trust to raise thereout the annual sum of 600*l.* for the benefit of his son T. C. J. Warner, and subject thereto upon trust for herself for life, and after her death he gave the said property to his son absolutely in case he should be then living, but in case he should then be dead, leaving issue then living, then to such issue as therein mentioned, but in case he should be then dead without leaving issue then living, then the testator gave his real estate to his brother

In re Warner's Settled Estates.

absolutely, but in case he should be then dead without issue the property was to go as in the case of intestacy. The will contained no power of sale.

The testator's widow, his son (who had attained twenty-one) and his brother contracted to sell a portion of the property to T. J. Steel, subject to the approval of the Court, which was duly obtained.

The purchaser insisted that succession duty was payable in respect of the successions subsequent to the life tenancy, and required the same to be paid or compounded for before completion. The vendors denied that the succession duty so payable would remain a charge upon the land after it had been sold. The purchaser, therefore, took out the present summons (which was adjourned into Court), calling upon the vendors to shew cause why the succession duty expectantly payable on the death of Maria Warner, should not be paid or compounded for by the vendors, or some or one of them.

Mr. Chitty and *Mr. E. S. Ford*, for the summons.—The proviso in the 42nd section of the Succession Duty Act which, on a sale of settled real estate, transfers the duty from the property sold to that acquired in substitution for it, and charges it in the meantime upon the successor's interest in the sale moneys, only applies to settled estate "subject to any power of sale, exchange or partition, exercisable with the consent of the successor, or by the successor with the consent of any other person;" and does not apply to a case like this, where the settlement does not contain any power of sale. It could not have any reference to the Settled Estates Acts, for none of them had, at that time, been passed. The vendors rely upon the decision in

Dugdale v. Meadows, 40 Law J. Rep. Chanc. 140; Law Rep. 6 Chanc. 501;

but, as pointed out in *Davidson's Conveyancing* (vol. i. part 2, p. 313, 4th ed.), it is not recognised as valid by the Crown, and is manifestly wrong, for it ignores section 5 of the Act, and proceeds upon principles which apply only where the proceeds of sale are to be laid out in the

purchase of land or are to be retained by trustees.

Mr. Ince and *Mr. Humber*, for the vendors.—The authority of

Dugdale v. Meadows (*ubi supra*)

is recognised in *Hanson on the Succession Duty Act* (3rd ed. p. 331). But whether it be right or wrong, is not very material for our purpose. If this were a sale pursuant to an express power in the will, there could be no question that the 42nd section of the Act would relieve the property sold from duty. The object of the Settled Estates Acts and their effect (when the sanction of the Court has been obtained) is to read into every settlement a power of sale exercisable with such consents and by such persons as the Court shall direct. If it were not so the same succession duty would be chargeable on as many estates as there were sales of portions of the property originally settled. The succession duty in this case cannot be commuted, since the 41st section only authorises the commissioners to commute "upon application made by any person who shall be entitled to a succession in expectancy." It is impossible at present to say who those persons are, or at what rate duty will eventually be payable.

Mr. Chitty, in reply.

THE MASTER OF THE ROLLS.—I am of opinion that the land is free from succession duty. First, I will consider the ordinary case of a sale under a power contained in a settlement. The effect of the exercise of the power in the settlement is to revoke the uses, and consequently there is no succession left; there is nothing out of which the duty can be charged, and if there were no succession duty on personal property, the land would be free and the purchase-money too; but when there is a power of sale and a trust to lay out the money in the purchase of land in the meantime, until so laid out it is a settlement of the purchase-money. In this way the Crown has a charge on the purchase-money, as it will have on the land when a permanent investment is made. But the settlement of the land originally settled is entirely destroyed by virtue of the overriding power contained in the settlement itself, and with the

In re Warner's Settled Estates.

destruction of the settlement, the right to duty in respect of the land originally comprised in it goes. That being so, in my opinion, there can be no duty payable in respect of the land in the hands of the purchaser. I am led to assume that this is in accordance with the view taken by the advisers of the Crown, because it is so stated in both editions of Mr. Hanson's book, which I have before me, and it is also stated to be the author's view in the last edition of Mr. Davidson's book, in the paragraph immediately preceding that which discusses *Dugdale v. Meadows*. I should not have felt any difficulty without the assistance of the text-writers, but it is very satisfactory to find they have considered it, independently, in the same way.

This, however, is not a sale under a power of sale, but under the Settled Estates Act, 1877, and the question is, Is it also a sale which gets rid of the very succession as to which duty is claimed?

Now the 22nd section of the Settled Estates Act says that the conveyance executed by such person or persons as the Court shall direct, "shall take effect as if the settlement had contained a power enabling such person or persons to effect such sale, and so as to operate (if necessary) by way of revocation and re-appointment of the use." This being so, the result is exactly the same as if the limitation of uses had been revoked by a power contained in the settlement itself. The reasoning on the first supposition, therefore, exactly applies, and consequently I shall declare that no succession duty is payable by the purchaser, or otherwise, in respect of the estate. Of course it will be payable as regards the purchase-money or any future investment of it.

Solicitors—H. J. Godden, for purchaser; Sewell & Edwards, for vendors.

[IN THE COURT OF APPEAL]

JESSEL, M.R.	} THOMAS v. THE PATENT LIONITE COMPANY.
BRETT, L.J.	
COTTON, L.J.	
1881.	
March 30.	

Company — Voluntary Winding-up — Commencement — Appointment of Liquidator — Compulsory Order — Distress — The Companies Act, 1862, ss. 87, 130, 133, 163 — The Judicature Act, 1875, s. 10 — The Bankruptcy Act, 1869, s. 34.

The 10th section of the Judicature Act, 1875, does not import into a winding-up the 34th section of the Bankruptcy Act, 1869, so as to enable a landlord to distrain after the commencement of a winding-up for rent due to him from the company.

The appointment of a voluntary liquidator is not necessary to give effect to a voluntary winding-up for the purposes of the 163rd section of the Companies Act, 1862.

A compulsory order, which "supersedes" a voluntary winding-up as from the date of such order, does not thereby entirely put an end to everything previously done under the voluntary winding-up.

Where, therefore, landlords, after the commencement of the voluntary winding-up of the company, but before the date of the compulsory order, distrained for rent due to them prior to the commencement of the voluntary winding-up,—

Held, that the distress was invalid, no special grounds being shown why the judicial discretion vested in the Court under the 87th section of the Companies Act, 1862, should be exercised in their favour.

The company was formed in May, 1874, and took a lease of some premises at No. 17 Charterhouse Buildings, of Messrs. Tubbs & Lewis, at a rent of 320l. per annum, which was duly paid up to the 25th of March, 1880.

On the 30th of July, 1880, an extraordinary resolution was passed to wind up the company voluntarily; but no liquidators were appointed.

On the 5th of August, 1880, Messrs. Tubbs & Lewis distrained for the quarter's rent due on the 24th of June.

On the same day this action was com-

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menced by the plaintiff (on behalf of himself and all other the debenture-holders of the company); and on the 6th of August Mr. Mason was appointed receiver and manager of all the property of the company.

The same day, on the application of the company, an injunction was granted to restrain the landlords from proceeding with their distress. No sale had then taken place under the distress.

On the 9th of August, 1880, at a meeting of the company, convened for that purpose, Messrs. Smith & Binney were appointed voluntary liquidators.

On the 18th of August, 1880, a petition was presented for a compulsory winding-up, on which the usual compulsory order was made in September, and Mr. Whinney appointed liquidator.

The goods distrained were afterwards sold by arrangement, and the proceeds of sale were set apart to await the determination of the question who was entitled to them.

A summons was taken out in the action (to continue which leave had been given, and to which the official liquidator had been made a defendant) by Messrs. Tubbs & Lewis, asking that the receiver in the action might be ordered to pay to them the sum of 80*l.*, being the quarter's rent accrued due on the 24th of June, 1880.

The question raised by the summons was, whether the distress was valid; or, in other words, whether the winding-up must be considered to have commenced on the 30th of July or on the 18th of August.

The Vice-Chancellor being of opinion that there was no effective winding-up until a liquidator was appointed, and that the compulsory winding-up did not relate back to the 30th of July, 1880, but only commenced as from the 18th of August, 1880, and, consequently, that at the time when the distress was levied there was no process of winding-up going on, and nothing to prevent the landlords from distraining for their rent, ordered the receiver to pay the 80*l.*

The official liquidator appealed.

Mr. J. Pearson and Mr. Northmore Lawrence, for the appellants.

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Mr. Higgins and Mr. A. Thomson, for the landlords.

The arguments are sufficiently noticed in the judgments. Counsel referred to

The Companies Act, 1862, ss. 85, 87, 130, 133, 163.

The following authorities were cited:—

The United Service Company, Law Rep. 7 Eq. 76; on appeal, 39 Law J. Rep. Chanc. 730; Law Rep. 5 Chanc. 707;

Oleve v. The Financial Corporation, 43 Law J. Rep. Chanc. 54; Law Rep. 16 Eq. 363;

In re The Coal Consumers' Association, 46 Law J. Rep. Chanc. 501; Law Rep. 4 Ch. D. 625;

In re The Withernsea Brick Works, *Ante*, p. 185; Law Rep. 16 Ch. D. 337.

JESSEL, M.R., after stating the facts, said—The only question we have to decide is, who is entitled to the sum of money paid into the bank to represent the goods which have been sold, and which were seized under the distress, and this question raises several points, which it appears to me necessary to decide. To my mind the Act of Parliament is plain enough. The 163rd section says, "Where any company is being wound up by the Court, or subject to the supervision of the Court, any distress . . . put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents." That would have avoided this distress, because it was not put in force before the commencement of the winding-up, but for certain decisions under the 85th and 87th sections. The effect of those decisions is this, that the Court has a judicial discretion to allow a landlord to distrain for rent after the commencement of a winding-up, and that that discretion ought to be exercised in his favour whenever he cannot prove for his debt, but, as a general rule, it ought not when he can prove. In the present case the landlords are entitled to prove in the winding-up, and therefore the 163rd section applied, and there are no grounds for exercising the judicial discretion in their favour and allowing them to enforce their distress,

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unless some special grounds can be shewn. Now it is said that they were prevented from enforcing their distress by some injunction irregularly obtained. If that was so, they should have moved to discharge the injunction, but they could not now claim to be in the same position as if they had sold. Now I think the injunction was irregularly obtained. It should have been obtained by the liquidator, or, if there was no liquidator, by a contributory. But the fact that the injunction was irregularly obtained really does not affect the case, because, if they had moved to discharge it they would doubtless have been met by a counter motion by a contributory. Then it is said that the whole property will be taken by the debenture-holders, and there will be nothing left for the creditors. This has not been proved; but even if it is true it makes no difference, for it merely shews that there is nothing in this objection that the injunction was irregularly obtained. Another objection is that the voluntary winding-up was null, because no liquidator was appointed. But that cannot be, because the 130th section says that a voluntary winding-up shall be deemed to commence at the time of the passing of the resolution authorising such winding-up. Then it is said that the compulsory order put an end to the voluntary winding-up—and so it did from that time, but it does not follow that everything which has been done in the voluntary winding-up previously to the compulsory order fails. There is nothing, therefore, in that objection. Then it is said that the 10th section of the Judicature Act, 1875, has imported into the winding-up of companies the rule in bankruptcy that a landlord may levy a distress for a year's rent after the commencement of his tenant's bankruptcy. I will not say that I understand that section in all respects, but it is clear to my mind that there is nothing in the section which gives a landlord the preference now claimed for him. The section says the same rule shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, as may be in force for the time being under the

law of bankruptcy. Now the landlord is not a secured creditor. He has merely a power of levying a distress. But that power is no charge upon the property, and does not give him a security. Then the other point under the section is, that the rule in bankruptcy is to prevail as to "debts and liabilities provable." No doubt the landlord's debt is a provable debt, but the section does not import into a winding-up the bankruptcy rules, which give a preferential payment to some special debts. The section applies to persons who will get dividends, not to those who will be paid in full. On the whole we should, I think, give effect to the plain words of the 163rd section, which avoids this distress, because no sufficient grounds have been shewn for the exercise of our judicial discretion in favour of the landlords.

BRETT, L.J., said—I am of the same opinion on all points.

COTTON, L.J., said—At the time when this summons was taken out there was an order for winding up the company, and, that being so, the question is, Was the Vice-Chancellor right in making this order on the ground that the winding-up had not commenced? I agree with the other members of the Court that, unless we see some special reason for granting the landlords liberty to proceed with their distress, the 163rd section of the Act of Parliament should be put in force. It is said that at the date of the injunction which prevented them proceeding with their distress there was no winding-up, because the omission to appoint a liquidator made the resolution to wind up inoperative. It is true that a liquidator may be necessary for getting in the assets, but I cannot agree with the view of the Vice-Chancellor that there is in effect no winding-up at all until a voluntary liquidator is appointed. The winding-up commences from the date of the passing of the resolution. Then it is said that the voluntary winding-up was entirely put an end to by the compulsory order; but that, in my opinion, is the result of an erroneous construction of the words of the Act of Parliament. It is true that a compulsory order "supersedes" a volun-

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tary winding-up as from the date of the order, but that does not mean that it entirely puts an end to everything that has been previously done in the voluntary winding-up. In my opinion, therefore, we must deal with this question according to the 163rd section, and I see no good grounds for giving leave to the landlords under the 87th section to proceed with their distress. If the property is valuable, they can take other proceedings for recovering it. The only other point is as to section 10 of the Judicature Act, 1875. It is said that that section introduces into a winding-up the 34th section of the Bankruptcy Act, 1869, but I think that point is really decided the other way by *In re The Withernsea Brick Works (Limited)*. To introduce that section would, in my opinion, have the effect of repealing *pro tanto* sections 87 and 163 of the Winding-up Act. But the Court cannot adopt such a construction unless they see in the 10th section a clear intention that those sections are to be considered repealed. No such intention appears on the face of the section. In my opinion, the 10th section, when it speaks of the "respective rights of secured and unsecured creditors," means creditors who were at the commencement of the winding-up secured or unsecured, and refers to the proof of their debts and the consequences of such proof, and does not affect any additional or peculiar rights which such proving parties may have. Here, at the date of the winding-up, the landlords were not secured creditors, although they had the peculiar right of levying a distress which, if exercised, might possibly have given them a security. No doubt the rent is a "debt provable" in the winding-up, but, in my opinion, the 10th section does not import into a winding-up the 34th section of the Bankruptcy Act, 1869, so as to give a creditor in a winding-up any additional rights to those he would have had, had that section not been passed.

Appeal accordingly allowed with costs.

Solicitors—Chapple, Welch & Chapple, for appellants; Poole, Hughes & Poole, for respondent.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.

JAMES, L.J.

BRETT, L.J.

COTTON, L.J.

1881.

March 17, 24.

In re WILKINSON; *ex parte* STUBBINS.

Bankrupt Trustee—Breach of Trust—Sale of Goods and Application of Purchase-money to make good Breach of Trust—Voluntary Preference—Act of Bankruptcy—The Bankruptcy Act, 1869, ss. 6 (sub-s. 2) and 92.

A trustee, who had misappropriated trust funds and was also insolvent, informed his co-trustees of his position, and induced him to purchase of him certain goods, and applied the purchase-money, with the knowledge of his co-trustees, in making good his breach of trust:—Held, that the transaction was not an act of bankruptcy within section 6, sub-section 2, of the Bankruptcy Act, 1869, as being a fraudulent transfer of property, nor a fraudulent preference of the trust estate within the 92nd section of the Act.

A mere voluntary transfer impeachable only on the ground that it is a preference by a debtor of a creditor is not an act of bankruptcy.

This was an appeal from the decision of Bacon, C.J.

The debtor and one Gaunt were the executors of the will of one J. Speight, deceased, and were both engaged in the wool trade at Bradford.

In November, 1878, the debtor informed Gaunt that he was in great pecuniary difficulties, and had been using for his own purposes some of the testator's money and wanted to pay it back, and confessed to have taken some 2,000*l.* of the trust estate, and induced Gaunt to purchase of him some wool, at a price to be fixed by some London brokers. Gaunt paid the debtor 2,050*l.* for the wool, and waited while the debtor went and paid that sum, and a further sum of 58*l.* 11*s.*, to the credit of the executorship accounts at a bank where that account was kept, and when the debtor returned he gave Gaunt the pass-book of the executors, who took it away with him.

In re Wilkinson ; ex parte Stubbins (App.), Bankr.

In January, 1879, the debtor filed his liquidation petition.

The County Court Judge, on the application of the trustee in liquidation, held that the transaction between the debtor and Gaunt was fraudulent and void as against the trustee in liquidation, and ordered Gaunt to pay the trustee the sum of 2,050*l.*, with interest at four per cent., from the 26th of November, 1878.

Gaunt appealed.

The Chief Judge held that the transaction was neither a fraudulent preference nor a fraudulent transfer under the 6th section of the Bankruptcy Act, 1869, and discharged the order of the County Court Judge.

Against this decision the trustee in liquidation appealed.

Mr. Wills and Mr. E. Tindal Atkinson, for the appellant.—The sale of the wool was a fraudulent transfer of his property for the purpose of defeating the distribution of his estate amongst his creditors within the meaning of sub-section 2 of section 6 of the Bankruptcy Act, 1869, and therefore an act of bankruptcy. It was also a fraudulent preference, because Gaunt, as representing the trust estate, was a creditor. It was a payment made voluntarily and with the knowledge of Gaunt. The debtor was clearly insolvent at the time, and the payment to the trust fund was a voluntary preference of the trust estate. They also referred to

Ex parte Boom, 41 Law Times, N.S. 42;

Ex parte The Hibernian Joint-Stock Banking Company, 14 Ir. Chanc. Rep. 113;

Thompson v. Freeman, 1 Term Rep. 155.

Mr. Winslow and Mr. West, for Gaunt, were not called upon.

JAMES, L.J.—The facts of the case are few and not in dispute. The debtor applied to his co-trustee, Gaunt, and offered to sell him a large quantity of wool, amounting in value to 2,050*l.* Gaunt was reluctant to buy it, but to induce him to make the purchase the debtor communicated to him that he was in great difficulties, as he appears in fact

to have been, his bankers having refused him any further credit, and also that he had misappropriated trust moneys belonging to a trust estate of which he and Gaunt were trustees, and he told him in effect that he wanted to sell the wool in order to raise money to make good that defalcation. Thereupon Gaunt was minded to make the purchase, and he agreed to make it at a price to be fixed by means of samples which were to be sent to a London broker, who was to fix the proper trade price for them. This being agreed to, the money was paid to the debtor, who, with the knowledge of Gaunt, immediately went to a bank in which there was a joint trust account in the names of the trustees, and paid the purchase-money to the trust account so as to make good his defalcation. The wool, the subject-matter of the contract, did not, as it turned out, amount in value to the purchase-money paid, but an additional quantity was subsequently added to make up the value. After the bankruptcy, which did not take place until two months after this transaction, the trustee, having investigated the matter, applied to the County Court for an order directed against the trust estate—that is, against both the trustees as representing the trust estate—to restore the money which had been so paid to the bankers to the trust account. Upon the hearing before the County Court Judge he was not persuaded to accede to the application in the form in which it was made; he declined to make any order against the trust estate as such, but he found his way to make an order against one of the two trustees—that is, against Mr. Gaunt, the purchaser—on the ground of a voluntary preference. He worked it out in this way: He considered that the 2,050*l.* which was paid under the circumstances I have mentioned was a loan from the one trustee to the other to enable him to make good the defalcation, and that then the goods were delivered by way of voluntary preference in satisfaction of the debt which had been so created. The Chief Judge was of opinion that this view of the transaction could not be sustained; but whether it could or could not be impeached upon other grounds,

In re Wilkinson; ex parte Stubbins (App.), Bankr.

it would be impossible to convert that which was really a payment in respect of goods to be delivered into a loan, and then to treat the delivery of the goods as a payment or satisfaction of that loan. In that view I entirely concur. It is impossible, as it seems to me, that the transaction can be converted from that which it was into something which it was not, in order to bring in the doctrine of voluntary preference. And, in truth, that view of the case was abandoned before us. It was admitted by the appellant's counsel that they could not sustain it. But it was pressed upon us that the order of the County Court Judge could be sustained on the ground that the sale was itself a fraudulent transfer—that is, that the transferring goods to a purchaser for value with the view of using the purchase-money for a voluntary preference, the purchaser knowing of this intention, was a fraudulent conveyance or transfer within the meaning of the 6th section of the Act. It appears to me that that view cannot be sustained. In truth, a mere voluntary transfer, impeachable only on the ground that it is a preference of a particular creditor, has never been held to be in itself a fraud or an act of bankruptcy. It may be impeachable on the ground that it is voluntary; but it is impossible, as it appears to me, to hold that a mere voluntary transfer is of itself an act of fraud. And if that is not fraudulent within any principle of law, it would be equally impossible to say that a sale becomes fraudulent because there is an intention in the mind of the vendor to use the purchase-money for the purpose of making a voluntary preference, the purchaser knowing that that is the motive of the sale and the intention of the vendor with respect to the proceeds of the sale. It appears to me that it would be an extravagant extension of any notion of fraud under the bankruptcy law to hold that such a sale under such circumstances is of itself a fraudulent act or an act of bankruptcy.

It was then contended that the appellant might fall back on the original form of the application to the County Court Judge for an order against the trust estate as such to restore the money which

had been paid to the credit of the two trustees in the banking account of the trust estate, on the ground that that payment was a voluntary preference of the trust estate. It appears to me that that view also cannot be sustained. If a debtor on the eve of insolvency sells goods in order that he may restore money which he has stolen from his master or anybody else, and does restore the money, it seems to me impossible to hold that such a payment can be treated as a fraudulent preference of a creditor.

BRETT, L.J., and COTTON, L.J., concurred.

Appeal dismissed with costs.

Solicitors—S. S. Seal, agent for Rawson, George & Wade, Bradford, for appellant; W. & J. Flower & Nussey, agents for Killick & Co., Bradford, for respondent.

[IN THE COURT OF APPEAL.]

JAMES, L.J.	} THE LONDON AND SUBURBAN LAND AND BUILDING COM- PANY v. FIELD.*
BRETT, L.J.	
COTTON, L.J.	
1881.	
Jan. 21.	

Beershop—Covenant—Off Licence.

A covenant that no building to be erected on a plot of land should be used as a "public-house, tavern or beershop," was held to be broken by the sale in a shop erected on that land of beer under an off licence authorising the sale of beer not to be drunk on the premises.

By deed dated the 19th of July, 1870, a plot of land forming part of a building estate was conveyed by the plaintiff company to Watkins in fee, subject to the provisions of an indenture dated the 7th of December, 1867. This deed contained a covenant by each of the purchasers of the several lots of land sold by the company with the company, and also with the other purchasers, for the observance of the following condition

* See *Holt & Co. v. Collyer*, *Ante*, p. 311; *Law Rep.* 16 Ch. D. 718.

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(among others): "On no piece of land except those numbered 290, 394, 424 and 608 on the said plan shall any public-house, tavern or beershop be built, nor shall any messuage or other building to be erected on any piece of land be converted into or used as such."

Watkins executed the deed on the 19th of July, 1870. The plot of land purchased by Watkins was not one of the four above-numbered lots. Part of his lot he let in 1873 to the defendant. The defendant erected a shop on it, and obtained an off licence, under which he was empowered to sell beer at the shop not to be drunk on the premises, and sold beer accordingly under the licence.

The company, who still owned other parts of the estate, brought an action to restrain the defendant from using his shop "as a public-house, tavern or beershop."

A demurrer by the defendant was overruled by the Master of the Rolls on the authority of

The Bishop of St. Albans v. Battersby, 47 Law J. Rep. Q.B. 571; Law Rep. 3 Q.B. D. 359.

The defendant appealed.

Mr. Chitty and Mr. Caldecott asked the Court to overrule

The Bishop of St. Albans v. Battersby (*ubi supra*); referred to the definition in *Burn's Justice* (29th ed. 1845, p. 59)—the edition current in 1867—"A beerhouse or shop is a house in which beer and ale is sold by retail to be drunk or consumed on the premises;" and contended that the word "beershop" had acquired a technical meaning in the trade, as a house where beer was sold by retail to be drunk on the premises. They referred to

The London and North Western Railway Company v. Garnett, 39 Law J. Rep. Chanc. 25; Law Rep. 9 Eq. 26;

Jones v. Bone, 39 Law J. Rep. Chanc. 405; Law Rep. 9 Eq. 674;

Pease v. Coats, 36 Law J. Rep. Chanc. 57; Law Rep. 2 Eq. 688;

11 Geo. 4 and 1 Will. 4 c. 64;

4 & 5 Will. 4 c. 85;

26 & 27 Vict. c. 33. s. 1.

Mr. Davey and Mr. Tyssen, for the company, were not called upon.

JAMES, L.J.—We must give effect to the plain intention of the parties to the deed of the 7th of December, 1867. The object of introducing the covenant in question into the deed was evidently to prohibit any sale of beer which would diminish the value of the lots specified as those on which the sale was to be authorised. The word "beershop" in its natural sense means a shop for the sale of beer, as a grocer's shop is a shop for the sale of grocery. But it is said that some particular species of shop must be meant by reason of the word having acquired a particular meaning in the trade. The word "beerhouse" has acquired such a meaning, but there is nothing to shew that the word "beershop" has any technical sense.

BRETT, L.J.—There are many words and phrases which in business have acquired a meaning other than the ordinary meaning, and where in a business agreement such words and phrases are used it is proper to construe them according to that other meaning. But when words are used in an agreement which have not acquired any other meaning they are to be construed according to their ordinary meaning unless the context appears to shew that they are not so used. Here two words are used which have acquired a meaning different from the ordinary, namely, "public-house" and "tavern," and if the word "beerhouse" had been used that would be another word with such an acquired or technical meaning. But the word "beershop" has not acquired a peculiar meaning, and therefore must be construed according to the ordinary construction as meaning a place and a shop where beer is sold. It, therefore, includes a beerhouse, but something more—a place where beer is sold and yet is not a beerhouse—and the case stated is one which is struck at by the covenant.

COTTON, L.J.—I agree with Lord Justice Brett as to the rule which ought to guide us in construing the word. Had the

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word "beershop" acquired at the time of the lease any peculiar meaning? In my opinion it had not. A shop means a place where goods are sold by retail; a beer-shop, therefore, is a place where beer is sold by retail, and it is immaterial whether it is consumed on the premises or not. The word includes a beerhouse, but also a shop where beer is sold to be drunk off the premises.

Solicitors—T. W. Rogers, for plaintiffs; Shum, Crossman, Crossman and Prichard, for defendants.

HALL, V.C. }
1881. } *In re HILL. HILL v. HILL.*
April 6. }

Settlement—Breach of Trust—Employment of Trust Fund in Trade—Profits accrued—"Corpus" or Income.

The plaintiff was tenant-for-life under the settlement executed on her marriage, part of the settled property consisting of a sum of 15,500l. This sum was allowed to remain in the hands of the plaintiff's father, who employed it in trade, he covenanting at his death to pay it to the trustees. Upon the death of the father 10,000l., part of the 15,500l., was allowed to remain in the business, such investment being unauthorised by the settlement. Large profits accrued to the 10,000l., some of which, with the plaintiff's consent, had been paid to her husband:—Held, that the plaintiff was entitled in respect of income to four per cent. on the original 10,000l. and upon all accretions of profits retained and employed in the business, and that the rest of the profits must be regarded as capital subject to the trusts of the settlement, and must be made good out of the husband's estate, so far as he had received any part thereof.

By a settlement executed in January, 1860, on the marriage of the plaintiff (then Anna Elizabeth Mumm) with Captain C. E. Hill, the sum of 15,500l., which was then with the plaintiff's consent in the hands of her father, J. E. Mumm, was

assigned to J. W. Hill and J. B. Mumm upon trust as soon as they received the same to invest it in the stocks, funds and securities mentioned in the settlement, and to pay the income thereof to the plaintiff during her life for her separate use, without power of anticipation, and after her death upon certain trusts for the benefit of Captain Hill, if he should survive her, and of the issue of the marriage; and if she should die leaving no child who being a son should attain the age of twenty-one, or being a daughter should attain that age or marry then upon trust for J. B. Mumm if then living, and if then dead upon trust for his children then living, and the issue then living of such as should be dead equally *per stirpes*; and upon the death of J. B. Mumm, if there should be no child or issue of a deceased child then living, then upon trust for the children of J. E. Mumm then living, and the issue then living of such as should be dead equally *per stirpes*.

The settlement contained a covenant by J. E. Mumm to pay to the trustees the said sum of 15,500l., and until the same should be wholly paid to pay interest thereon or on so much thereof as should for the time being remain unpaid at the rate of five per cent. per annum; and a declaration that it should not be lawful for the trustees to compel payment of the 15,500l. or any part thereof for the term of ten years from the day of the solemnisation of the marriage, if the said J. E. Mumm should so long live, but if he should die before the expiration of the said term of ten years, then the payment of the 15,500l. might be enforced against his heirs, executors or administrators; and further, that if during the marriage the plaintiff or Captain Hill in her right should become possessed of or entitled to any real or personal property to the value of 200l. or upwards for any estate or interest whatsoever, the same should be settled upon the trusts thereinbefore declared of the 15,500l.

J. E. Mumm died in 1863 intestate, leaving his widow, Elizabeth Mumm, and the plaintiff and the defendants, J. B. Mumm and R. J. Mumm, and three other children, surviving him.

In re Hill.

Down to the time of his death no part of the 15,500*l.* had been paid to the trustees of the settlement. During his life J. E. Mumm carried on business as a champagne shipper and importer at Rheims and in London, under the name of "Jules, Mumm & Co.," and at his death the capital belonging to and employed by him in the Rheims business amounted to 36,000*l.*, of which the sum of 10,000*l.*, representing part of the 15,500*l.*, was appropriated to the plaintiff and placed to her capital account in the books of the firm of Jules, Mumm & Co. at Rheims.

On the 24th of March, 1868, articles of partnership were entered into between Elizabeth Mumm, the widow of J. E. Mumm, the defendant, J. B. Mumm, and the plaintiff, whereby, among other things, it was agreed that they should carry on the business at Rheims for a period of ten years from the 1st of January, 1868, and that the capital should consist of 36,000*l.*, whereof the share of the plaintiff amounted to 10,000*l.*, and that interest at the rate of five per cent. should be paid to each partner on the share of capital contributed by him or her, and that the profits should belong to, and the losses be borne by, the partners in proportion to their respective shares of the capital.

It was further provided that no partner should withdraw any part of the share of profits due to him or her until the capital of the firm should have become increased to 40,000*l.*, but might draw the interest of his or her share annually, and might allow his or her share of the profits to remain in the business, and that consequent accretions to the original capital should bear interest at the rate of five per cent., and that in case the capital became larger than should be necessary for the purposes of the partnership, it might be reduced by payments of accumulations to the respective partners.

During his life Captain Hill acted as manager of the London business, and remittances were sent from Rheims on account of the interest due to the plaintiff, and with her consent were carried to the credit of the account of Captain Hill with the London house, and he drew against

such account at his pleasure. As the business increased very large accumulations of profits accrued to the capital, and considerable sums were from time to time remitted by the firm at Rheims on account of the plaintiff's share, and all these sums were carried to the credit of Captain Hill's current account in the books of the London house.

Before the expiration of the articles of partnership of 1868 fresh articles were entered into on the 2nd of May, 1877, for a term of five years from the 1st of January, 1878, the capital being 120,000*l.*, of which the plaintiff's share amounted to 24,000*l.*

By his will, dated the 7th of August, 1874, Captain Hill devised his real estate to the plaintiff for her life, with remainder in fee to the defendant, J. W. Hill, and after making various bequests of personal estate he bequeathed the residue of his estate to the plaintiff and the defendants, Arthur Hill and R. J. Mumm, upon trust to sell and convert the same as in the said will directed, and to invest the proceeds upon the securities therein mentioned, and to pay the income of such investments to the plaintiff for her life for her separate use, with remainder to the testator's three brothers, J. W. Hill, F. C. Hill and Arthur Hill, and their children as therein mentioned, and the testator appointed the plaintiff and the defendants Arthur Hill and R. J. Mumm joint trustees and executors of his will.

Captain Hill died on the 7th of June, 1878, without having had any children, and without having revoked or altered his will, which was proved on the 24th of June, 1878, by two of the executors.

In this action, which was brought by the plaintiff against the trustees of the settlement and her co-executors, under the will of Captain Hill, for the execution of the trusts of the settlement, and for the administration of the trusts of the will, the question arose, whether the accumulations of profits on the plaintiff's share in the capital of the business, which had been received by Captain Hill and expended by him, should be treated as part of the capital of the trust fund settled by the settlement, in which case they would have to be refunded out of his

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estate, or whether they should be treated as the income of the settled fund to which the plaintiff was entitled under the trusts of the settlement.

Mr. Graham Hastings and Mr. Rigby, for the plaintiff.—Where there has been an investment in breach of trust and profits have been made, the tenant-for-life is entitled to interest at five per cent., and all beyond that must be considered as an accretion to the capital.

Mr. Armitstead, for the trustees of the settlement.—I submit that the plaintiff is only entitled to interest at four per cent. on the original 10,000*l.*, and that all the accumulations must be regarded as capital—

Straker v. Wilson, 40 Law J. Rep. Chanc. 680; Law Rep. 6 Chanc. 508.

Mr. W. Pearson and Mr. Langworthy, for J. W. Hill, one of the trustees of the settlement and a residuary legatee under the will.—We submit that these profits should be regarded as income—see

Stroud v. Gwyer, 28 Beav. 180.

Unless they can be brought within the covenant to settle after-acquired property they cannot be considered as capital; and as to that, see

Townshend v. Harrowby, 27 Law J. Rep. Chanc. 553; 4 Jur. N.S. 353.

They also referred to

Green v. Britten, 42 Law J. Rep. Chanc. 187;

Brown v. Gellatly, Law Rep. 2 Chanc. 751.

Mr. Robinson and Mr. H. J. Hood, for F. C. Hill and Arthur Hill, residuary legatees under the will.—All these sums were either paid to the plaintiff and by her handed over to her husband, or paid to him with her knowledge and consent. We submit that they must be treated as income—see

Townend v. Townend, 1 Giff. 201.

HALL, V.C. — With regard to the amount of interest, it seems to me that I ought not to go beyond four per per cent., and that it would be altogether inconsistent with principle to allow five per cent. Considering the transaction to be unauthorised, as I certainly do, I do not

see any principle upon which I could allow five per cent., and I am not aware of any authority upon which I could proceed in allowing more than four per cent. That is what was done in the case of *Griffiths v. Porter* (1); and I will also mention in reference to this point the case of *Davies v. Hodgson* (2), where the Master of the Rolls only gave the *cestui que trusts* a sum equal to the dividends on the original sum of stock. It was stock that had been sold and put into an unauthorised investment, and he would only give a sum equal to the dividends. That is another authority against the general observations of the Master of the Rolls in the case of *Stroud v. Gwyer*. I confess that as regards *Stroud v. Gwyer* I cannot understand the principle of that decision. But it is not necessary, as Mr. Graham Hastings has said, to question that decision under the particular facts and circumstances of the present case. There are observations of the Master of the Rolls in that case drawing a distinction between the non-conversion of existing investments and the putting into an unauthorised investment a fund not already invested, the reasoning of which I really cannot follow. That disposes of the question of interest. With reference to the investment being a breach of trust, it seems to me to be plain in this case that it was a breach of trust to allow this fund to remain in the business, and I must follow the rule and hold that the tenant-for-life is only entitled to interest at the rate of four per cent. upon the money so improperly invested, and that all beyond that, however produced, whether by capitalisation of income or otherwise, must be taken as being and constituting the capital of the trust fund. That applies not only to the original sum, but to all accretions thereto in the shape of profits arising from the use of the fund in the business, whether such accretions were dealt with as income, or were accumulated, and all beyond that on which four per cent. is allowed must be treated as being capital. That being so, it seems to me to dispose of the whole case with this one exception, that it was

(1) 25 Beav. 236.

(2) Ibid. 177; 27 Law J. Rep. Chanc. 449.

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said that some portion of the four per cent. which I am going to allow has itself contributed to accretions and accumulations; and I suppose, strictly speaking, if the parties desire it, they would be entitled (although I am not aware of any case in which it has been done) to have it ascertained how much of the fund has arisen from interest at four per cent. which the party was entitled to.

Mr. Rigby.—It is only in the case of five per cent. being allowed that any such question could arise on the figures.

HALL, V.C.—Very well. Then it was contended in argument that these moneys or some of them were received substantially by the wife, and then paid over by her to the husband, so that no claim in respect of them can be tenable. What I have said as to treating them as capital of course disposes of that also, because if they are capital they are subject to the trusts of the settlement, and there is an end of it.

But independently of that I should have great difficulty indeed in a case of this kind in coming to the conclusion that this lady, a married woman, restrained from anticipation, has, under the circumstances which are before me, deprived herself of the right to assert that those sums ought to be treated as capital, and therefore subject to the trusts of the settlement. That would seem to me to be getting behind the restraint upon anticipation very substantially. The observations which will be found in the case of *Davies v. Hodgson* (2) deal with that very point, and would dispose of that argument if it were necessary. The result is, therefore, that the plaintiff is entitled to interest at four per cent. on the original sum of 10,000*l.* employed in the business, and upon every sum which from time to time has been added thereto and become part thereof.

Solicitors—Emmet & Son, for plaintiff; Darley & Cumberland, agents for Newstead & Wilson, for defendants.

HALL, V.C.

1881.

April 7, 9.

May 2.

In re THE GREAT AUSTRALIAN GOLD MINING COMPANY. APPEYARD'S CASE.

Company—Winding-up—Fully paid-up Shares—Proof for Breach of Contract to allot.

A., the holder of debentures of a limited company, by arrangement with the company exchanged his debentures for shares in the company, which were issued to him as fully paid up. No contract in writing in respect to the shares was filed with the Registrar of Joint-Stock Companies, as required by section 25 of the Companies Act, 1867, and accordingly, in the winding up of the company, A. was held liable as contributory in respect of the shares as unpaid shares:—Held, that A. was entitled to prove in the winding-up against the company for damages in respect of their breach of contract in not issuing to him fully paid-up shares.

Mudford's Case (49 Law J. Rep. Chanc. 452; Law Rep. 14 Ch. D. 634) followed. *Houldsworth v. The City of Glasgow Bank* (Law Rep. 5 App. Cas. 317) distinguished.

Adjourned summons.

The applicant, Mr. Appleyard, was the solicitor and one of the directors of the above company, and prior to November, 1873, he was the holder of two debentures of the company for 500*l.* These debentures had been assigned to Appleyard by one Kavanagh, who was the promoter of the company, in consideration in part of money lent and in part of services rendered. On the 24th of November, 1873, these two debentures were, by agreement between Appleyard and the company, surrendered by Appleyard to the company in exchange for 500 A shares of 2*l.* each, which were allotted to Appleyard as fully paid-up shares. No contract or agreement, however, respecting the shares was registered, in accordance with the 25th section of the Companies Act, 1867, and accordingly Mr. Appleyard was, upon the application of the liquidator, held liable by his Lordship and by the Court of Appeal as a contributory

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in the winding-up of the company in respect of these shares. The case as argued before the Vice-Chancellor is reported 49 Law J. Rep. Chanc. 290.

Mr. Appleyard, having paid calls in the winding-up to a considerable amount, acting upon the authority of the decision of the Vice-Chancellor in

Mudford's Case (ubi supra),

took out a summons for leave to prove in the winding-up in respect of the breach of contract on the part of the company to allot to him fully paid-up shares. The chief clerk had refused the application upon the ground, as it was stated, amongst others, that the decision in

Mudford's Case (ubi supra)

was in conflict with that of the House of Lords in the case of

Houldsworth v. The City of Glasgow Bank (ubi supra),

and this summons was adjourned into Court. The present report deals only with the question of the right of Mr. Appleyard to prove, assuming the validity of the contract to allot to him fully paid-up shares. The further facts in the case, however, and the arguments raised by counsel appear from the previous report and from the judgment of his Lordship.

Mr. Rigby, for Appleyard.—The right of proof is fully established by

*Mudford's Case (ubi supra).**Houldsworth v. The City of Glasgow Bank (ubi supra)*

has no application to the present case. That was a case of fraudulent misrepresentation, and proceeded upon the ground that the only remedy of the shareholder was by rescission of the contract, and that after the winding-up this remedy was not available. In truth there the shareholder got what he had bargained for. This is a simple case of breach of contract; the shareholder has not got the article he bargained for, namely, fully paid-up shares, and he is therefore entitled to prove for damages.

In re Stapleford Colliery Company.

Barrow's Case, 49 Law J. Rep. Chanc. 498; Law Rep. 14 Ch. D. 432,

is a direct authority that the circumstance that Mr. Appleyard was an officer of the

company does not affect his right of proof. He referred also to

White's Case, 48 Law J. Rep. Chanc. 820; Law Rep. 12 Ch. D. 511;

and

In re The Droitwich Salt Company, 43 Law J. Rep. Chanc. 581.

Mr. W. Pearson and *Mr. Grosvenor Woods*, for the liquidator.—

Houldsworth v. The City of Glasgow Bank (ubi supra)

is directly in point. The judgments of the Lords are based upon the principle that after the winding-up of a company the creditor who is also a partner cannot come into competition with the other creditors. See in particular the judgment of Lord Hatherley, p. 333, and see also

Burgess's Case, 49 Law J. Rep. Chanc. 541; Law Rep. 15 Ch. D. 507.

Even if there was a valid contract to allot fully paid-up shares, Mr. Appleyard is, by his own neglect, debarred from claiming the benefit of it, because it was his duty as the solicitor of the company to see to the registration of the contract. There is no case in which an agent has recovered for breach of contract against the principal where the breach was occasioned by the agent's own default. They referred also to

The Midland Great Western Railway Company of Ireland v. Johnson, 6 H.L. Cas. 798.

Mr. Rigby, in reply.—The company cannot set up as a defence to Mr. Appleyard's claim an act of negligence on his part by which they have been in fact benefited.

Our. adv. vult.

HALL, V.C. (on May 2).—Mr. Appleyard having been put on the list of contributories in respect of 500 A shares seeks to prove in the winding-up against the company in respect of an alleged breach of contract by the company that he should have 500 A shares fully paid up.

It was said by the liquidator that the alleged contract was not shewn to have been entered into. It appears to me that the alleged contract is established by

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minutes of proceedings of the directors at board meetings and the allotment and registration of the shares. Something was said as to the contract for the purchase of the mine not being enforceable, but the contract has not been set aside and has been acted upon, and I cannot act on the present occasion on the view that the contract should be treated as wholly void. Indeed I have not had evidence submitted to me establishing such a case. The company seems to have taken possession and sunk shafts therein during a period of six months. (See the report of *Appleyard's Case* in the *Law Journal*.) Mr. Appleyard obtained by assignments from Kavanagh, who was treated as one of the vendors of the mine, two debentures of the company given by the company for 500*l.* each in part payment of the purchase-money for the mine, and it was in consideration of his giving up these debentures to be cancelled that the company issued to Appleyard the shares in respect of which he has been placed on the list of contributories. It was said that Appleyard did not give any consideration for the debentures, and that if he did the consideration was promotion-money, and that in either case the shares were not acquired for any valuable consideration, or at all events not such consideration as the Courts would recognise. The evidence as to the consideration for the debentures is not altogether clear, but I am not able to say (the debentures having in fact been given in part payment of the purchase-money for the mine) that the giving up the debentures should be considered as not being any consideration for the issuing of the shares, or that Appleyard should be treated as having received these debentures, and in substitution for them the shares, as promotion-money, and therefore unable to make any claim upon the company that the shares should be fully paid-up shares.

It appears to me that the consideration was in part recompense for money lent and in part services rendered to Kavanagh by Appleyard as his solicitor. Fraud on the part of Appleyard has not been suggested. On the whole I think the liquidator has not made out a case in

opposition to the claim founded on the shares being held by Appleyard without consideration or as representing promotion-money. I have above assumed, but not decided, that if such case had been made out in evidence the claim would have been thereby displaced.

It was said that Appleyard might and should have had a proper contract registered, particularly as he was a director and the solicitor of the company, and then he would not have been put on the list of contributories, and thus it is his own fault if he suffers loss under the contract. It appears to me that this is not an answer to Appleyard's claim. His not having done this is not a loss to the company, and the creditors of the company are benefited by the omission. However, there was not, I consider, a duty cast on Appleyard which can be set up as a bar to the claim.

It was said that the contract between Appleyard and the company was *ultra vires*. This does not so appear to me. Although the articles of association provided for payment of the purchase-money on the leases being assigned to the company, they also gave to the directors ample powers, acting under which they could and did arrange for part payment by issuing debentures, and under which they could issue to Appleyard shares fully paid up.

In *Mudford's Case* I acted on a contract by a company to give fully paid-up shares as a valid contract and allowed a proof. I think that what I have said disposes of the alleged specialties in the present case; and this being so, I must hold that Mr. Appleyard is entitled to prove in the winding-up, unless *Mudford's Case* is shewn not to be law. He claims to prove in respect of his payments made or to be made for calls on the shares, and I think he is entitled to such proof. As to my decision in *Mudford's Case*, I considered my decision to be supported by what was said by Lord Justice Cotton in *White's Case*. He said, "He must make such a claim as he can in respect of damages for the non-completion by the company of the contract into which they have entered;" and Lord Justice James said that "this order would be without prejudice to any ques-

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tion whether Mr. White is entitled to any damages against the company." It was, however, contended that the decision in *Houldsworth v. The City of Glasgow Bank* shews that the decision in *Mudford's Case* is wrong. I have considered that case and the several judgments delivered by the Lords. The judgment of Lord Cairns was mainly relied on, and some passages in his and the other judgments are said to be favourable to the liquidator's contention in the present case. The case was one not of contract but of fraudulent misrepresentation, and it is to be observed that Lord Cairns (see p. 325) placed reliance on this, namely, that damages for a fraud committed on the shareholder by the company cannot be intended to be included in the contract to take the shares; and he afterwards said the claim was inconsistent with the contract into which he had entered, and that in making the claim he was approbating and reproaching. It was considered, and no doubt rightly, that the shareholder there had by contract devoted the assets to the payment of the debts and liabilities of the company, and that a claim for damages in respect of a fraud practised on him was not in contemplation of the parties, and from the nature of the case was excluded by the parties.

The observations of Lord Selborne in his judgment (see p. 329) seem to me to recognise the shareholder's rights as being in ordinary cases the same as those of a stranger, the case of a claim founded on a fraudulent procuring of a person to take shares being, however, distinguishable from other claims of the shareholder for the reasons stated in the judgment, especially because, as Lord Selborne considered, it would involve his getting from his co-shareholders full indemnity without himself contributing to the claim, although the contract was not and could not be rescinded.

The judgment of Lord Hatherley is, perhaps, more general and favourable to the contention of the liquidator, but it should, I think, be read as applicable only to the case with which their Lordships had to deal. Lord Blackburn guards his judgment in a manner which, I think, prevents its applying to the present case.

On the whole, I think, the case cannot be deemed to be applicable to a case of contract like the present, and I therefore think the present case must be considered to be governed by *Mudford's Case*.

Solicitors—Charles Appleyard, the applicant, in person; West, King, Adams & Co., for the liquidator.

HALL, V.C. } *In re* THE LONDON, BOMBAY
1881. } AND MEDITERRANEAN BANK
April 12. } (LIMITED).

Company—Winding-up—Shares taken by Husband in name of Wife—Contributories.

D. in 1864 applied for 300 shares in a bank, 100 in his own name and 200 in the name of *M.*, his wife, and paid the deposit on the whole 300. *M.* was ignorant of the transaction. *D.* subscribed the memorandum and articles of association for himself and *M.* and paid all calls on the shares. The company went into liquidation in 1866, and *D.* died soon afterwards, having within a year from the winding-up sold and transferred 140 of the 200 shares allotted to *M.* *M.* was placed on the *A* list in respect of the 60 shares and on the *B* list in respect of the 140 shares, and her separate estate being insufficient to meet the calls, the liquidator applied to have the *B* list rectified by placing the executors of *D.* thereon in respect of the 140 shares:—Held, that as the company had accepted *M.* as a shareholder and there had been no concealment of the nature of the transaction, the estate of *D.* could not be charged.

Adjourned summons.

The bank was incorporated in the year 1864 as a limited company, and in the same year Sorabjee Jehangeerjee Daver applied for and paid the deposit on 300 shares in the company—100 in his own name and 200 in that of his wife Mherbai.

The 300 shares were duly allotted to Sorabjee Daver and Mherbai respectively,

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and the former thereupon subscribed the memorandum and articles of association in respect of all the shares, the subscription in the case of the 200 shares allotted to Mherbai being in the words, "Sorabjee Jehangeerjee Daver for Mherbai his wife."

Sorabjee paid the deposit on the whole of the shares, and in the receipt given to him for the amount of the deposit paid in respect of the 200 shares the money was expressed to be "received from Mherbai, wife of Sorabjee Jehangeerjee Daver," and each receipt was indorsed by Sorabjee as follows: "Sorabjee Jehangeerjee Daver for Mherbai his wife."

The company was ordered to be wound up in June, 1866.

In the end of the year 1865 and beginning of 1866, 140 of the 200 shares were sold and transferred by six separate deeds of transfer to other persons, the transfers being in two cases executed in the following words: "Mherbai, wife of Sorabjee Jehangeerjee, by Sorabjee Jehangeerjee;" and in the remaining cases, "Sorabjee Jehangeerjee Daver for Mherbai his wife."

Sorabjee, by his will dated the 8th of March, 1868, gave all his real and personal estate to Mherbai, and appointed her and her two sons his executors.

Sorabjee died on the 13th of March, 1868. On the 8th of August, 1868, the name of Mherbai was settled on the A list of contributories in respect of the 60 shares allotted in her name and not transferred before the winding-up of the company, and on the 7th of February, 1878, her name was settled by the chief clerk on the B list in respect of the 140 shares which had been so transferred. On the 7th of March, 1879, a summons was taken out by Mherbai's solicitor that her name should be removed from the list in respect of the 140 shares, or that the list might be rectified by stating that she was a contributory only in respect of her separate estate at the time when she was registered a member of the company; and on the hearing of the summons before Hall, V.C., on the 30th of April, 1879, it was decided that she was only liable to the extent of the separate estate to which she was entitled or which she had power to dispose of during coverture.

Such separate estate being quite in-

adequate to meet the calls made on the shares, the present application was made by the liquidator seeking to have the B list of contributories rectified by inserting therein the names of Mherbai and her two sons as executrix and executors of Sorabjee instead of the name of Mherbai in respect of her separate estate, in order to render Sorabjee's estate liable to pay all calls made on the 140 shares. It appeared from a letter written in 1874 by the liquidator's agent in Bombay to Mherbai, that the liquidator was then aware of the fact that Mherbai was a widow.

Mr. Graham Hastings and Mr. Whitehorn, for the liquidator.—This was Sorabjee's own contract; he only made use of his wife's name as a substitute for his own; his estate therefore ought to be held liable—see

In re The Hercules Insurance Company. Pugh and Sharman's Case, 41 Law J. Rep. Chanc. 580; Law Rep. 13 Eq. 566;

and

In re The Imperial Mercantile Credit Association. Richardson's Case, 44 Law J. Rep. Chanc. 252; Law Rep. 19 Eq. 588.

Mr. Robinson and Mr. Phipson *Baile* for Mherbai and her co-executors.—We submit that the only person who can be put upon the B list in respect of these shares is Mherbai. The application was made by Sorabjee in the name of Mherbai. Her name was put on the list of members by the company and she was dealt with as a member for four years. Sorabjee's name cannot now be put on the list on the ground that Mherbai was simply a trustee for Sorabjee—

In re The Great Wheal Bury Mining Company. King's Case, 40 Law J. Rep. Chanc. 361; Law Rep. 6 Chanc. 196;

and

In re The Humber Ironworks and Shipbuilding Company. Williams's Case, 45 Law J. Rep. Chanc. 48; Law Rep. 1 Ch. D. 576,

are conclusive on this point.

Sorabjee has never been a shareholder of this company in respect of these shares, and his executors cannot now be put on

In re London, Bombay and Mediterranean Bank.

the list of contributories without making a new contract between the parties. There is nothing to prevent a married woman being a shareholder in a joint-stock company—see

The Leeds Banking Company. Mattheu's Case, 36 Law J. Rep. Chanc. 90; Law Rep. 3 Eq. 781.

Pugh and Sharman's Case (ubi supra) differs materially from the present case. It was an application for shares made in a false name, and fraud was committed.

Richardson's Case (ubi supra) was the case of a person taking shares in the name of an infant and is distinguishable from the present case. The liquidator's contention must also fail on the ground of delay, he having been aware since 1874 that Mherbai was a widow.

Mr. Graham Hastings, in reply.—This is not a case of trustee and *cestui que trust*, but simply one of contract. We must look at sections 38 and 23 of the Act to see who are to be contributories. These sections taken together define a contributory as "a subscriber to the memorandum of association and every other person who has agreed to become a member and whose name is entered on the register." Sorabjee, we submit, did agree to become a member, and we ask the Court to rectify the register by putting him on the list.

King's Case (ubi supra) is distinguishable from the present case on the same ground on which Lord Justice Mellish distinguished it from

The Wheal Emily Mining Company.

Cox's Case, 4 De Gex, J. & S. 53; 33 Law J. Rep. Chanc. 145, which was there relied upon. And

Williams's Case (ubi supra) is one of that class of cases where transfers have been registered by means of misrepresentation of the character or person of the transferee.

Here the application for shares was made by Sorabjee without the knowledge and consent of his wife; it cannot therefore be said that she was a trustee for him. On the other hand, he was the real contracting party, and was not the less so because he used the name of his wife—see also

In re The Oobre Copper Mining Company. Weston's Case, 39 Law J.

Rep. Chanc. 753; Law Rep. 5 Chanc. 614,

which is important both as to the point of law and also on the question of delay.

HALL, V.C.—This case has been extremely well argued, and, so far as I know, there is no case of a similar kind to be found. The contention on behalf of the liquidator is that the case is to be treated as one in which a person has applied for and taken shares in another's name, so that upon the true name being discovered that name will thereupon be put upon the register by way of rectification in lieu of the name originally put forward. The husband being dead and the object being to render his estate liable, it is said that the case must be considered just as though the process of rectifying the register had been gone through; and the register being treated as rectified, the case is brought within the provisions of the Act of Parliament, because we then have a person who agreed to take the shares and who is on the register in respect of the shares. Of course that is not the actual state of things here, but upon the case presented to the Court it is said that it must be supposed that that process has been gone through and the matter put in that position. Now there is no case that I am aware of in which that rectification has been made, where the name has been put upon the register deliberately by the company without any fraud or concealment whatever.

In the present case the facts were stated to the company on the application for the shares; the applicant said that he desired to have so many shares allotted to himself and so many to his wife. I will take it as established that he paid the money payable on application and allotment. He told the directors that they were to put the shares in the name of his wife. It now appears (and that circumstance, as shewn from her affidavit, seems to have been the sheet-anchor of this application) that the wife was not informed of it and knew nothing about it, and that some year or so after the shares were allotted it suited the husband's purpose to dispose of some of them, and that he did so, the wife being equally

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ignorant of that. That circumstance of the ignorance on the part of the wife is made use of as fortifying the case of the liquidator on the present application.

But it appears to me that the whole of the facts having been communicated to the company, I cannot assume that the applicant for the shares intended to practise any fraud on them by putting forward the name of his wife as the holder or allottee of the shares. The object which is imputed to the husband was that he sought to save himself from liability by not having the shares in his own name; but from the circumstances of the case, looking at the whole transaction and the position of the parties, I draw the conclusion that the transaction was meant to be what it purported to be—that the husband meant to make a provision for his wife by means of these shares, and that, meaning that, he requested that the shares should be put into her name. The non-communication to her of the fact that the shares had been put into her name could not have the effect of varying the actual operation of the transaction. The shares were in her name, and although she as a married woman was under a disability in respect to them, and although the company were in a peculiar position with reference to any claim against her which they might make in respect to them, yet they thought fit for whatever it might be worth to accept her liability as a shareholder. It is said that she had no separate estate, but that was apparently a matter for enquiry on the part of the company. They made no enquiry. They may have trusted, and very likely did, to the money being found for paying the calls on those shares, or in default to the remedy, which I presume they had—the ordinary remedy of forfeiture of the shares; and matters in all probability were very likely to have gone on according to the inception of the transaction, if the company had prospered and gone on (which I must assume the parties at that time contemplated would be the case) as a continuing and paying company. In that state of things the moneys to pay the calls would in all probability have been found, not out of the separate estate, there being none, but either by the husband

or by the dividends, which might have accrued upon these shares, being accumulated and applied for that purpose or in some other way. But I do not find here that element, which I think exists in all those cases in which the party has been put upon the register who is not the person whose name was originally on the register. I do not find any case in which that has been done where there has been no concealment of the real transaction from the company, and the company have thought fit to accept the person as a shareholder. There is no misrepresentation or concealment here as to infancy or otherwise which will enable the Court to act. The application to rectify the register (if it could have been made at all) ought to have been made by the company immediately after the transaction took place, and certainly they can be in no better position now than they would have been if they had come to the Court immediately afterwards. It is said that the real position of things was not known by the company—that they did not know that the wife had not been applied to to give her consent. In fact, their case is attempted to be made out by what has subsequently happened, namely, their ascertaining that the wife was not communicated with, and was not aware of the transfer and subsequent dealings with the shares by her husband. Some part of these circumstances could not have been brought forward immediately when the transaction took place, because they occurred subsequently, but although they may now be used as evidence to shew the real nature of the transaction, yet they do not, to my mind, bring the present case within any authority which has been referred to as shewing that the husband was the person whose name ought to have been upon the register as being the real applicant for the shares on his own account.

I must, therefore, acting upon the two authorities which have been referred to—namely, *Williams's Case* (before the Master of the Rolls) and *King's Case* (before the Court of Appeal)—consider that, as far as this case is to be decided upon authority, those are the governing cases rather than the others which have been

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referred to, in which there were circumstances which certainly ought to have been disclosed to the company but which were not in fact disclosed.

I shall, therefore, dismiss this application with costs.

Solicitors—Munns & Longden, for the liquidator;
Lattey & Hart, for Mherbai.

[IN THE COURT OF APPEAL.]

JAMES, L.J.
LUSH, L.J.
1881.
Feb. 19.

WATSON v. CAVE.

Appeal—Withdrawal of, with Consent of Respondent—Withdrawal of Withdrawal—Practice.

An appellant gave notice of his intention to withdraw his appeal, and asked the respondent's consent to such withdrawal, which was given. Two days afterwards he gave notice of his intention to proceed with the appeal:—Held, that the withdrawal could not be rescinded, and that the appeal could not be heard.

Appeal by Mr. Cave, one of the defendants in the action, against an order made by the Master of the Rolls, on the 17th of December, 1880, which was passed and entered on the 24th of December, 1880.

Cave gave the plaintiff notice of appeal from this order on the 18th of January, 1881. On the 26th of January his solicitor wrote the following letter to the plaintiff's solicitor:—

"I propose to withdraw the appeal from the order made by the Master of the Rolls on the 17th of December last. Please hand bearer your consent to the withdrawal of the appeal. My client will, of course, pay your proper costs of the appeal. In the event of your not consenting I must ask you to treat this letter as without prejudice."

The plaintiff's solicitors replied on the same day: "On the other side we send you our consent to withdraw the appeal

upon payment of costs; our briefs have been delivered."

On the 28th of January, the defendant's solicitors (after receipt of such consent) again wrote as follows:—

"When I wrote my letter to you of the 26th inst., my clients were under a misapprehension as to a matter of fact, which it was material for them to know in deciding whether to proceed with the appeal or to withdraw it. That misapprehension has to day been removed, and it is now our intention to proceed with the appeal. I write, therefore, without a moment's delay, to give you notice that I no longer propose to withdraw the appeal from the order made by the Master of the Rolls on the 17th of December last, and that it will be proceeded with."

The plaintiff's solicitors replied that the notice of appeal having been withdrawn, and they having consented to such withdrawal, the appeal could not now be proceeded with.

The defendant, however, persisted in bringing the appeal to a hearing. The plaintiff filed affidavits in answer to those filed by the defendant in support of the appeal.

On the opening of the appeal,

Mr. Ohitty (with him *Mr. Millar* and *Mr. Mulligan*) took the preliminary objection that the defendant having withdrawn his appeal could not proceed with it.

Mr. Kay and *Mr. Rigby* (with them *Mr. Romer* and *Mr. G. Cave*), for the appellant, contended that as the appeal had not been struck out they could proceed. When an order was made in Court in the presence of the parties by consent, it was open for either party to withdraw that consent at any time before the order was actually drawn up—

Rogers v. Horn, 26 W.R. 432.

The appeal could have been struck out by the respondents if they had been minded to do so, and until struck out there was *locus penitentiae* for either side. The injury caused to the appellant was far greater than any risk incurred by the respondents, as the result of this technical objection would deprive the appellant of all right of appeal, as the time would

Watson v. Cave, App.

have expired; whereas the only risk of the respondent was the chance of having to pay costs, which the appellant would of course repay.

Mr. Ince, Mr. Grosvenor Woods, Mr. Snagge and Mr. Creed, for other parties.

JAMES, L.J., was of opinion that it would be *peccata minuta* if they were to allow such a withdrawal of the appeal as that which was contained in the letter of the 26th of January, 1881, to be rescinded. In this case it was true that within two days the appellant wrote, withdrawing his withdrawal. But it might have been after two years, and it was impossible to say what might not have been done by the respondents in the meantime on the faith of such withdrawal. The letter of the 26th of January could not be treated as a mere proposal to withdraw, but was a formal notice by the appellant of his intention to withdraw his appeal, and to avoid further costs he asked the respondents to consent to his withdrawal. The respondents gave their consent, and if the appellant wished afterwards to withdraw his withdrawal and return to his former position, his proper course would have been to have applied for leave to give fresh notice of appeal. If the notice of withdrawal had been given under any mistake of fact, the Court might, upon a due consideration of all the facts, have acceded to such an application, but at present it knew nothing of the facts of the case.

LUSH, L.J., was of the same opinion. The proposal made on the one side, and accepted on the other constituted a contract which was binding on the parties, and did not require, in order that it should be perfected, that the appeal should be actually struck out of the list. If the case had come before the Court after what had taken place, their Lordships would themselves have ordered the appeal to be struck out. The proper course for the appellant would have been to have applied for leave to serve his notice of appeal, although such notice was out of time, and if he could have shewn that there had been a mistake of a serious nature, in consequence of which he ought to be allowed to withdraw his

notice of withdrawal, the Court might have given leave. As it was, however, they knew nothing about the facts. He was of opinion that the proposal, when once accepted, became a contract by which the parties were bound.

The appeal was dismissed with costs, such costs not to include the respondents' costs of affidavits filed since the acceptance by him of the withdrawal.

Mr. Kay asked for leave to give notice of motion to enlarge the time for appealing.

The Court gave leave, but no motion was subsequently made.

Solicitors—*T. Cave*, for appellant; *Duignan & Smiles*; *Markby, Stewart & Co.*; *J. Neal*; *Harrison, Beall & Harrison*; *J. B. Batten & Co.*; *G. S. & H. Brandon*; and *Travers, Smith & Co.*, for the various respondents.

HALL, V.C.	} THE ATTORNEY-GENERAL v. THE DEAN AND CANONS OF MAN- CHESTER.
1881.	
Feb. 7.	
May 9.	

Charity—Charitable Trusts Act, 1855 (16 & 17 Vict. c. 137), ss. 17, 62, 63—*Action against Dean and Canons—Mandamus—Sanction of Charity Commissioners, whether necessary.*

By the Parish of Manchester Division Act, 1850, it was enacted that the defendants, after certain payments, should pay the residue of the capitular revenue to the Ecclesiastical Commissioners, to be applied (subject to certain payments thereout) for the benefit of the rectors and incumbents of the parishes or districts within the parish of Manchester in augmentation of their incomes, and the defendants were to render yearly accounts to the Ecclesiastical Commissioners stating the particulars and items of their receipts and disbursements. An action having been brought by the Attorney-General on the relation of the rectors and incumbents, alleging that the accounts

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rendered by the defendants contained improper items of disbursement, and claiming a declaration to that effect, and a mandamus ordering the defendants to render proper accounts, the defendants demurred on the ground that it did not appear that the action had been sanctioned by the Charity Commissioners as required by section 17 of the Charitable Trusts Act, 1853:—Held (following *The Attorney-General v. Sidney Sussex College*, 15 W.R. 162), that although by section 62 the defendants as a capitular body were expressly exempted from the operation of the Act, yet section 17 applied, and that therefore the action could not be maintained without the sanction of the Charity Commissioners. Held, further, that even if the action were to be treated as a mere action for a mandamus (and therefore prior to the Judicature Acts a simple common law action), yet inasmuch as it involved the investigation of the accounts of the capitular revenues it was within section 17.

Semble, a mandamus is a "proceeding" within the meaning of that section.

In re Meyrick's Charity (24 Law J. Rep. Chanc. 669; 1 Jur. N.S. 438) considered and explained.

The granting of their sanction by the commissioners is not mere matter of form but matter of substance for their serious consideration.

Demurrers.

The action was brought by the Attorney-General on the relation of eleven clergymen, rectors of parishes or districts in Manchester, on behalf of themselves and all other the rectors, incumbents or ministers of the rectories, parishes or districts existing or hereafter to be constituted within the parish of Manchester, save the dean and chapter of the cathedral or collegiate church of Manchester, against the dean and canons of Manchester and the Ecclesiastical Commissioners for England, and the statement of claim contained allegations to the following effect.

The constitution of the cathedral or college of Manchester was regulated by a charter of King Charles 1, under which the college was to consist of one warden in priest's orders and four fellows in

priest's orders, two chaplains or vicars and four singing men and four singing boys. There were also to be a sub-warden, and a treasurer or bursar, a collector of rents, teacher of the choristers, an organist and a bailiff, of whom the sub-warden, treasurer and collector were to be always chosen from the number of the fellows, and the other officers from the remainder of the collegiate persons.

By a subsequent statute the warden and fellows acquired the style or title of "dean" and "canons" respectively.

By the Parish of Manchester Division Act, 1850 (13 & 14 Vict. c. 41), it was enacted (by section 14) that there should be paid to the dean of Manchester for the time being, as such dean, out of the annual revenue of the chapter of Manchester the annual income of 1,000*l.* and no more, and the further annual sum of 800*l.* and no more, in consideration of his being charged with the cure of souls in the parish of Manchester, to each canon the annual income of 600*l.* and no more, and to each chaplain the annual income of 250*l.* and no more, and that the dean and canons should "pay the clear residue of the said revenue to the Ecclesiastical Commissioners after reserving thereout such sum or sums of money as should have been expended with the approbation of the bishop of the diocese in the repairs of such part or parts of the said cathedral or collegiate church and of St. Mary's church, in Manchester, as they were or might be liable to keep in repair out of the revenues of the said chapter, and also all such other necessary and proper expenditure as might lawfully devolve upon the said dean and canons."

By sections 23 and 24 of the Act the Ecclesiastical Commissioners were to apply the moneys and revenues to be paid to them as aforesaid, first, in making compensation, as therein mentioned, to certain persons injured by the operation of the Act; and secondly, in the payment of such yearly or other sums as the commissioners deemed fit to each and every or any one or more of the rectors, incumbents or ministers of the rectories, parishes or districts then existing or thereafter to be constituted within the

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parish of Manchester, save to the dean of the cathedral, in addition to the other endowments and surplice and other fees belonging to such rectories, incumbents or ministers respectively (subject to certain provisions for equalising the augmentation as between the several rectors, incumbents or ministers), and the surplus was to be set apart and accumulated for the purpose of raising a fund for the permanent and independent endowment of the several rectors, incumbents and ministers.

By the 35th section of the Act it was enacted that the dean and canons should in every year render to the Ecclesiastical Commissioners an account annually at Easter of the receipts and disbursements in respect of the said tithes, lands and hereditaments vested in the dean and canons for the year ending at the Christmas next preceding, stating therein all the particulars and items of such receipts and disbursements in such form, and to be so verified as the Ecclesiastical Commissioners should direct, and that it should be lawful for the Ecclesiastical Commissioners from time to time or at any time or times to appoint any agent or agents, accountant or accountants to inspect all papers, writings and documents relating to such tithes, lands, hereditaments, estates and accounts, and to take copies of or extracts from the same or any of them, and that one copy of such annual account should be transmitted by the commissioners to the bishop of the diocese, and the commissioners should cause an abstract of the same to be deposited in the registry of the diocese.

The statement of claim then proceeded to set forth the annual accounts rendered by the dean and canons to the Ecclesiastical Commissioners for the years 1872 to 1879 inclusive. The plaintiffs submitted that many of the items of disbursements entered in the said accounts ought not to be allowed, and particularly they objected to—

First, salaries paid to the bursar, collector of rents and registrar, those offices (as the plaintiffs alleged they had discovered) being held by the canons themselves.

Secondly, sums paid to the singing men

and boys other than the four men and four boys provided for by the charter.

Thirdly, salaries paid to the master of the choristers' school, the precentor, being one of the minor canons whose income was limited to 250*l.* by the Act of 1850, and clerk in orders, and sums expended in establishing and furnishing and keeping up the choristers' school; and

Fourthly, alleged improper payments in respect of the repairs of the cathedral, and other miscellaneous expenses.

Under this latter head was an item in the account for 1879, "sundry expenses 474*l.* 5*s.* 5*d.*"

The plaintiffs claimed—

1. A declaration that the dean and canons were not at any time since the passing of the Act of 1850, and that they and their successors were not and would not be, entitled to pay to the canons of the said cathedral, out of the annual revenue of the cathedral, more than the annual income of 600*l.*, to be paid to the said canons respectively, as provided by the 14th section of the said Act, or to pay to the minor canons of the said cathedral for the time being, out of the said annual revenues, more than the annual income of 250*l.*, to be paid to the said minor canons respectively, as provided by the same section, and that any sums paid to the canons or minor canons respectively as bursar, registrar, collector of rents, or otherwise than as aforesaid, ought to be disallowed.

2. A similar declaration in reference to the choristers' school, salaries of master of choristers, precentor and clerk in orders, cathedral repairs and miscellaneous expenditure.

3. An injunction restraining the dean and canons from making any payments except in accordance with the 14th section of the Act of 1850.

4. An order directing them to pay over the future surplus revenues to the Ecclesiastical Commissioners in accordance with the declarations claimed as above.

5. A writ of *mandamus* or order of the Court directing the dean and canons to render for the future, in compliance with the 35th section of the said Act, accounts of the receipts and disbursements in respect of the tithes, lands, hereditaments

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and estates vested in them, stating therein all the particulars and items of such receipts and disbursements, and the purposes for which such disbursements were made, and in particular directing them in their past and future accounts to give further particulars to the plaintiffs and the commissioners of such items of expenditure as were referred to in the accounts which had been rendered under the following heads, namely, "By collector's, bursar's, registrar's, surveyor's, accounts, solicitor's and land agent's charges." "By salaries of clerks in orders, precentor, master of choristers, organist, singers and college officers," or other such or similar general items of expenditure, including the names or name of the persons who from time to time received any part of the sums charged under such items, and all necessary declarations and orders for ensuring compliance by the dean and canons with the provisions of the said 35th section in the future accounts to be rendered by them.

6. Leave, if necessary, to use the name of the Ecclesiastical Commissioners in any action or other proceedings which might be necessary against the other defendants.

The dean and canons and the Ecclesiastical Commissioners separately demurred to the statement of claim, the only grounds of demurrer which call for a report being that no order or certificate of the Charity Commissioners authorising the action had been obtained under section 17 of the Charitable Trusts Act, 1853.

Mr. Kay, Mr. Romer and Mr. Osens-Hardy, for the dean and canons.—We submit that under section 17 of the Charitable Trusts Act, 1853, the sanction of the Charity Commissioners must be obtained before this action can be brought. That section requires that "no suit, petition or other proceeding for obtaining any relief, order or direction concerning or relating to any charity, or the estates, funds, property or income thereof," shall be commenced, presented or taken without the sanction of the commissioners. The funds here in question are both a charitable trust and an

endowment within the Act, and section 17 therefore applies.

They further submitted that the action was improperly constituted, and one which the Court had no jurisdiction to entertain, and cited various authorities to that effect.

Mr. W. F. Robinson and Mr. Swan, for the Ecclesiastical Commissioners, adopted the same arguments, and further submitted that as no direct relief was sought by the plaintiffs against the commissioners, they were improperly made defendants in the action.

Mr. Graham Hastings and Mr. Grosvenor Woods, for the Attorney-General and the relators.—First, we submit that section 17 is inapplicable, because this charity is, by section 62, wholly exempted from the operation of the Act. No doubt the case of

The Attorney-General v. The Sidney Sussex College (ubi supra)

is apparently an authority to the contrary; but from the report of that case it appears that it was not fully argued. The objection was treated by Lord Chelmsford as technical and unimportant, although he allowed it, and section 63 of the Act, which empowers the exempted charities to apply by petition to the commissioners to have the benefit of the Act, and so, if they wish it, bring themselves within section 17, was not brought to his Lordship's attention. It is true that section 63 has since been repealed, but it was in force when the case before him was decided. And, moreover, if that case be against us,

In re Meyrick's Charity (ubi supra)

is in our favour. There the charity was in part for a college and in part for a school, and Kindersley, V.C., held that so far as it was for a college, section 17 did not apply. According to that case it may well be that the sanction of the commissioners is necessary where the cathedral body are trustees of a specific property for a charitable purpose, but here the property which has to be dealt with is the whole property of the cathedral. The rectors and incumbents are not the objects of the "charity" here in question, for the plaintiffs are not in any wise complaining as to the management or

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mode of distribution of the funds applicable for their benefit. The complaint is that the amount of such funds is diminished by the wrongful management of the cathedral revenues.

Secondly, irrespectively of section 62, section 17 does not apply, because this action is in substance an action for a *mandamus* to compel the dean and canons to render proper accounts to the Ecclesiastical Commissioners—that is, it is in substance what would have been, before the Judicature Acts, a common law action—see

The Queen v. The Southampton Port and Harbour Commissioners, 39

Law J. Rep. Q.B. 253; Law Rep.

4 E. & I. App. 449;

and it has been decided in

Holme v. Guy, 46 Law J. Rep.

Chanc. 223, 648; Law Rep. 5

Ch. D. 901,

that the words “suit, petition or other proceeding” apply only to proceedings in Chancery and not to common law actions.

[HALL, V.C.—If you adopt that line of argument it would be necessary to shew me that I have jurisdiction to grant a *mandamus*.]

They referred on that point to

Glossop v. The Heston and Isleworth

Local Board, 49 Law J. Rep.

Chanc. 89; Law Rep. 12 Ch. D.

102;

In re The Paris Skating Rink Com-

pany, 46 Law J. Rep. Chanc.

831; Law Rep. 6 Ch. D. 731;

and

Hedley v. Bates, 49 Law J. Rep.

Chanc. 170; Law Rep. 13 Ch. D.

498.

No reply was called for.

HALL, V.C.—Notwithstanding the argument which has been addressed to me that this being an action for a *mandamus* is matter with which it is competent to the Court to deal, my original impression that the proceedings cannot go on without the sanction of the Charity Commissioners being obtained remains unaffected. The argument founded on the fact that a *mandamus* is asked for here is one which I cannot appreciate, and I do not

think it necessary to investigate the frame of this pleading on that head, because it appears to me that even though a *mandamus* be the only relief sought for, yet the matter is still left within the operation of the 17th section of the Charitable Trusts Act, 1853. There is nothing in the language of the section to distinguish the case of a *mandamus*, because a *mandamus* is a “proceeding,” and that being so I think that it is unnecessary to say more on that head. It is said that the case of *Glossop v. The Heston and Isleworth Local Board* is distinguishable and inapplicable to the case before the Court. In the view which I take it is beside the question to consider whether that is so or not. At present nothing has been said which satisfies me that I should ever grant a *mandamus* in this case.

It is said that the operation and effect of the 62nd section of the Act is to be ascertained by resorting to the 63rd section, and that the latter section was overlooked in the argument and judgment in the case of *The Attorney-General v. The Sidney Sussex College*, before Lord Chelmsford. The 63rd section cannot have any bearing upon this particular case, because it was repealed by the subsequent statute 32 & 33 Vict. c. 110. s. 17. But, of course, the observation remains that the section was not repealed when Lord Chelmsford heard and decided the case of *The Attorney-General v. The Sidney Sussex College*, and therefore the above criticism would be correct if founded on a sound and just construction of the section. But I cannot think that it is so. It would be a very odd thing to say that you might affect the operation of the 17th section by resorting to the process of petitioning to the Charity Commissioners to exempt the particular body from the operation of the 62nd section. Section 63 was never meant to be addressed to such a process as that, so as to exclude the operation of the 17th section. The 17th section of the Act, as it appears to me, clearly embraces such a case as that with which the Court has now to deal, and in reading through that section—which I did more than once—I was struck very

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much with the number of things which are contained in it pointing to the Charity Commissioners exercising a guarded and careful jurisdiction in reference to the institution of proceedings in the case of charities. The section authorises them to qualify their order sanctioning proceedings with all such stipulations or provisions as they may think fit, and to stop the proceedings and so forth, shewing that it is meant to give them a very large discretion, and that they have a very important duty in reference to the administration of charities in giving or withholding leave. Therefore, in a case like the present, I can by no means take it for granted that this is a mere form, or think it otherwise than a very serious matter to go before them, when, I have no doubt, it will be carefully considered by them.

It is stated, however, that the case before the Master of the Rolls of *Holme v. Guy* is an authority that such a case as this is not within the provisions of the Act. It appears to me that all the remarks of the Master of the Rolls in the case before him, instead of tending to shew that this is not a case within the Act, shew clearly that it is within it. The evil of having proceedings taken in such a case which may lead to no good result, is one which must be carefully borne in mind and considered. Supposing we were at the hearing of this action, and a final order were about to be made, what would have to be done? I should probably, if the plaintiffs were entitled to judgment, have to send this case to a referee to investigate all these accounts and to ascertain a number of things—for instance, whether the organist was paid too much or whether there were too many choristers—all that sort of enquiry would have to be taken somewhere, because of course it could not be gone into before me. The plaintiffs might establish, no doubt, some particular cases of misapplication of funds. There are, indeed, two or three questions pointedly raised upon which the Court is asked to make some specific declarations of misapplication of funds by the persons who have to pay them over, and those particular points so raised might be dealt

with, but all the other matters which are sought to be gone into could not be decided in Court. Mr. Grosvenor Woods has disclaimed this being an action to administer the trusts of the charity at all. He says it is a suit instituted for the purpose of directing proper accounts to be delivered over to some persons to whom they ought to be delivered, and which accounts it is said are not delivered in proper form; and he says it asks (I do not know exactly how) that proper accounts may be delivered by the dean and canons to the plaintiffs, to whom they are not ordered to deliver or required to deliver any accounts at all. Those are difficulties from the nature of the case. It was a difficult case for the pleader to deal with, but all these things I refer to only for the purpose of shewing from the nature of the case that it is one eminently within the 17th section, if not within the 62nd section, and for the purpose of shewing that it is very desirable that there should be such a jurisdiction as it is said exists under the 17th section applicable to this particular case.

Such being my view as to that, the question as to the operation of the 62nd section really depends on the effect of the authorities. I should have decided this case as I now decide it without any authority, but I myself consider that it is decided by the cases to which reference has been made, namely, of *In re Meyrick's Charity*, before Vice-Chancellor Kindersley, and *The Attorney-General v. The Sidney Sussex College*, before Lord Chelmsford. The case before Vice-Chancellor Kindersley is claimed as an authority by the plaintiff's counsel for the proposition that the 17th section is not applicable; but as I read the judgment, and understand the reason of the thing as explained there, it is an authority that the section exactly applies to a case of this sort. The case there was considered to be a dealing entirely within the provisions of the 62nd section. The Vice-Chancellor says the reasonable way is to look at the object of the application. "If it is to affect matters of which the college is the object, then you need not go before the commissioners, but if it is to affect an end of which another charity is the object, then it would be necessary to

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go before them." Is not this a case in which the result of this pleading and action is to affect an end of which another charity is the object, that charity being these relators, and the other rectors on whose behalf they represent themselves as suing? That undoubtedly is so, and although it does involve enquiry into what is the fund which ought to be transferred to the Ecclesiastical Commissioners to be dealt with, the object is plainly to administer partially or to some limited extent, or to get some special or peculiar or limited relief in respect of the funds which are the subject of that charity and with which in fact the dean and canons cease to have any concern after the money is handed over by them. The object is to get the proper fund handed over for the purpose of the charity from the hands of the persons who have it, namely, the dean and canons, and who it is said do not render proper accounts. This case appears to me plainly within the principle of that decision. The other case before Lord Chelmsford is exactly in harmony with it, and in fact it is admitted that that case is an authority against the plaintiff's proceeding here without the leave of the Charity Commissioners, but it is attempted to weaken the force of that in the way I have already mentioned.

Upon the whole, it seems to me that I cannot proceed any further with this argument. I should not have been at all unwilling to have heard the case once for all, but I do not think it right to do so. Taking that view, I think the right course to adopt, under all the circumstances of the case, will be to withhold actual judgment upon these demurrers and let them stand over, although, no doubt, my decision is that it is wrong at present to bring the action.

[The sanction of the Charity Commissioners having been subsequently obtained, the demurrers were again brought on for hearing on the 3th of May, 1881, when his Lordship delivered a further judgment, holding that the case, whether considered as one of charity or of trust, was within the inherent jurisdiction of the Court, and that the Ecclesiastical Commissioners (as being interested in the

mode in which the capitular accounts were to be taken) were rightly made parties, and he therefore overruled both the demurrers. On appeal, this decision was unanimously affirmed by the Court of Appeal on the 22nd of June, 1881.]

Solicitors — Cunliffe, Beaumont & Davenport, agents for Cunliffe, Leaf & Co., Manchester, for the Attorney-General and the relators; Clarke, Woodcock & Rylands, agents for Orford & Milne, Manchester, for the Dean and Canons of Manchester; Jennings, White & Buckton, for the Ecclesiastical Commissioners.

FRY, J. }
1881. }
April 5. }

GLOVER v. GILES.*

The Building Societies Act, 1874, s. 12
—*Incorporation—Certificates.*

An action cannot be maintained to impeach the incorporation of a society under the Building Societies Act, 1874.

The plaintiffs in this action were fourteen persons, who sued, as members of the Nineteenth Starr Bowkett Benefit Building Society, on behalf of themselves and other members. The defendants were the last trustees, directors, secretary and treasurer of the society when the circumstances complained of happened.

The society was enrolled under the Act, 6 & 7 Will. 4. c. 32. Its last rules were certified on the 25th of May, 1875. On the 10th of April, 1879, at which a resolution was passed for the purpose of registering the society under the Building Societies Act, 1874, with a view to having it wound up, the society was registered, and the Registrar of Building Societies gave his certificate of incorporation, dated the 26th of April, 1879. An instrument of dissolution, dated the 15th of May, 1879, was executed by

* Compare *The Princess of Rouss v. Ross*, 40 Law J. Rep. Chanc. 656; Law Rep. 6 E. & L. 176.

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seventy-one persons as members of the society. A statutory declaration was made by the secretary that the instrument of dissolution was agreed to by not less than three-fourths of the members holding not less than two-thirds of the total number of shares in the society. The instrument was registered, and the Registrar of Building Societies certified on the instrument that it had been duly registered on the 28th of May, 1879. The statement of claim alleged that the resolution for registering the company had been obtained by fraud, and at a meeting informally and improperly held, and that the execution of the instrument of dissolution and registration of it had also been obtained by fraud, and that these things were done to screen the defalcations of the secretary and treasurer, and that, with the exception of the defendants, the whole of the members of the society were desirous of having the affairs of the society liquidated and the proceedings of the trustees and directors investigated under the Companies Act, 1862.

The plaintiffs claimed, first, a declaration that the certificate of registration of the 26th of April, 1879, was obtained by fraud, and was of no effect, and ought to be delivered up; second, a declaration that the resolutions authorising the obtaining of that certificate were obtained through misrepresentation, and were invalid and not binding on the plaintiffs or the society; third, a declaration that the instrument of dissolution was similarly obtained, and was fraudulent and void and ought to be set aside, delivered up and cancelled; fourth, a declaration that, notwithstanding the certificate of incorporation and the instrument of dissolution, the society was a subsisting society under the provisions of the statute, 4 & 5 Will. 4. c. 40; fifth, an injunction to restrain the defendants from carrying out the provisions of the instrument of dissolution; and sixth, the appointment of a receiver.

The other facts sufficiently appear in the judgment.

Mr. Cookson and Mr. Russell Roberts, for the plaintiffs, to shew that the action

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was properly constituted as to parties, cited

MacDougall v. Gardiner, 45 Law J. Rep. Chanc. 27; Law Rep. 1 Ch. D. 13;

Atwood v. Merryweather, 37 Law J. Rep. Chanc. 35; Law Rep. 5 Eq. 464 n;

Russell v. The Wakefield Waterworks Company, 44 Law J. Rep. Chanc. 496; Law Rep. 20 Eq. 474.

They said an action constituted in this way was the only means the members of the society had of trying their right. The society, if it could be considered as ever having been incorporated, was no longer so, and could not be made a party.

The certificate of the Registrar was not conclusive, and did not prevent the Court declaring the invalidity of the acts certified to—

Laing v. Reed, 39 Law J. Rep. Chanc. 1; Law Rep. 5 Chanc. 4.

They referred to

The King v. Langhorn, 4 Ad. & E. 538; 6 Nev. & M. 203;

In re The British Sugar Refining Company, 3 Kay & J. 408; 26 Law J. Rep. Chanc. 369;

Lindley on Partnership (4th ed.) 545,

to shew that the resolution on which the certificate of incorporation was founded was void, because the meeting at which it was passed had not been duly summoned.

Moors v. Marriott, 47 Law J. Rep. Chanc. 331; Law Rep. 7 Ch. D. 543,

was also referred to as shewing that the rights of the members against the defaulting officers were not lost by any delay.

Mr. North and Mr. Oswald, for the defendants, were not called on.

Fry, J., said—This is a case belonging, unfortunately, to a numerous class of cases—those which result from the defalcations and sometimes from the frauds of officers of benefit building societies. The relief which the plaintiffs seek in this action, on behalf of themselves and other members of a benefit

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building society, is, in the first place, that the certificate of incorporation, dated the 26th of April, 1879, may be declared to have been obtained by fraud and to be of no effect, and that it ought to be delivered up to be cancelled. It asks also to have it declared that certain resolutions which purported to be passed at a meeting of the benefit building society were obtained through misrepresentations, and it prays similar relief with regard to the instrument of dissolution of the 15th of May, 1879.

Now the facts are shortly these: This benefit building society was formed before the passing of the Act of 1874, and its rules were certified under the statute then in force—that of the 6 & 7 Will. 4. c. 32. The 7th section of the Act of 1874 repealed the statute, 6 & 7 Will. 4, but continued it in force with regard to societies which had been registered under it. And the 9th section contained this provision: "That every society now subsisting or hereafter established shall, upon receiving a certificate of incorporation under this Act, become a body corporate by its registered name, having perpetual succession, until terminated or dissolved in manner therein provided, and a common seal;" and the 12th section provides that "The certificate of incorporation under this Act shall not be granted to an existing society except upon application to the Registrar made by authority of a general meeting of the society specially called for the purpose, and the Registrar may require of the person making application a statutory declaration that such authority was duly given."

I pause, therefore, to observe that a certificate of incorporation was given in April 1879 to this society; it was given by the properly appointed officer, and I am now asked to declare that the certificate is void.

In opening the case it was, in the first place, put upon two grounds—misrepresentation of particular facts alleged to particular members of the society; and, secondly, upon irregularity in the general meeting; and Mr. Cookson very fairly, I think, and very necessarily, admitted that he could not in this action, and framed as

the record is, succeed upon the ground of misrepresentations to individual members of the society. Therefore, the question I have to determine is, whether or no that incorporation can be declared to be void on the ground of irregularity.

Now it appears to me that it is clear that the certificate was granted by the Registrar, and it was his duty to satisfy himself whether there was the authority of a general meeting specially called for the purpose, and he was at liberty to require the person making application to verify that authority by statutory declaration, and upon its being done so, according to the terms of the Act of Parliament, the society became incorporated.

Now it is said I can declare that to be void on the ground that no proper meeting was held, and it is said that the meeting held on the 10th of April, 1879, was not a proper meeting within the meaning of the 12th section of the Act, because it did not comply, it is said, with certain regulations which were in existence with regard to the summoning of general meetings. In my view, I have no power to enquire into that at all—I cannot declare the incorporation to be void. The incorporation of persons into bodies corporate is a prerogative of the Crown, and although in this case it is exercised under certain statutory provisions, the incorporation is none the less in exercise of that prerogative. There is a perfectly well-known method by which an incorporation may be recalled or made void. It is competent to proceed by *quo warranto*, and to shew that those persons who represent themselves as members or officers of a corporation are not so. But it is quite new to me that individual corporators of a corporation can come to this Court and ask to have it declared as against other members of that corporation that the incorporation was obtained by fraud or irregularity. And, further than that, there is in this case, as it appears to me, this fatal objection—that the declaration that the incorporation is void is sought for in the absence of the corporation itself, because the corporation are not defendants in this proceeding. Therefore, I am in effect asked

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to declare an incorporation void in the absence of the corporation itself—a step which, in common fairness, it is absolutely impossible for me to take.

His Lordship also held on the evidence that the society had shewn a dissolution in form and manner required by the 32nd section of the Act, and dismissed the action with costs.

Solicitors—Brook & Chapman, for plaintiffs;
Freeman & Winthrop, for defendant; C. A. Brown; Woodbridge & Son, for the remaining defendants.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.	} LYON v. TWEDDELL.
JAMES, L.J.	
LUSH, L.J.	
1881.	
May 19.	

Partnership—Action for Dissolution—Equitable Grounds—Date from which Dissolution should commence—Practice.

Where partnership articles contain no provision for the dissolution of the partnership, and the intervention of the Court is sought to put an end to the partnership on purely equitable grounds, such as incompatibility of temper, and a dissolution is decreed, the dissolution will date from the date of the judgment.

This was an appeal from a decision of Bacon, V.C.

The action was commenced by writ on the 4th of June, 1879, and claimed a dissolution of the partnership then existing between the plaintiff and the defendant, two medical men, on the ground of incompatibility of temper, and other relief.

The partnership was for a term of years, under a deed, which contained no provision enabling the partners to determine the partnership.

On the 29th of April, 1880, the action came on for trial, when the Vice-Chancellor decreed a dissolution of the partnership, and held that the dissolution should date from the date of the writ, and directed that the partnership accounts should be taken in a particular manner.

The defendant appealed, and the only point calling for a report on the appeal was, from what date the dissolution should date.

Mr. Davey and Mr. J. G. Wood, for the appellant.—The practice is unsettled. We submit that the dissolution should date from the judgment of the Vice-Chancellor. This is not a case of seeking to enforce dissolution under the partnership articles, but of seeking the intervention of the Court on equitable grounds. In

Besch v. Frolich, 1 Ph. 172; 12 Law J. Rep. Chanc. 118,

which was a case of a lunatic partner, dissolution was decreed from the date of the judgment. We submit the same rule should be applied here.

Mr. Caldecott (Mr. J. Pearson with him), for the respondent.—The Vice-Chancellor, under the circumstances of the case, thought it right that the dissolution should date from the date of the writ. Can that point be severed from the rest of his judgment; and will the Court of Appeal interfere with the exercise of his discretion? In

Kirby v. Oarr, 3 You. & C. Ex. 184;

Shepherd v. Allen, 33 Beav. 577,

which were cases of partnerships at will, dissolution was decreed from the date of the writ.

No reply was heard.

JESSEL, M.R., said—I think on the whole the more convenient and better plan is to make the dissolution date from the date of the judgment. Consider the nature of the action. The action is instituted not to carry out or enforce any of the partnership articles, but asks the intervention of the Court on purely equitable grounds; that is to say, that under the circumstances the partnership is so detrimental to the parties that the Court is asked to intervene and to put an end to it. In such a case the dissolution should, in my opinion, as a matter of principle, date from the date of the judgment.

JAMES, L.J., said—I am of the same opinion. I think that the date of the dissolution should be the date of the judg-

Lyon v. Tweddell, App.

ment, where the misconduct on which the dissolution is based is not in respect of any breach or misfeasance of the partnership articles or contract, but where it arises from incompatibility of temper or other like matter. It appears to me that every word of Lord Cottenham's judgment in *Besch v. Frolich* applies to the present case, and that is really a matter of principle. But in holding this I guard myself expressly and say that it applies only where the dissolution is sought for misconduct not arising under the partnership articles.

LUSH, L.J., said—The point is important, and one in which the practice should be settled. In the present case the partnership articles do not provide for a dissolution. In such a case, where both the partners are *sui juris*, and the Court dissolves the partnership on grounds not within the partnership articles, it seems to me that the principle of the decision in *Besch v. Frolich* applies with even greater force than when one partner is a lunatic. I am also of opinion, therefore, that the dissolution should date from the date of the judgment.

Solicitors—Rogerson & Ford, agents for F. Marshall, Durham, for appellant; Shum, Crossman & Co., agents for Kidson, Son & McKenzie, Sunderland, for respondent.

KAY, J. }
1881. }
May 26. }

SEAGRAM v. TUCK.

Statute of Limitations—Sum due from Receiver—Debt of Record.

A sum of money due from a receiver, whether the amount has been ascertained or not,—Held, so long as the recognisance exists, to be a debt of record.

Trial of action.

This was a creditors' action to have the personal estate of John Charles Wood (who, in the year 1866, was appointed receiver in an administration suit of *Walters v. Walters*) administered under the direction of the Court.

On the 7th of September, 1866, the

usual order was made in the suit of *Walters v. Walters*, appointing John C. Wood to collect and get in the personal estate of Ralph Walters, deceased; and ordering him, on the 12th of June, 1867, and on the same day in each succeeding year, to leave at the chambers of the Judge his account as such receiver. And it was thereby ordered that he should, within twenty-one days after the date of the chief clerk's certificate of the allowance of such account, pay the balance that should be thereby certified to be due from him on such account, or such part thereof as should be certified to be proper to be so paid, into Court.

In the opinion of the Court the evidence shewed that in May, 1870, John C. Wood sold certain railway stock belonging to the estate of Ralph Walters, and received the net proceeds of sale, amounting to a sum of 357*l.* 1*l.*s. 6*d.*; and that he never brought this sum into his receivership accounts.

In September, 1876, John C. Wood died.

On the 9th of June, 1877, an order was made in the suit of *Walters v. Walters* that Emma Tuck, the then legal personal representative of John C. Wood, should pass his final account as receiver; and that she and her husband, William Henry Tuck, should pay the balance which should be certified to be due from the estate of John C. Wood into Court. And it was ordered that "upon such payment being made" the recognisance entered into by John C. Wood in August, 1866, be vacated.

Shortly after the date of this order the final account was brought into chambers (in the suit of *Walters v. Walters*) by the then legal personal representative of the receiver, and passed; and the recognisance was vacated.

On the 29th of November, 1880, this action was brought against William H. Tuck, the then legal personal representative of the receiver, and William C. L. Tuck, his heir-at-law; alleging that the final account was passed, and the recognisance vacated in ignorance of the fact that the receiver had received and had not accounted for the said sum of 357*l.* 1*l.*s. 6*d.*; and that "the fact that

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he had not done so was not discovered until the summer of the year 1880 ; ” and claiming administration of the receiver's personal estate.

The defendants, by their statement of defence, claimed the benefit of the Statute of Limitations.

Mr. Higgins and *Mr. Fellows*, for the plaintiffs.—First, This sum of 357l. 11s. 6d. was money in the hands of the receiver as a confidential agent. He was an officer of the Court, who had a duty imposed upon him to account for the same. The statute, therefore, could not begin to run until his death in September, 1876—

Teed v. Beere, 28 Law J. Rep. Chanc. 782 ;

Burdick v. Garrick, 39 Law J. Rep. Chanc. 369 ; Law Rep. 5 Chanc. 233.

Secondly, This sum of money was a debt due from the receiver ; and therefore, so long as the recognisance existed—that is to say, in June, 1877—it was a debt of record—

Englehart v. Ordell (not reported) ;

Seton (4th ed.) p. 426.

They also referred to

The Earl of Hardwicke v. Vernon, 14 Ves. 504.

They were then stopped.

Mr. Oswald, for the legal personal representative of J. C. Wood.—

Burdick v. Garrick (*ubi supra*)

was a case of an express trust, and has no application to the present case.

The statute began to run in August, 1873, when the receiver passed his account for the year, beginning in May, 1870, and made no mention in it of this sum. The plaintiff can only escape from the defence of lapse of time by shewing that, through no fault of his own, he did not then discover that this money was not accounted for. In August, 1873, he must be taken to have known that this money was not accounted for, and he has acquiesced for more than seven years—

Rolfe v. Gregory, 13 W.R. 355 ; 34 Law J. Rep. Chanc. 274 ;

Townsend v. Townsend, 1 Bro. C.C. 550 ;

Dean v. Thwaites, 21 Beav. 621 ;

Shelford's Real Property Statutes (8th ed.) p. 289.

Mr. Haughton, for the heir-at-law.

Mr. Higgins, in reply.—The effect of the decision in

Englehart v. Ordell (*ubi supra*)

is that a debt due from a receiver, whether he has never accounted at all, or whether he has only delivered an imperfect account, must be treated as a debt of record.

He also referred to

Ludgater v. Channell, 3 Mac. & G. 175.

KAY, J.—This case involves a question of very great importance ; and, during the whole argument, I have not been furnished with any very direct authority upon the point.

On the evidence I hold it proved that, in the month of May, 1870, certain sums of railway stock belonging to the estate of Ralph Walters were sold by John Charles Wood, the receiver, and that he received the proceeds of sale, amounting to a sum of 357l. 11s. 6d. In August, 1873, the receiver passed his account for the year beginning on the 1st of May, 1870 ; and, in that account, there is no entry of the 357l. 11s. 6d., or of any other sum of money, as the proceeds of sale of the railway stock. In September, 1876, the receiver died. After his death, his executors passed certain further accounts ; but in none of them is there any entry of the proceeds of sale of the railway stock.

Then, on the 29th of November, 1880, ten and a-half years after he had received the money, this action is commenced against his present legal personal representative, and the person who is interested in his real estate, claiming administration of his estate. Now I am satisfied that John Charles Wood did receive this money, and that he has not accounted for it. The money, therefore, is due from his estate. But then it is said that the defence of the Statute of Limitations ought to prevail. Now, on the 9th of June, 1877, a final order was made, after the death of the receiver, that his then legal personal representa-

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tive should pass his final account; and it was ordered that, upon payment into Court of the balance which should be certified to be due from his estate, the recognisance entered into by him, in August, 1866, be vacated. The recognisance, therefore, was in existence in June, 1877, and afterwards; because the recognisance could not be vacated until the balance was paid into Court.

I was referred to a passage in *Seton*, which says that "the balance due from a receiver, though his account had never been passed, or required to be so, was held a debt of record—*Englehart v. Ordell*." That is a very meagre statement. But it would seem, from the note of the case in the Registrar's book, that a petition had been presented upon the recognisance; and the order shews that the reason why the debt in that case was held to be a debt of record was on account of the existence of the recognisance. Therefore, in this case, according to that decision, if any sum of money was in fact due—whether it had been found to be due or not—so long as the recognisance existed that sum would be a debt of record. And, therefore, as late as the month of June, 1877 (and afterwards, until the recognisance was vacated), this was a debt of record. That would be one answer to the defence of the Statute of Limitations.

Moreover, I should be disposed to decide that a receiver is a trustee of the moneys due from him, for the persons entitled thereto. It seems very important to hold the position of a receiver to be one in which the account against him cannot readily be barred. And, if necessary, the receiver in this case—at any rate as long as he lived—must be treated as a trustee of the money which he omitted to state in his account.

Therefore, either way, whether this money be treated as being trust money or as being a debt of record (until the recognisance was vacated), there will be an answer to the defence of the Statute of Limitations. Accordingly the plea of the statute cannot prevail.

But I am much impressed by the way in which this debt was overlooked by the persons whose duty it was to see to

the passing of the accounts. I think the business was conducted with great negligence on the part of the plaintiff. Accordingly I shall make an administration decree, on the footing of this being a debt; but, to mark my disapprobation of the negligent manner in which the business has been conducted, I shall give the plaintiff no costs up to the hearing.

Solicitors—Stibbard, Gibson & Co., agents for Gibson, Pybus & Maples, Newcastle-on-Tyne, for plaintiffs; Webb, Stock & Burt, for defendants.

Fry, J. } *In re SUTCLIFFE. ALISON v.*
1881. } *ALISON.*
May 19. }

Practice—Discovery—Administration—Creditor—Order XXX. rule 5.

A plaintiff in an administration action is entitled to discovery as to the property of the deceased debtor at the earliest stage of the action.

This was a motion by the plaintiff, a beneficiary in an administration action, to compel a further answer from the defendants, the representatives of the deceased debtor, to interrogatories, some of which they had objected to answer. One of the interrogatories was the old common interrogatory as to the details of the deceased's personal estate, and was in the following terms: "Set forth a full, true and particular account of the personal estate of the above-named testator, Joseph Sutcliffe, at his death, and the particulars whereof the same and every part thereof consisted, and the full and utmost value of such particulars respectively, and when and by and to whom and on what account, and by whose order and for whose use, such personal estate and every part thereof, and the proceeds thereof, has or have been received, sold or disposed of, applied, allowed or administered, and what balance arising therefrom is now in the hands of the defendants Elizabeth Sutcliffe and John Sutcliffe, or either or all of them, or due

In re Sutcliffe.

from them respectively, and what part of such personal estate is unsold and undisposed of, and where and in whose possession."

There was also an interrogatory as to the deceased's real estate. The objection to answer these two interrogatories taken was, that they were not material at that stage of the action. Judgment had not been given in the action. The point was argued on the interrogatory as to personal estate.

Mr. Eyre, for the motion, said that neither the reasons for giving the discovery nor the practice in allowing it had been changed by the Judicature Acts—

Saunders v. Jones, 47 Law J. Rep. Chanc. 440; Law Rep. 7 Ch. D. 435.

It might be material for the plaintiff to know what the property of the deceased consisted of at the earliest stage of the action for two reasons—he might find that it was not worth while going on with the action and incurring expense, or he might wish to have a receiver appointed; and he was entitled to have this information—

Thompson v. Dunn, Law Rep. 5 Chanc. 573;

Elmer v. Creasy, 43 Law J. Rep. Chanc. 166; Law Rep. 9 Chanc. 69;

Saull v. Browne, 43 Law J. Rep. Chanc. 588; Law Rep. 9 Chanc. 364.

Mr. Caldecott, for the defendants, said the practice of making these interrogatories at this stage had ceased to exist, and there could be no object in knowing the details enquired into, which would come out more accurately and satisfactorily, or taking the usual enquiries after judgment. He referred to

Order XXXI. rule 5.

Fry, J., after having determined that the interrogatory must be answered, said—As this is an important point of practice I will give my reasons. The interrogatory to which exception is taken as being immaterial and not sufficiently relevant at this stage, is the old en-

quiry as to personal estate in administration suits. It is said that of late years, and I am glad to hear it, such interrogatories are not so frequent. The question is, whether the beneficiaries have lost the right of discovery which they had. In my opinion they have not. I will only refer to the case of *Thompson v. Dunn*, where Lord Hatherley expressed his opinion. He said, "There is no case in which the Court has ever applied the doctrine of *Adams v. Fisher* (1), so as to allow an executor by answer to refuse to set out an account of his receipts and payments. I do not mean to say there might not be a case where the Court would allow him to do so if the asking for the accounts was vexatious. But, looking at the position of an executor, the Court has always thought it desirable that he should by his answer make a full discovery of the assets, so that the plaintiff may be in a position to move to have the balance brought into Court." It appears to me that there is nothing whatever to which my attention has been called which deprives beneficiaries of that right against the executors. Furthermore, it is important at this stage of the action to have the discovery for two purposes: in the first place the plaintiff may desire to move to have the funds paid into Court; in the next place the account may satisfy him, and he may desire to discontinue the action. That interrogatory will therefore be allowed.

Solicitors—James Burn, agent for Barker, Son & Co., Huddersfield, for plaintiff; Layton, Jaques & Co., agents for Fenton, Owen & Hall, Huddersfield, for defendants.

(1) 3 Myl. & Cr. 526; 7 Law J. Rep. Chanc. 289.

FRY, J. }
1881. }
April 6. }

HOOLE v. SMITH.

Mortgage—Construction—Power of Sale—Notice.

Previously to the exercise of a power of sale in a mortgage-deed three months' notice to the mortgagor or his assigns was requisite. A second mortgage was executed:—Held, that notice to the mortgagor alone was insufficient.

This action was brought by a second mortgagee of certain leasehold houses which had been sold under a power by the first mortgagee, who had entered into possession.

He was the defendant.

The plaintiff claimed an enquiry whether the price realised was proper, and, if not, an account, and also an account of rents and profits previously to the sale and consequential relief.

A question in the action was whether notice required by the deed of mortgage to the defendant previously to the exercise of the power of sale had been properly given.

The mortgagor was one Samuel Harrison. After having mortgaged the houses to the defendant he mortgaged the equity of redemption to one Pierson, who assigned his mortgage to the plaintiff.

By the defendant's mortgage, after the power of sale which he had exercised, it was provided that William Smith, the mortgagee, his executors, administrators or assigns, should not execute the power unless and until he or they should have given a notice in writing to Samuel Harrison, the mortgagor, his executors, administrators or assigns, to pay off the money for the time being due and owing on the mortgage, or left a notice in writing to that effect at or upon some part of the premises thereby demised, and default should have been made in payment of such moneys or some part thereof, for three calendar months from the time of giving or leaving such notice, or unless or until some half-yearly payment of interest or a part thereof should have become in arrear for three calendar months.

The Judge found on the evidence that notice had been given to Harrison, the mortgagor, but no notice had been given to the plaintiff.

Mr. Cookson and Mr. Chester, for the plaintiff, argued that the true construction of the proviso requiring notice was that if there was an assign the assign was entitled to have notice given him—

Gill v. Newton, 14 W.R. 490.

Mr. North and Mr. Hatfield Green, for the defendant, contended that the proviso was satisfied if the strict letter of it were fulfilled, and that if notice were given to either the mortgagor or his assign the sale was valid for every purpose and against every person, including the second mortgagee—

Forster v. Hoggart, 15 Q.B. Rep. 155;
19 Law J. Rep. Q.B. 340.

Mr. Cookson replied.

FRY, J. (after finding that as matter of fact due notice had been given to Harrison of the defendant's intention to sell, but no notice had been given to the plaintiff), said—Then arises the question whether that service is sufficient, and that turns on the words of the proviso following the power of sale.

It is plain to my mind that Pierson, in the first place, and Hoole, in the second place, were assigns of Harrison, of whose assignments the defendant had notice years before the sale. The question is, whether, under that state of things, the service on Harrison is sufficient. In my judgment it is not. I think that according to the true construction of that proviso there must be either service on Harrison and his assigns, or service on the assigns and not on Harrison. It is not necessary to determine which of those two constructions is the true one. But when I find the word "assigns" mentioned, it seems to me impossible to say the mortgagee can proceed without giving notice to the assigns. The object of putting in the word is to enable the assigns to intervene and pay off the mortgage debt. No person is more interested in doing so than a second mortgagee. I think that the effect of the words "or assigns" is to subrogate the second mort-

Hoole v. Smith.

gaged to the right to receive notice. And whether Harrison is excluded by the word "or" is immaterial for the purpose of this action.

Judgment was given for the plaintiff, with costs down to and including the hearing.

Solicitors—C. Butcher, agent for Thomas Pierson, Sheffield, for plaintiff; Church, Sons & Co., for defendant.

FRY, J. }
1881. }
March 8. }

HASTINGS v. HURLBY.

Practice—Time—Extension—Service out of Jurisdiction—Order IX. rule 13—Order XI. rule 1—Order LVII. rule 6.

The time for indorsing the date of service on a writ served at Gavelston, in the United States, was extended for a month from the application.

This was a foreclosure action in which the writ had, under an order obtained for that purpose, been duly served on one of the defendants, at Gavelston, Texas, U.S., by the British Consul, on the 10th of February, 1881; he had omitted to indorse the day of service on the writ.

Mr. Vernon Smith, for the plaintiff, applied by motion for an extension of the time limited to three days from service, by Order IX. rule 13, for making the indorsement.

FRY, J., extended the time for a month from the present day, but required the consul to make a fresh affidavit of service.

Solicitors—Peacock & Goddard, agents for Brydges & Mellersh, Cheltenham.

FRY, J. }
1881. } EDRIDGE v. HAWKER AND
May 18, 23, } COMPANY.
24, 25. }

Landlord and Tenant—Brewer—Public House—Covenant—Construction—Void Instrument—Duress—Surprise—Illegality—Forcible Entry—5 Rich. 2. c. 8.—Possession.

A covenant by a publican to buy all beer of his landlord's brewers is satisfied by buying as an undisclosed principal through an agent.

The publican is relieved from the obligation of such covenant with respect to any article his landlord will not supply.

A letter by the tenant licensing the landlord to enter and evict by force was held void as being a licence to commit a crime under 5 Rich. 2. c. 8, and voidable as being obtained under pressure of authoritative and mistaken statement of legal rights.

The fact that no resistance is made to actual entry does not remove the illegality of entry with shew of force and subsequent forcible eviction under the statute 5 Rich. 2. c. 8.

The plaintiffs in this action were one Edwick and his wife. They sued in respect of a forcible entry on an ejectment from a beerhouse called the "Dells" at Bishop Stortford, by the defendants, brewers, of Bishop Stortford, the landlords of the premises. The plaintiff, Mr. Edwick, held a lease of the "Dells" from the defendants, for which he had paid them a premium. The lease contained a covenant by the lessee "that the lessee shall and will purchase of the lessors, their heirs, executors, administrators or assigns, during the continuance of this demise, all beer, ale, porter and stout (whether in bulk or in bottle), wine, brandy and other spirit or liquor that shall be sold or consumed in or upon, or from the said premises;" and the lease contained a proviso for re-entry in case of breach or non-observance of any of the covenants.

The defendants made two kinds of bitter ale, one of which only, the stronger and more expensive, which they called I P A, they sold to their own or "tied"

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public-houses; the other, the weaker, which they called A K, they supplied to private families and some free taverns and public-houses. The plaintiff, Mr. Edwick, got a neighbour, a carrier, to purchase at the brewery on several occasions an eighteen-gallon cask of the A K ale, which he paid for himself, getting 1s. discount, and was repaid in full by the plaintiff, Mr. Edwick, getting the 1s. discount for his trouble. The defendants having discovered the facts sent for the plaintiff, Mr. Edwick, and on the 9th of September, 1880, Mr. Wiggan, the senior partner in the brewery, and his partner, Mr. Blunt, who was also a solicitor practising in London, had an interview at the brewery with Mr. Edwick, and told him he had committed a breach of his covenant and a fraud on the public, and while he was there Mr. Blunt drew up a letter of licence to evict, which he (Mr. Edwick) signed, and which was in these terms: "In consideration that you will not take immediate steps to eject me from the 'Dells,' of which I have forfeited the lease, I undertake to give you quiet possession on the 29th inst., and you may use this letter as leave and licence to eject me without any process of law on that date."

Mr. Edwick consulted his solicitor, who entered into correspondence with the defendants, and repudiated on behalf of his client any right in the defendants to re-enter on the 29th of September. The defendants wrote a letter to Mr. Edwick demanding possession; it was delivered on the following day and he refused to go out. On the 4th of October the defendants sent a foreman and policemen and two men in their employ to take possession. Mr. Edwick was put out. He entered again and was put out the following day. He entered again and was put out on the 6th. He was put out forcibly but with no great violence on each occasion. Mrs. Edwick and her children had been allowed to remain in till the 6th, when she also was put out. More of the defendants' men and two policemen were present on that occasion, and there was a crowd of persons collected outside. She made stout resistance, and considerable violence was used in putting her out,

and she received injuries. During the whole of the time some one in the defendants' employ was in the house as being in possession on their behalf.

The other material facts sufficiently appear in the judgment.

The plaintiff claimed damages.

Mr. North and *Mr. T. L. Wilkinson*, for the plaintiffs, argued that the meaning of the covenant to take beer of the defendants was that he would use their beer only, and it had therefore been strictly carried out, and no right of re-entry had arisen.

Secondly, if that was not the construction of the covenant, there was a converse obligation implied on the defendants to supply such beer as the plaintiff required; and they having refused to supply him with A K beer he was at liberty to buy it otherwise—

Luker v. Dennis, 47 Law J. Rep. Chanc. 174; Law Rep. 7 Ch. D. 227,

and for that reason the covenant was not broken by the plaintiff.

The letter of licence to enter by force could not be set up by the defendants, for it was obtained under circumstances of surprise and by undue influence of a superior over an inferior, and was therefore voidable, and had been avoided by the repudiation of the plaintiff.

Moreover it was void *ab initio*, because it was a licence to do an act made criminal by the Act of 5 Rich. 2. c. 8; and lastly, the re-entry was a criminal act under that statute, and the defendants were at least liable in damages for the injury done to the female plaintiff in forcibly ejecting her.

Beddall v. Maitland, *ante*, p. 404; Law Rep. 17 Ch. D. 174.

Mr. Cookson, *Mr. Cracknall* and *Mr. Graham*, for the defendants, said the covenant in the lease was to buy of the defendants, and of them only, and directly. It was in that form to prevent the very act done by the plaintiff, namely, the selling of the lower class of bitter ale at the defendants' public-houses and injuring the defendants' reputation.

Whether the lease was, or was not, forfeited for breach of covenant, the

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terms of the letter licensing the defendants to enter and evict were binding as being terms of a contract to compromise a right disputed *bona fide*—

Calisher v. Bischoffsheim, 39 Law J. Rep. Q.B. 181; Law Rep. 5 Q.B. 449;

Ockford v. Barelli, 20 W.R. 116; and the licence extended to the case of assistants—

Dennet v. Grover, Willes, 195.

Such a licence was legal and could be acted upon—

Kavanah v. Gudge, 7 Man. & G. 316; 13 Law J. Rep. C.P. 99.

No offence had been committed under the statute Richard 2, inasmuch as the agent of the defendants had been admitted peaceably, and once in possession, as two persons could not be legally in possession, their possession being that of the legal owner, the plaintiff became a mere trespasser—

Semayne's Case, 5 Coke, 91.

Mr. North replied.

The following authorities were also referred to on the effect of the letter of licence, and the question whether it was voidable—

Addison on Torts, p. 353;

Bridges v. Blanchard, 1 Ad. & E. 536;

Davies v. Marshall, 10 Com. B. Rep. N.S. 697; 31 Law J. Rep. C.P. 61;

Roper v. Harper, 4 Bing. N.C. 20.

Fry, J., said—The first question which arises is this: Were the defendants, in the acts which they committed, trespassers upon the plaintiff's property? The second question which has arisen is this: Supposing they were not trespassers, then did they through their agents commit some act which was wrongful, unless they could justify their possession and entry; and are they unable to justify their possession and entry by reason of its being forcible, and so contrary to the statute of Richard 2? The third question, which has been more or less discussed, and also which only arises in the event of their not being trespassers, is, whether or not, in pursuance of their lawful right to put the plaintiff and his wife out of

the property, their agents were guilty of any excess in the force that was used.

[In continuing the history of the transactions upon the interview between the parties on the 9th of September, his Lordship observed:] They (the partners, Messrs. Hawker) expressed their annoyance and indignation at what he (Mr. Edwick) had done, and told him that he had committed a breach of his covenant. That statement they appear to have made with great positiveness and with great authority as regards him, because they spoke not merely in the words of influential brewers and landlords, but they spoke through the mouth of an experienced London lawyer. Now that statement, I think, was erroneous in point of fact, but made in good faith.

[After stating the facts down to the purchase by the plaintiff (Mr. Edwick) of A K ale, his Lordship continued:] The question which arises, then, is this: Was that a violation of the plaintiff's contract that he would purchase of the lessors all the beer to be consumed on the premises? In my judgment it was not a breach. I ask myself whether, according to ordinary parlance, and the ordinary use of the English language, the plaintiff did purchase his beer of the defendants, and I conceive I must answer that question in the affirmative. What he authorised Cundall to do was to be done as his agent, although in the name of the agent; and, whatever the mind of the lessors may have been in selling, the mind of the plaintiff in purchasing was clearly to buy through an undisclosed agent as to purchasing of the lessors. It appears to me that that is so. The lessors (the defendants) say this: "We make two kinds of bitter beer, the I P A, or India pale ale, and the A K. The India pale ale is the only kind of ale which we supply to the public-houses who are tied to us. The A K we supply to private families, and in some cases, at any rate, to public-houses which are free and not tied to us;" and they suggest that the plaintiff was guilty of fraud upon the public in selling, as bitter ale, the A K; and to protect the public from that fraud they are unwilling to sell this A K ale to the publicans. I have clearly nothing to do with the arrange-

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ments they make with the publicans. It appears to me there is no fraud upon the public in selling as bitter ale that which was bitter ale; because A K is as much bitter ale as the I P A, and it is so described by the plaintiff's counsel and by the defendants themselves. It was sold in some cases at the same price as the I P A, which might, or might not, lead to confusion. It was not I P A. I cannot help observing, however anxious the defendants may be as to the sale of A K to the public as bitter ale, they are not unwilling to sell it to other publicans who buy it of them, and I suppose they sell it as bitter ale, because they can sell it as nothing else. I have nothing to do, in the first place, with the alleged fraud upon the public; and, in the next place, it appears to me there is no fraud upon the public in selling A K as bitter ale when it is so described by the defendants. Then, supposing I am wrong in that conclusion, another argument requires consideration. Mr. North has said that the true construction of this covenant is to make the lessee the arbiter of what kinds of beer, what kinds of spirits, what kinds of liquor he shall sell; and that there is an implied contract by the lessors that they will supply such ales as the lessee may require—at any rate that he is liberated from his obligation to purchase of them in respect of any kind of beer, liquor or spirit which he applies for and with which they cannot supply him; and therefore, if they declined, according to their own story, to supply him with A K, he was at liberty to buy A K of Cundall. Having regard to the conclusion I have already expressed as to the question of fraud, it is not necessary for me to express my opinion upon that obligation. I may say that that argument is well worthy of consideration, and I am inclined to think that that construction is the true one. I hold, therefore, that there was no breach of this covenant by the plaintiff, and I hold, consequently, that the proviso for re-entry did not come into effect.

[Upon the construction and effect of the letter of licence to eject, his Lordship said:] In the first place the document proceeds evidently upon the footing of a

forfeiture of the lease. That is the foundation upon which both parties are treating. In the next place, it is apparent that the plaintiff recognises that the lease has come to an end, and he undertakes to give quiet possession; but, according to the construction which I put upon the document (and if I have understood both Mr. Cookson and Mr. Graham rightly, the construction which they put upon it), something much more than that was expressed to be authorised by this instrument, namely, the power to eject without any process of law, and the power for that purpose to enter upon the property, and to use all necessary force upon so entering in putting out the plaintiff and his family from the property. That, I repeat, if I am not mistaken in the argument of the learned counsel for the defendants, has been their construction as to the document. If so, the document appears to me to be void as being, in effect, a licence to commit a crime, because the statute of Richard 2 has provided that, even where there is a lawful right of re-entry, no man shall enter with strong hand, nor with multitude of people, but only in a peaceable and easy manner. Any violence, therefore, which is used for the purpose of obtaining an entry upon land which is in the possession of another—anything amounting to a strong hand—is a violation of that statute; and, consequently, according to the view which I take of the true construction of this instrument, I think it is void in its inception, as being, in effect, a licence to commit that which is contrary to the public law of the country. But even if it were not so, I think the instrument so voidable for the reason I have already indicated. I think it is voidable upon the suggestion that the lease had been forfeited, and that suggestion emanated in good faith, but in error, from the defendants. Such an instrument is voidable according to the well-known case of *Rawlings v. Wickham* and other cases where an innocent representation has been the ground of an executed contract being rescinded; and I think by force of Mr. Hardcastle's letter of the 29th of September, or, if not by that, then by virtue of the plaintiff's refusal to give up

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possession on the 4th of October, the mind of the plaintiff to rescind that voidable agreement was sufficiently made known to the defendants, and from that time the voidable agreement became void.

[His Lordship proceeded with the judgment as a trial of issues of fact, and assessed damages for injuries to Mr. Edwick at 250*l.*, including something for assault and wrong, and 200*l.* for injuries to Mrs. Edwick, and continued:]

I might be content to leave the matter here if it had not been that very important questions have been agitated in the course of this discussion with regard to the right of landlords to enter upon premises in the occupation of their tenants, and also because, in my judgment, the damages which I have assessed in respect of the wife may, in this case, be justified, even if I am wrong in thinking that the defendants were trespassers. If on the 4th of October they had a right of entry which they might have put in force through proper means of law, I think they nevertheless made a wrongful entry on that date. I couple the amount of force which they actually displayed on that entry—four men—with the previous letter of the 29th of September. I couple it with the plaintiff's statement that he should not give up possession, and I think that the acts which began with that entry on the 4th were one continued series of acts until the female plaintiff had been ejected through the gates in the yard on the afternoon of the 6th; and until that ejection the defendants never recovered actual possession of the property. It has been said by Mr. Cookson that the statute of Richard only applies to entry upon land, and that if I, who have a title, can get peaceably over the border of the land of the defendant, who is in possession, and who has no title, possession follows the title. I am in possession, and I may use all necessary violence or force in putting the person out who had been in possession. In my judgment that is not the law. The statute of Richard, as I have already pointed out, prohibits an entry with a strong hand, which means, as I understand it, coming with an excessive number of persons, or with a

multitude of people. It can only be done in a peaceable and easy manner. If the operation of the statute is confined to the mere fact of getting over the border—the edge of the property in question—peaceably, the statute evidently is not adequate to meet the evil which it was intended to express, namely, the evil of persons, who had a right, as well as those who had not a right, causing disturbance, inaugurating civil war, for the purpose of obtaining that which was their property. Accordingly it appears to me to be clear law, which I desire to re-state, that if an entry be made, and if after entry has been made and before actual and complete possession is obtained, violence is used towards the person who is in possession, that is criminal within the statute of Richard.

Now *Viner's Abridgment*, referring to *Lambart's Birenarcha*, lays down the law in these terms: "If one enters peaceably and when he has come in useth violence this is a forcible entry." In the same way in *Bacon's Abridgment* the law is laid down thus: "If a man enters peaceably into a house, but turns the party out of possession by force or by threats frights him out of possession this is a forcible entry." Now I will read only one other passage, which is in *Hawkins's Pleas of the Crown*, where he says this: "It is to be observed that wherever a man either by his behaviour or speech at the time of his entry gives those who are in possession of the tenement which he claims just cause to fear that he will do them some bodily hurt if they will not give way to him, his entry is esteemed forcible, whether he cause such a terror by carrying with him such an unusual number of servants or by arming himself in such a manner as plainly intimates a desire to back his pretensions by force, or by actually threatening to kill, maim or beat those who shall continue in possession, or by giving out such speeches as plainly imply a purpose of using force against those who shall make any resistance, as if one say that he will keep his possession in spite of all men." Now, applying that principle—the principle laid down in the passage I have last read—to the circumstances of the case here—looking at the

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threat contained in the previous letter of the 29th; looking at the way in which the police on the evening of the 4th of October warned the plaintiff not to lay hands upon the defendants' men; looking at the way in which the police were placed under the instructions and directions of Mr. Mortlock; looking at the way in which he came with more men than were necessary for getting actual possession; looking at the way in which those men were assisted by others from time to time; and looking, as I do, at the whole series of acts from the 4th to the 6th of October as one continued act, I come to the conclusion that there was in this case not merely a forcible entry, but an independent wrong done to the plaintiff's wife in the course of that forcible entry, which, according to the doctrine of *Newton v. Harland* (1) and that class of cases, being independent of the mere act of entry, gives a cause of action.

I have made those observations because, in my judgment, it is important there should be no misunderstanding as to what the rights of persons who have a right of entry are. Their rights are to enter in a peaceable and an easy manner, and if they cannot do so they must resort to the Courts. In no other way can the peace and the quiet of this country be maintained, and in no other way can the relation of landlord and tenant be maintained, and be prevented from resulting in such acts of violence and disturbance as I regret to say there were in this case.

Solicitors—Mr. Hardcastle, for plaintiff; Messrs. Walker, Son & Field, agents for W. Gee, Bishop Stortford, for defendants.

[IN THE COURT OF APPEAL.]

JAMES, L.J.	} NOBEL'S EXPLOSIVE COMPANY v. JONES, SCOTT AND COMPANY.
BAGGALLAY, L.J.	
LUSH, L.J.	
1881.	
April 27, 29.	

Infringement of Patent—User of Patented Article—Agency.

J. S. & Co., a firm in London, acting for the occasion without remuneration as Custom House agents, on behalf of K. & Co., a firm in Cologne, took the necessary steps in clearing through the Custom House and obtaining the necessary warrants for enabling cargoes of lithofracteur, manufactured by K. & Co. at Cologne, to be discharged into lighters in the Thames for the purpose of being stored in K. & Co.'s warehouses. This lithofracteur was manufactured by a process which was patented in this country by letters patent vested in the plaintiff company.

On an action by the plaintiffs for damages and an injunction against J. S. & Co. on the ground of user of the patented invention,—

Held (reversing the decision of BACON, V.C.), that the act of J. S. & Co., although it was one of the steps that must of necessity be taken before K. & Co. could discharge the cargoes, and (assuming that the trans-shipment and storage in K. & Co.'s warehouse was, having regard to the nature of the invention, a user of it within the meaning of the letters patent) J. S. & Co. thereby assisted K. & Co. in infringing the patent, yet did not constitute any infringement on the part of J. S. & Co., nor was it an actionable wrong, and the action was dismissed with costs.

The Court in dealing with agents has regard to the character of the agency—that is, the agency must be an agency in the making, using, exercising or vending the patented invention.

This was an appeal from a decision of BACON, V.C. The case is fully reported in the Court below, 49 Law J. Rep. Chanc. 726.

The plaintiff company had become the assignees of letters patent granted to Nobel for an invention for rendering safe

(1) 1 Man. & G. 956; 10 Law J. Rep. C.P. 11.

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and practicable the use and transport of nitro-glycerine.

By means of this invention a substance called "lithofracteur" had been produced, which had become a well-known article of commerce and was extensively manufactured and dealt in by the plaintiffs.

This patent was assigned to the plaintiff company on the 23rd of April, 1877. It appeared from the evidence that some years previous to the date of the assignment the defendants had been purchasing this article from Krebs & Co., manufacturing chemists at Cologne, with a view to exportation to Australia, under an agreement dated July, 1873, with Krebs & Co., by which they had obtained exclusive right to supply the Australian colonies with the said article. But that agreement had come to an end before the plaintiffs' title as assignees accrued.

The acts complained of on the part of the defendants since April, 1877, were shortly as follows:—

Krebs & Co. imported from Maasluys, in Holland, into the port of London in May, 1877, 1,200 cases of lithofracteur by a ship called the *Edward Austin*. In July, 1878, a further cargo by the ship *J. Prieman*, and 710 cases by the ship *Castalia* in December, 1878. The *Edward Austin* also brought some detonators which were not the subject of the patent, and of which the defendants were the importers. The cases of lithofracteur were consigned by Krebs & Co. to themselves, the bills of lading being made out to "Krebs & Co. or assigns." The ship was freighted by Krebs & Co., who paid the freight.

The defendant firm being on friendly terms with Krebs & Co., acted on their behalf in procuring the necessary warrants and authorities from the Custom House officers for the delivery of the lithofracteur into lighters for the purpose of its transmission to Krebs' warehouses. In filling in one of the documents that was necessary for the purpose, one of the defendants' clerks gave the name of the defendants as importers.

The importation licence, to the holder of which alone under the Explosive Substances Act, 1875 (38 & 39 Vict. c. 17), s. 40. sub-s. 9, the captain could have

delivered the cargoes, was held by a man named Sneyd as agent for Krebs & Co.

The plaintiffs alleged that the defendants, if they had not infringed the patent by the use of the invention in England, had as agents, whether gratuitous or paid agents, assisted the defendants in infringing the patent by obtaining the documents and authorisation which were necessary to enable the defendants to deliver the patented article from the vessel in the Thames for the purpose of warehousing in this country.

The Vice-Chancellor made an order restraining the defendants from transshipping, importing or exporting into or from any port of Great Britain, or from moving or attempting to move from any place to any other place any lithofracteur or such other compounds, or from either using or putting in practice the invention, or from in any other way infringing the letters patent, and directed an enquiry as to the amount of damages which the plaintiffs had sustained by the unlawful use which had been made in this country of their patented invention, the defendants to pay the amount of damage when ascertained and the costs of the action.

The defendants appealed.

Mr. Davey and *Mr. Goodeve*, for the appellants.

Mr. Aston and *Mr. Outler*, for the company.

The arguments and cases used and cited in the Court below were repeated, and the following cases were also cited:—

Higgs v. Godwin, E. B. & E. 529; 27 Law J. Rep. Q.B. 421;

Gibson v. Brand, 1 Web. Pat. Cas. 630;

Upmann v. Elkun, 41 Law J. Rep. Chanc. 246; Law Rep. 7 Chanc. 130;

Vavasseur v. Krupp, Law Rep. 9 Ch. D. 351.

JAMES, L.J.—*Mr. Davey*, we have had an opportunity of considering this case and we shall not trouble you to reply.

In this case the plaintiffs complain of the defendants, Messrs. Jones, Scott & Co., as having infringed letters patent which are now vested in the plaintiffs,

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who are a limited company. The defendants do not deny the rights of the plaintiffs to their letters patent or in any way traverse the validity of them, but they simply deny the fact that they have in any way infringed those letters patent. That is their case. The defendants Jones, Scott & Co., it appears, some years ago, before the plaintiffs' title as assignees of the patent had accrued at all, had been dealing in the article, as purchasers from the German manufacturers, Krebs & Co., with a view to exportation to Australia. That seems to be the only thing that they had to do with it. They had an agreement with Krebs & Co., giving them a sort of exclusive right, and I believe an exclusive right to supply the Australian colonies, or some of them, and they had an agreement for purchasing for that purpose. However, they say that all these transactions of purchasing had come to an end before the plaintiffs' title had accrued, and then they say this, with respect to what occurred since the title of the plaintiffs had accrued, "the only intervention which the defendants have made or with or in which they have been concerned or taken part in relation to lithofracteur—which was the name of the article—since the 23rd of April, 1877, has been in acting as Custom House agents in reference to obtaining on behalf of Messrs. Krebs & Co., of Cologne, the real owners of this lithofracteur, permission for the discharge thereof from ships into lighters. As such Custom House agents the defendants' function was confined to obtaining papers necessary for such trans-shipment, and they never had any ownership in or exercised any control over the said lithofracteur. The defendants were in no sense the importers of the said lithofracteur, though, in order to comply with the forms in use at the Custom House, they appear to have been so described in some of the papers sent in by them; but notwithstanding the use of the word, the real nature of the defendants' employment was explained to and well understood by the Custom House officers." That is what they allege. It was for the plaintiffs to prove, if they could prove, the burden being upon the plaintiffs, that the defendants had been

concerned or taken part or had intervened in respect of the cargoes in question in some other manner than that which the defendants themselves alleged, because any person who says that the defendants have committed a wrong against him must prove the wrong by ordinary legal evidence. Now the plaintiffs have really given no evidence whatever in support of that contention. On the other hand, the defendants have conclusively proved—that is to say, if the evidence is to be believed—every word of that allegation to be strictly and literally true. But it was suggested, and seems to have been suggested with some success in the Court below, that although the plaintiffs themselves had not proved the affirmative, yet some of the affirmative was to be supposed to have been proved, or was to be assumed to be proved because the negative had not been in every respect satisfactorily established by the evidence on the part of the defendants, especially because the defendant, who was abroad in Australia, had not stayed here to give evidence himself. But really that is a fallacy which we have had occasion more than once to refer to in this Court, namely, that a man supposes that he proves the affirmative because the witness for the negative was not wholly and entirely to be believed. Of course that is not so. The affirmative must be proved; and to say that a witness for the negative is not wholly to be believed, or that some other witness might be there is in no sense of the word to prove the affirmative.

Then what we have with regard to the facts of the case is this: As to what the defendants did, it appears to me they have really proved it in every respect most satisfactorily, and that there is no inference or suspicion whatever to be drawn from or raised by the fact that Mr. Jones, the defendant, happened to be in Australia and did not happen to be in Court to give evidence. What we do know is this, that Krebs & Co. manufactured these articles at Cologne, that they were consigned to Krebs & Co. by themselves—the bills of lading being made out to Krebs & Co., or assigns; that the ship was freighted by Krebs & Co., that the freight was paid by Krebs & Co.,

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that when the goods arrived in the river Thames they were transferred from the ship to the lighter paid for by Krebs & Co., and were transferred from that lighter into a warehouse which was Krebs & Co.'s warehouse, where they remain. It is true that in the course of the proceedings in the Custom House, in obtaining the permission from the Custom House, the defendant's clerk—this was the only thing, I think, raised in the whole case to shew their liability—in filling in some document which had to be filled in, in the course of obtaining a discharging order or a warrant for discharge from the ship, used expressions which seemed to shew that his masters, Messrs. Scott & Co., were the importers. These documents were utterly immaterial for any purpose in this action, except so far as they might have raised suspicion. Of course the fact that Jones, Scott & Co. had inadvertently made that immaterial mistake in the document is not of any consequence, and is not an estoppel, it being shewn conclusively that Jones, Scott & Co. never had any interest whatever in the lithofracteur in question, or any of those cargoes, and that they never had any possession, either as agents or otherwise, or any control or power or dominion over them. Although there were those documents which were part of the transaction, the proper and essential documents, the leading documents in the case as far as Jones, Scott & Co. were concerned, were letters written and signed by them or signed by Mr. Jones, the partner, and addressed to the Custom House, in which it conclusively appeared that when they asked for the proper warrant or authority from the Custom House, Jones, Scott & Co. were not the importers, but that Krebs & Co. were the importers, and, in fact, the only persons who held the proper and necessary importer's licence. The agent of Krebs & Co. appears to have been a person in this country who was authorised to take these things under the particular provision of the Act requiring a proper licence or a proper authority to receive explosive compounds of this character. Then we have this established—and in point of fact established to my

mind clearly—that the goods remained Krebs & Co.'s goods; that the defendants really were not trading as Custom House agents; but what they did was as agents on behalf of Krebs and Co. to obtain the warrant authorising the delivery from the ship to the lighter. Those are the facts.

Then a question was raised by Mr. Aston very broadly. "Even assuming that to be the fact," he says, "that you only applied to the Custom House for the purpose of getting that authority, yet that was one of the steps by which Krebs & Co. were about to infringe the plaintiff's patent, and you took part therefore in it and assisted Krebs & Co. Therefore, so far as you did, you obtained the warrant. They might have obtained it themselves or by anybody else, but you did in fact obtain that warrant or authority from the Custom House, and therefore you lent yourselves in one step in the case in such a way as to enable Krebs & Co. to infringe, or you assisted them in infringing." Now is that an actionable thing? Is the mere assisting in getting the goods from the ship into a lighter an actionable wrong? What is actionable and what the plaintiffs' rights are, are shewn by the letters patent themselves. What the rights of the patentee are, and what nobody can infringe is, that the patentee and his assigns, and no other, shall during the term lawfully make, use, exercise and vend his said invention. Can anybody say that going to the Custom House and writing to the Custom House for Krebs & Co. for a warrant to discharge things from a ship into a barge is making the invention? Is it using it? Is it exercising it? Is it vending it? It seems to me it is neither making, using, exercising nor vending the said invention. Krebs & Co. may possibly be supposed to have been using it. Krebs & Co., the persons who had the control over it, or the persons who had the possession, may, in one sense, be said to be using it, having regard, as Mr. Aston said (though I do not think it is necessary for us to determine the point), to the particular nature of the invention in this case, which was patented; that is to say, it was an invention in truth by means of which

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every drop of the highly explosive thing "nitro-glycerine" is coated with some other material in such a way as to make it storable, movable and transportable with safety. Therefore, as the effect and utility of the patent, according to Mr. Aston's view—and he may be right in that—was the safety communicated to the nitro-glycerine by means of the particular invention, anybody who was enjoying that safety might be said in that sense or in that way to be using the invention. It may be, therefore, possible, if ever the point arises, that if Krebs & Co. were to bring the thing into this country for the purpose of sending it abroad even without opening the packages—if the packages were on board a ship in England or in a warehouse in England, and there stored *bona fide* with a view of its being sent out of this country—it is possible that would be using it in this country, in not exactly the same sense, but nearly in the same sense, as the persons were held to be using Bett's Patent Capsule, because Bett's Patent Capsule was protecting the liquor in this country, which was the use of the invention (1). Krebs & Co. might, in that sense, be supposed to be using the invention. But a man who has no possession of the thing, and has no control over it, and who has no dominion or power to deal with the thing, to whom the safety is of no consequence or the want of safety is not of the slightest consequence whatever, cannot be said to be using the invention, and that is the only way in which it could be said that these letters patent were infringed. Of course nobody could pretend to say that was "making, exercising or vending," and it does not come within either of those. It is not necessary to go through the prohibitory words, which do not carry it any further.

Therefore, it appears to me that if an action had been brought against these gentlemen setting up the exact facts, and saying that "Krebs & Co. imported into this country articles made in contravention of

the letters patent, and you went to the Custom House and got from the Custom House an authority enabling the captain of the ship who imported them to deliver them into Krebs & Co.'s lighter"—if that action had been brought, alleging those facts, I cannot but think myself that that declaration would have been clearly demurrable; and nobody could suppose that there was in the mere act of assisting in procuring the transfer from one vessel to another vessel any infringement of the patent.

It is said the Court of Chancery has gone further in dealing with agents, but I do not think it ever did. The Court of Chancery has always held a hand over agents; but then, it appears to me, they must be actual agents. They must be agents who are agents in the making, in the using, in the exercising or in the vending of the invention. They must be actually agents, whose agency is directly in the making, using, exercising or vending. Or in another case there might be a person who had possession of the pirated article, still as agent, consignee or factor, or in any other capacity, which possession the present High Court—formerly the Court of Chancery—would prevent being used in any way to the damage or injury of the patentee. But then it must be that kind of agency; and that is the kind of agency we are asked to extend to this case.

It appears to me that if we call a man an agent for this purpose it would be saying that any person whatever who had anything to do with the removal of goods from a manufacturer's factory to that manufacturer's storehouse would be liable to an action, either for damages or for an injunction, because it turned out those articles were made either in infringement, or were going to be sold in infringement, of the letters patent, or, which is the same thing, in infringement of a trade mark. If it were to be said that any person who had anything to do, either directly or indirectly, with the means by which the goods got from one place to another was to be liable to an action at law or an injunction in an action by the plaintiffs it would be giving a wide, a great, a most injurious ea-

(1) In *Betts v. Neilson*, 37 Law J. Rep. Chanc. 321; Law Rep. 3 Chanc. 429; 40 Law J. Rep. Chanc. 317; Law Rep. 5 E. & I. App. 1.

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couragement to idle and vexatious litigation. According to my view, it would be interfering, without any real benefit to any human being, with the ordinary course of men's lives, in the prosecution of their trades and vocations. I am of opinion that there is no authority for such an extension of the rule; and none of the cases have gone beyond, as I have said, a direct agency in the possession of the thing itself. I think we should be doing a very wrong thing indeed if we were to encourage the extension of that to the ordinary transactions of life—to persons who really had nothing whatever to do with the infringement.

I am of opinion that the order of the Vice-Chancellor ought to be discharged, and that the action ought to be dismissed, and with costs.

BAGGALLAY, L.J.—I am of the same opinion, and for the same reasons. I have but a very few words to add, and they have reference rather more to the facts of the case than to the application of the law to those facts.

This lithofracteur, having been manufactured at Cologne, was shipped from a Dutch port for delivery at a warehouse on the river Thames. The permission or consent of three parties was required for that purpose. Inasmuch as the article was a foreign article the laws or the rules of the Custom House had to be obeyed. It had to be ascertained whether there was any duty payable in respect of it, and if duty was payable, whether it had been paid. Then, inasmuch as the article was an explosive material, the provisions of the Act with reference to explosive substances had to be complied with. Thirdly, as the goods were to be delivered in the river Thames, the regulations of the Thames Conservators had to be obeyed. No question arises here with reference to those regulations. It must be assumed that they were fully complied with.

Now the licence for the landing of explosive articles had to be obtained from the Secretary of State, and the licence was in favour of the importers whoever those importers might be. All that the Custom House had to do with the matter

was to ascertain whether they were free from duty, or if the duty was paid, and, therefore, before the goods could be landed from the ship in which they were imported to be taken on shore there must be what is called a landing order or delivery order—I forget which is the precise form of it—which simply authorises the landing of the goods. The licence in this case for the landing of the explosive substance was obtained by the importers. The transactions which we have to deal with were three in number, three several importations, but the circumstances of each were exactly the same, with one very slight exception. We may take the cargo brought by the *Edward Austin* as an example of all, and it has this advantage, that the *Edward Austin* brought over the lithofracteur of which Messrs. Krebs & Co. were declared the importers, and it also brought over detonators which were not the subject of the patent, but of which Messrs. Jones, Scott & Co. were themselves the importers. When they applied for the Custom House authority to land those goods they enclosed the licences which had been granted under the Explosives Act, and those licences were declared to be for Messrs. Jones, Scott & Co., the defendants, as regards the detonators, and for Krebs & Co. as regards the lithofracteur. In regard to each of the other two cargoes two licences were simply issued to Nursey, who, in each of the other two cases, was declared to be the legal importer. Therefore you have got the authority under the Explosives Act in favour of the actual importer of the goods. Then what was it that Jones, Scott & Co. did? They simply forwarded the licence for the landing in pursuance of the provisions of the Explosives Act to the commissioners, and asked them merely for their authority to clear the goods (which I think is the general expression) through the Custom House, and to hand in the proper delivery order, which indicated that all the duty (if any duty was payable) had been paid and discharged. That was all that they did.

I quite assent to the proposition which Mr. Aston pressed very strongly upon us, and which was stated by my colleague,

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Lord Justice James, in the case of *Elmslie v. Boursier* (2), that any interfering with the exclusive right of a grantee of letters patent will be restrained; and if in this case these goods had ever been in the actual possession of Messrs. Jones, Scott & Co. themselves, having regard to the peculiar nature of the subject-matter of the letters patent, there may have been a question (it is not necessary to express an opinion upon it) whether in that respect they were using the invention. But I am satisfied upon the evidence that the goods were never in the possession of Messrs. Jones, Scott & Co. at all, but they were delivered from the ship to the lighterman, which lighterman was employed by Sneyd, who was the manager in England of Messrs. Krebs & Co.

Therefore, it appears to me that there is really no ground for the making of the decree or giving the judgment which has been given in this case, and that the appeal ought to be allowed, and the claim dismissed with costs.

LUSH, L.J.—My learned colleagues appear to me entirely to have exhausted the subject. Their judgments are the result of our joint deliberations, and I have nothing to add to them, but simply to say I adopt every word which has been said by my two learned colleagues.

Solicitors—Woodbridge & Sons, for appellants;
J. & R. Gole, for respondents.

KAY, J.
1881.
May 27, 30. }

ROOKE v. NISBET.

Partnership—Dissolution—Return of Premium.

The plaintiff and defendant entered into partnership as solicitors for a term of twelve years, "the partnership to be determinable at the option of any partner" by giving three months' notice; and the plaintiff to have the option of increasing his share in the profits of the business upon payment to the defendant of 600l.

The plaintiff paid the premium of 600l. Afterwards the defendant dissolved the partnership by giving a notice as provided by the articles:—

Held, that the plaintiff was entitled to the return of a proportionate part of the premium.

Trial of action.

On the 1st of July, 1867, the plaintiff, Mr. F. H. Rooke, and the defendant, Mr. H. C. Nisbet, entered into an agreement for a partnership as solicitors. The agreement contained (amongst others) the following clauses:—

1. The partnership to be for seven years, from the 1st of January, 1868, determinable at the option of either party by three months' notice, expiring at the end of any year.

2. F. H. R. to pay a premium of 2,400l., and to be entitled to one-fifth share of the profits.

3. In case the partnership shall be determined by desire of H. C. N. before the expiration of the term, he shall repay to F. H. R. such a proportion of the premium as shall be equivalent to the unexpired portion of the term.

4. In case the partnership shall be terminated by desire of F. H. R. before the expiration of the term, he shall be entitled to receive back the premium, subject to a reduction of one-half of the sums received during the partnership as his share of profits.

7. In case of the death of F. H. R. his representatives shall be entitled to receive the same return of premium as if the partnership had been then terminated by his desire.

Rooke v. Nisbet.

The plaintiff duly paid the premium of 2,400*l.*

On the 11th of November, 1871, a memorandum was indorsed on the agreement of July, 1867 (upon the admission of Mr. S. J. Daw as a partner), which was as follows:—

The above-named H. C. Nisbet and F. H. Rooke having this day entered into new articles of partnership for twelve years, from the 1st of January, 1872, on the admission of Samuel John Daw into their firm, it is agreed that the within articles shall be superseded by the new ones, except as regards clauses 3, 4 and 7, which shall remain in force during the first three years of the new term.

And it is further agreed that F. H. Rooke shall have the option at the expiration of five years of the new term to increase his share in the profits of the business to one-fourth on payment to the said H. C. Nisbet of 600*l.*

On the same 11th of November, 1871, new articles of partnership were entered into between the plaintiff, the defendant and Mr. S. J. Daw, which contained (amongst others) the following clauses:—

1. The partnership to be for twelve years, from the 1st of January, 1872, determinable at the option of any partner by three months' notice, expiring at the end of any year. . . .

5. In case of the dissolution of the partnership by notice, the said H. C. Nisbet shall be allowed the option of continuing to occupy the offices of the late partnership, and buying the other partners' share of the furniture at a valuation.

The new articles contained no provision for the return of a proportionate part of the premium, in case the partnership should be determined by a three months' notice pursuant to clause 1.

Shortly before the 1st of January, 1878, the plaintiff exercised his option (pursuant to the terms of the memorandum of November, 1871) of increasing his share in the partnership business to one-fourth; and he accordingly paid to the defendant the sum of 600*l.* by way of premium for such increased share from the 1st of January, 1878.

On the 31st of December, 1880, the

partnership between the plaintiff, the defendant and S. J. Daw was dissolved by a three months' notice duly given by the defendant to the plaintiff, pursuant to clause 1 of the new articles of partnership.

In January, 1881, the plaintiff brought this action against the defendant, alleging that under the circumstances aforesaid he was entitled to a return of the sum of 300*l.*, part of the premium of 600*l.*; and claiming payment accordingly.

Mr. Higgins and *Mr. Cozens-Hardy*, for the plaintiff.—Here the defendant, the partner who received the premium, has himself dissolved the partnership for no fault or misconduct on the part of the plaintiff. The plaintiff is, therefore, entitled to a return of a proportionate part of the premium—

Atwood v. Maude, Law Rep. 3 Chanc. 369;

Wilson v. Johnstone, 42 Law J. Rep. Chanc. 668; Law Rep. 16 Eq. 606.

They were then stopped.

Mr. Whitehorne and *Mr. Armitstead*, for the defendant.—It is an express term of the partnership article, that the partnership shall be determinable by any partner upon giving "three months' notice." The defendant has simply done what he had a strict legal right to do.

[KAY, J., referred to

Featherstonhaugh v. Turner, 25 Beav.

382; 28 Law J. Rep. Chanc. 812, as an authority to shew that in such a case the partner turned out was entitled to a return of premium.]

In

Bond v. Milbourn, 20 W.R. 197, where there was a clause (similar to the one here) enabling either partner to determine on giving notice, and the defendant exercised his right, Bacon, V.C., held that there could be no return of premium. They also referred to

Akhurst v. Jackson, 1 Sw. 85;

Lee v. Page, 30 Law J. Rep. Chanc. 857.

Mr. Higgins was not called upon to reply.

KAY, J.—Mr. Rooke paid the premium of 600*l.* on the 1st of January, 1878.

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The partnership then had some years to run. Afterwards, without any misconduct whatever on the part of Mr. Rooke, but upon a question arising between him and Mr. Nisbet—a question upon which they might well differ—the partnership was dissolved.

The question is, whether Mr. Nisbet, having by his own voluntary act dissolved the partnership, under the power contained in the partnership articles, is at liberty to retain the whole of that 600*l.* I say nothing at all about what might be the proper way of deciding this question, in case there had been any misconduct on the part of Mr. Rooke, or in case Mr. Rooke himself had given the notice to dissolve. I quite understand that different considerations would then apply. But, as I put it to Mr. Whitehorne during the argument, if Mr. Nisbet is at liberty, for no misconduct on the part of Mr. Rooke, but simply at his own will and pleasure, to determine the partnership at any time he likes, and to keep the premium; of course he would have been at liberty to have given the notice within a couple of days after the premium had been paid. And would any Court of equity hold it equitable that a man should receive from his co-partner a payment of 600*l.*, as the consideration for an increase of his share, and then, the next day, should be at liberty, under the power contained in the articles of partnership, to determine that partnership, and say, "Oh, this is your bargain. You bargained that any of us should be at liberty to determine the partnership; you paid the 600*l.* with your eyes open to that bargain; and I now determine the partnership because it is my will, my pleasure, to do so, and I will keep the whole 600*l.*?"

I am referred to cases on the subject, one of which is the case of *Atwood v. Maude*. In that case Lord Cairns says, in the course of his judgment, "We think the case is one in which, using the words of Lord Cottenham, . . . a payment has been made in anticipation of something afterwards to be enjoyed, where, if circumstances arise so that that future enjoyment is denied, the party paying is not to lose his money." Then he says, "Can it be just that the defendant, who has re-

ceived the 800*l.* as the price of submitting to the inconvenience for the whole term of seven years, but who will now be relieved from it, should nevertheless retain the whole sum?" In that case there was a state of things existing between the two partners, by no special fault of either of them, which made it impossible for the partnership to continue; and the person who had paid the premium filed his bill and obtained a decree for dissolution. Lord Cairns and Lord Justice Selwyn there held that a state of things existed, without the special fault of either party, in which it was just and equitable that the premium should be apportioned.

I asked whether the same thing did not appear to be law of the Court, from the case of *Featherstonhaugh v. Turner*. That case was cited to Lord Cairns (in *Atwood v. Maude*), and he mentions it without disapproval. There there was a partnership "for such term and time as they should mutually agree to continue partners." The Master of the Rolls, in giving judgment, says, "This partnership having been entered into between Mr. Turner and Mr. Marsh in consideration of 800*l.* paid by Mr. Marsh, I think it was not in the power of Mr. Turner to dissolve it next day, and keep the 800*l.* in his pocket." Beyond all question it was in his power to dissolve it the next day, according to the terms of the partnership. But, although he had the power to dissolve it the next day, the Master of the Rolls says—and I take Lord Cairns's comment as being not a disapproval—that if he did exercise that power of dissolving the partnership, he was not to be at liberty to keep the whole premium in his pocket.

The only case to the contrary is a case of *Bond v. Milbourn*. There the partnership was determined under a notice given according to the articles. There was this peculiarity about the case: the defendant gave notice to determine and then wrote to forbid the plaintiff from carrying on business under the name of Milbourn & Co.; which, according to the articles, he would be at liberty to do, because the articles provided that the party to whom the notice should be given "should be at liberty, if he pleased, to take upon himself the whole of the joint trade, and

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should pay the party retiring and giving such notice the value of his share." The Vice-Chancellor decided, in that case, that there could be no return of premium. But I think I can see very plainly the reason of that decision. In that case the men who paid the premium knew that if the partnership were dissolved by the person to whom he had paid it, the business would belong to him. And it was a very natural construction of that partnership contract to say that he took that fact into consideration when he paid the premium, and that he was content to pay it subject to the possibility of no return if his co-partner chose to dissolve by giving notice; because in that case he would get the great benefit of the goodwill of the business.

I do not think that that case goes against the view I have taken here; because, in this case—whoever gives the notice—the business is to endure for the benefit of Mr. Nisbet, and Mr. Nisbet is to have the option of taking the partnership offices, and paying a valuation for the furniture to the other partners; which, practically, supposing there to be anything like a goodwill attaching to a solicitor's business, would give him the command of that goodwill. Therefore I do not think this case analogous to the case I have last referred to.

I think it would be most inequitable that Mr. Nisbet should be at liberty to determine the partnership and to keep the whole of the premium in his pocket. Accordingly, I shall make the same declaration as was made in *Atwood v. Maude*, that the plaintiff is entitled to the return of such a part of the sum of 600*l.* as bears the same proportion to that sum which the unexpired period of the term of twelve years bears to the whole term.

Mr. Cozens-Hardy.—We are agreed that the amount to be returned shall be one-half, or 300*l.*

Solicitors—*Rooke & Sons*, for plaintiff; *O. Leese*, for defendant.

FEY, J.
1881.
March 26, 28. }

STEEL v. DIXON.

Principal and Surety—Co-sureties—Contribution—Indemnity.

All of several co-sureties are entitled to participate in the benefit of an indemnity taken from the principal debtor by some.

In October, 1878, T. A. Steel and W. Chater, the plaintiffs in this action, and the two defendants, G. W. Dixon and F. Gurney, signed a joint and several promissory note for 800*l.*, as sureties to one Robinson, to a bank. The principal debtor made default, and the four sureties had to pay the sum of 200*l.* each on the note.

Previously to their signing the note Robinson had promised the defendants Dixon and Gurney to give them security, and on the 20th of February, 1879, Robinson executed a deed by which he demised a leasehold house at Hounslow, and assigned the furniture in the house to the defendants Dixon and Gurney, and it was declared by the deed that "the premises demised and assigned should be held by the defendants Dixon and Gurney upon trust for sale, and to apply the proceeds of such sale—in the first place in payment of expenses; in the second place, in or towards payment of the share or shares of the moneys which should or might become payable upon, or in respect of, the said promissory note for 800*l.*, and which share or shares the defendants Dixon and Gurney should or might, as between themselves and the plaintiffs, be liable to pay or contribute in the event of default being made by the principal debtors; and in the third place, in or towards payment of the residue of the moneys which should or might become payable upon, or respect of, the said promissory note, and which residue the plaintiffs would, upon default of the principal debtor, be primarily liable to pay or contribute, but so that the plaintiffs, or either of them, should have no right or power to interfere or claim any benefit in the provisions of the security; and lastly, to pay the surplus of the proceeds to the principal debtor."

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The affairs of the debtor, W. Robinson, were put in liquidation; and the defendant J. J. Saffery was appointed trustee of his estate.

The defendants Dixon and Gurney realised the property vested in them by the deed of February, 1878, and after paying expenses and providing for payment of the 400*l.* they had paid as sureties they had a balance.

The plaintiffs claimed to participate in the benefit of the security taken by their co-sureties.

Saffery, the trustee of Robinson's estate, was made a party at the instance of the defendants Dixon and Gurney, and pleaded that the deed of indemnity was void, and might be set aside.

The question whether the plaintiffs were entitled to participate in the benefit of the security was argued, in the first place, between the plaintiffs on the one hand and the defendants Dixon and Gurney on the other, on the assumption that the deed was void as against Saffery, and created a good security in favour of Dixon and Gurney, but did not, so far as its construction went, give any benefit to the plaintiffs.

Mr. Cookson and *Mr. Warmington*, for the plaintiffs, said that though there were no English authorities exactly in point, as on the principle that between co-sureties there was equality of burden, sureties were entitled to contribution from their co-sureties—

Dering v. The Earl of Winchelsea,
1 Cox, 318;

Swain v. Wall, 1 Ch. Rep. 149.

So every surety ought to be allowed to participate in the benefit of any security taken by his co-sureties from the principal debtor, and so it had been decided in the Courts of the United States of America as a logical result of the principle of equality—

Miller v. Sawyer, 30 Vermont, 412;

McCrus v. Belt, 45 Missouri, 179;

Aldridge v. Hapwood, 39 Vermont,
630;

Story's Equity Jurisprudence, s. 499.

The principles of Roman law as to suretyship were similar to those of English law, and according to such Roman

law the plaintiffs would be entitled to participate in the benefit of the mortgage—

Mackelley, Systema Juris Romani, pl.
438.

Mr. North and *Mr. Chubb*, for the defendants Dixon and Gurney, argued that they had a right to protect themselves when they undertook to become sureties by any specific bargain. If the mortgage had not been made in pursuance of a contract earlier than the date of the plaintiffs' contract of suretyship the case might have been different. They referred to

Done v. Walley, 2 Exch. Rep. 198;
17 Law J. Rep. Exch. 225.

Mr. Millar and *Mr. Maidlow*, for Saffery.

Fry, J., stated the facts and said—
In my opinion, upon these assumptions the plaintiffs are entitled to share in the benefit of that deed. I base my opinion on the general principle applicable to co-sureties established in the well-known and often-cited case of *Dering v. The Earl of Winchelsea*, the result of which is, that as between co-sureties there is equality of burden or benefit. I don't mean necessarily equality in a simple and absolute form, but in what has been sometimes called a proportional form. The result is expressed by Baron Alderson in the case of *Pendlebury v. Walker* (1) in these terms: "Where the same default of the principal renders all the co-sureties responsible, all are to contribute; and then the law superadds that which is not only the principle, but the equitable mode of applying the principle, that they should all contribute equally, if each is a surety, to an equal amount, and if not equally, then proportionally to the amount for which each is a surety." I hold, therefore, that the result of that case is to require that the ultimate burden is to be borne by the sureties in proportion to the amount of the principal's debt for which they made themselves responsible. That being the case, it follows that each surety must bring into hotchpot every benefit which he has received in respect

(1) 4 You. & C. 441; 10 Law J. Rep. Exch. in Eq. 32.

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of his suretyship which he undertook, and if he received a benefit by way of indemnity from the principal debtor, it appears to me that he is bound to bring that into hotchpot as between himself and his other co-sureties in order that it may be distributed between himself and his co-sureties equally or proportionately as the case may be.

In arriving to that conclusion I am much strengthened by the American authorities to which my attention has been called by Mr. Cookson. Mr. Justice Story asserts that principle in these terms: "Sureties are not only entitled to contribution from each other for moneys paid in discharge of their joint liabilities for the principal, but they are also entitled to the benefit of all securities which have been taken by any one of them to indemnify himself against such liabilities."

In the case of *Miller v. Sawyer*, before the Court of Chancery in the State of Vermont, the principle is thus stated by Barratt, the learned judge who delivered judgment. Having referred to the case of *Dering v. The Earl of Winchelsea*, he says, "For present purposes it is needless to cite and discuss the books and cases to any considerable extent in which this subject is treated, and the leading principles of it applied in settling the rights and duties of parties. It may be comprehensively stated that persons subject to a common burden stand in their relation to each other upon a common ground of interest and of right, and whatever relief by way of indemnity is furnished to either by him for whom the burden is assumed enures equally to the relief of all the common associates;" and in the course of his judgment he refers to other cases. With respect to that of *Hull v. Robinson* (2), he reads, "Chief Justice Ruffin says, The relief between co-sureties in equity proceeds upon the maxim that equality is equity, and that maxim is but a principle of the simplest natural justice. It is a plain corollary from it that when two or more embark in the common risk of being sureties for another and one of them subsequently

obtains from the principal an indemnity or counter security to any extent it enures to the benefit of all."

Those American decisions are exactly, as it seems to me, in point. Mr. North has urged that a difference may arise on this question, namely, where the security taken by one or more co-sureties is taken by virtue of a bargain entered into between the co-surety and the debtor at the time of his becoming surety. In my judgment that is immaterial. I think it does not affect the principle of equity to which I have referred whether the security is the result of contract between the debtor at the time of the co-surety becoming surety or is a voluntary security subsequently given, or arises in any other manner whatever. I repeat, whatever goes to diminish the total amount of burden must, in my judgment, be brought into hotchpot.

In saying that I wish to guard myself against its being supposed that this equity may not in any case be varied or departed from. Those to whose benefit the security enures may contract themselves out of the benefit, and the question may therefore well be considered in each case where there has been such a contract between the co-sureties. But a contract between one surety and the debtor is not to be confounded with a contract between the co-sureties, by one co-surety renouncing his equity in favour of another. In the next place, it appears to me that many cases may arise in which one co-surety, by reason of his default in performing his duty towards the other, may estop himself from the equity which otherwise he would have had against the defendant. Some of such cases have been suggested by Mr. North in the course of his argument, but neither of those principles appears to me to apply in the present case, because here the contract upon which the security was given was one between the debtor and two co-sureties, and was not communicated at the time of the suretyship to the other sureties, and here there appears to me to be nothing in the contract of the plaintiffs, upon the assumption of which I am now proceeding, which deprives them of the benefit of their right against the co-sureties. Therefore,

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on those assumptions, I hold the plaintiff would be entitled to the benefit he claims. It remains to be considered how far those assumptions are correct.

[The trial of the other issues proceeded and the deed was upheld.]

Solicitors—Armstrong & Lamb, for plaintiffs;
J. B. Churchill, and Stocken & Jupp, for defendants.

JESSEL, M.R. } In re THE BIRMINGHAM AND
1881. } LICHFIELD JUNCTION RAIL-
May 28. } WAY COMPANY.

*Railway Company — Undertaking —
Abandonment—Parliamentary Deposit—
Judgment Creditor — Receiver — Railway
Companies Act, 1867 (30 & 31 Vict. c. 127),
ss. 4, 31-35—Abandonment of Railways
Act, 1869 (32 & 33 Vict. c. 114).*

By the provisions of the special Act of a railway company, the Parliamentary deposit was not to be paid out unless the company should, within the period named, either open the railway or prove, to the satisfaction of the Board of Trade, that one-half of their capital had been paid up and expended; and in default thereof the special Act provided that the deposit should be applied in compensating landowners and others injured by the company, and, subject thereto, should either be forfeited to the Crown, or, in the discretion of the Court, if the company should be insolvent and be ordered to be wound up, or if a receiver should be appointed, should be wholly or in part paid or transferred to the liquidator or receiver, or be otherwise applied as part of the assets of the company for the benefit of the creditors thereof. The company had never purchased any land or commenced their railway, and the time for completing the same had expired. They had not paid up or expended one-half of their capital, and had no uncalled capital. The Board of Trade had refused to grant a warrant of abandonment of the railway.

On a petition under the 4th section of the Railway Companies Act, 1867, by a judgment creditor of the company who had

obtained a charging order on the deposit, asking for the appointment of a receiver of the undertaking of the company and for an inquiry as to the claims of any landowners and others injured by the exercise of their compulsory powers by the company, and for payment, subject to such claims, to the receiver, of the Parliamentary deposit, and for the application thereof in payment of the amount due to the petitioner and the other creditors of the company,—

Held, that no receiver could be appointed, inasmuch as, under the circumstances, there was no “undertaking” of the company within the meaning of the 4th section of which a receiver could be appointed, and that, as no winding-up order of the company had been made, the Court had no power to make any order dealing with the deposit.

Petition.

The Birmingham and Lichfield Junction Railway Company was incorporated by Act of Parliament in 1872. By the 43rd section of that Act an agreement was confirmed between one Hewitt and the company, whereby, in consideration of Hewitt withdrawing his opposition to the bill, the company agreed to pay him 1,200l.

The time for the construction of the railway was limited to five years, and the powers of compulsory purchase to three years from the passing of the Act.

In May, 1873, Hewitt sued the company for the sum of 1,200l., and signed judgment against them for 1,274l. 1s. 2d.

In February, 1874, he issued a *fi. fa.* against the company, but the sheriff made a return of *nulla bona*, and in July, 1874, Hewitt registered his judgment in the Common Pleas.

By a Deviation Act, passed in 1874, the company was authorised to make certain other railways and deviations from the railways previously authorised, and also to abandon a portion of such railways.

By the 26th section of that Act the powers for compulsory purchase were limited to three years from the passing of the Act.

By the 27th section it was provided that the sum deposited in the Court of Chancery, in pursuance of the standing

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order, should not be paid or transferred to the persons paying in the same unless the company "shall previously to the expiration of the period limited by this Act for completion of the railways, by this Act authorised, either open the said railways, or prove to the satisfaction of the Board of Trade that the company have paid up one-half of the amount of the capital authorised to be raised by means of shares, and have expended for the purposes of this Act a sum equal to such one-half of the said capital; and if the said period shall expire before the company shall either have opened the said railway for the public conveyance of passengers, or have given such proof as aforesaid to the Board of Trade, the said sum deposited shall be applied in manner hereinafter specified."

By the 28th section it was provided that the money deposited should be applied towards compensating landowners and others suffering loss by the exercise of the company's compulsory powers, and for which no compensation should have been paid, and should be distributed in satisfaction of such compensation in such manner as to the Court of Chancery might seem fit, "and if no such compensation shall be payable, . . . then the said sum of money, or such portion thereof as may not be required as aforesaid, shall either be forfeited to Her Majesty, and accordingly be paid or transferred to, or for the account of, Her Majesty's Exchequer, in such manner as the Court of Chancery in England thinks fit to order on the application of Her Majesty's Treasury, . . . or in the discretion of the Court, if the company is insolvent and has been ordered to be wound up, or a receiver has been appointed, shall wholly, or in part be paid or transferred to such receiver or to the liquidator or liquidators of the company, or be otherwise applied as part of the assets of the company, for the benefit of the creditors thereof."

By an Act of 1877, the period limited for the construction of the railways authorised by the Acts of 1872 and 1874 was extended to three years from the 6th of August, 1877.

The company had given no notice to

treat, and had never purchased any land by agreement under their Acts of 1872 and 1874, and the railways by such Acts authorised had never been commenced, one-half of the share capital authorised by the Act of 1874 had not been paid up, and the company had not expended one-half of such capital. The company had no uncalled capital. The Parliamentary deposit was represented by a sum of 1,942*l.* 14*s.* 1*d.*, new three per cent. annuities, and Hewitt now presented a petition in respect of the 1,274*l.* 1*s.* 2*d.*, with an arrear of interest still owing to him, asking that a receiver of the undertaking of the company might be appointed, that an enquiry might be directed what compensation (if any) was due to any landowner, and that the sum in Court might be paid to the receiver and applied by him after satisfying all claims (if any) in respect of compensation in payment of the amount due to the petitioner and the other creditors of the company according to their priorities.

The petitioner had applied to the Board of Trade for a warrant of abandonment, but they had declined to grant it, on the ground that the Railway Companies Act, 1867, only applied to railways authorised to be constructed by an Act of Parliament passed previous to that Act. In the action against the company for his debt, the petitioner had obtained an order absolute, charging the company's interest in the sum of 1,942*l.* 14*s.* 1*d.* with his judgment debt and interest.

Mr. Buckley, in support of the petition. —As the petitioner cannot get a warrant of abandonment, and so proceed under the Abandonment of Railways Act, 1850, and obtain a winding-up order under the Companies Acts in pursuance of the Abandonment of Railways Act, 1869, his only remedy is to obtain the appointment of a receiver of the "undertaking" under the 4th section of the Railway Companies Act, 1867. The Parliamentary deposit is made assets of the company by their Act of 1874, and therefore their "undertaking" consists, amongst other things, of the Parliamentary deposit. The petitioner, as a judgment creditor of the

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company, is entitled as of course to have a receiver or manager appointed—

In re The Manchester and Milford Railway Company, 49 Law J. Rep. Chanc. 365; Law Rep. 14 Ch. D. 645.

There may be some unpaid calls and the receiver could get them in, and it is inequitable to think that unless a receiver is appointed the petitioner has no remedy.

He also referred to

In re The Bradford Tramway Company, 46 Law J. Rep. Chanc. 89; Law Rep. 4 Ch. D. 18;

In re The Lowestoft, Yarmouth and Southwold Tramways Company, 46 Law J. Rep. Chanc. 393; Law Rep. 6 Ch. D. 484.

Mr. Whitehorne, for the directors who had provided the deposit, supported the petition.

Mr. Brooksbank appeared for the railway company.

Mr. Stirling, for the Crown, was not called upon.—He referred to

Gardner v. The London, Chatham and Dover Railway Company, 36 Law J. Rep. Chanc. 323; Law Rep. 2 Chanc. 201.

THE MASTER OF THE ROLLS.—I regret to say that I cannot assist the petitioner. It does appear to me that what the Legislature intended was that these *bona fide* debts should be paid, but a condition was imposed that there must be either a winding-up order or a receiver. There is neither. The condition has not been complied with. Then the suggestion is that I can appoint a receiver, but in my opinion the Court has no power to appoint a receiver in this case. The 4th section of the Act of 1869 obviously does not apply to a case where there is no undertaking. Here the railway company never had any railway nor any suggestion of any property. This sum of money which was paid in by the promoters never belonged to the company, and though in certain events, if it were their assets, it could be applied in paying their debts, yet it never was part of their assets, and therefore no receiver of it can be appointed. Then it is suggested that the receiver may get some money from calls, but the

answer to that is, that the 4th section never was intended to preclude the creditor from what used to be called his remedy by *scire facias* to get the unpaid calls. You are not precluded from that by appointing a receiver; the receivership does not extend to unpaid calls. The object of the section was to prevent creditors of the railway company from interfering with the railway, but not to prevent the creditors from obtaining any unpaid calls which they might have a right to get, and therefore a receiver of the "undertaking" means the railway and works as a going concern, and includes the stock and everything else; but if there is no stock what is the receiver to do? By the 4th section, all money received by the receiver is to be applied and distributed under the direction of the Court, after "due provision for working expenses and other outgoings in respect of the undertaking," in payment of the debts of the company; but there is no undertaking in this case within the 4th section, and therefore there is nothing that I can appoint a receiver of. There is no power of appointing a receiver where the company has no property that I am aware of. The only other mode in which the deposit can be made available is under a winding-up after a warrant of abandonment has been granted by the Board of Trade, under the Abandonment of Railways Act, 1850, as amended by the Railway Companies Act, 1867, and the Abandonment of Railways Act of 1869. In the present case, however, the Board of Trade have declined to grant their warrant. I suppose if they did grant a warrant I could act whether they had power to grant it or not; and it is equally clear, I should say, if they do not grant it, whether they have power to grant it or not, I cannot act. Whether or not they have power to grant it, they have not granted it; I cannot compel them to grant it, and therefore I cannot act in this matter. It certainly seems to me to be immaterial to enquire whether they have or have not power to grant it, but I must say if they have not power they ought to have it; but that is a thing I cannot grant, it must be granted by the Legislature. Under these circumstances I can afford the petitioner no

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present relief, and all I can do is to dismiss his petition. Then, as regards the parties who appear as respondents, they are three: first of all there is the Treasury, which has a very ample fund, called the Consolidated Fund, to fall back upon; and counsel for the Treasury very properly left the matter of costs in the hands of the Court. It is not a case for asking for costs against this unlucky petitioner, and therefore, acting on that very proper submission on the part of the Treasury, I shall make no order as to their costs, neither shall I give any costs to the company nor the directors who appear.

The petition will therefore be dismissed without costs.

Solicitors—H. R. T. Alexander, for petitioner;
Tilleard, Godden & Holme, for the company;
Hare & Co., for the Crown.

HALL, V.C. }
1881.
June 1, 2. }

BISCOE v. JACKSON.

Charity—Mortmain—Bequest for "Establishment" of Charitable Institutions in such Manner as not to violate Mortmain Acts.

A testator bequeathed to his trustees a sum of 4,000*l.* out of pure personalty, and directed them to apply the same, or such part thereof as they should think fit, and the annual income of such part as should not, for the time being, be so applied, "in the establishment of a soup kitchen for the parish of S., and of a cottage hospital adjoining thereto, in such manner as not to violate the Mortmain Acts;" such hospital to be provided with not less than four beds for patients, and with all other necessary furniture and appliances. The testator also directed that his trustees should set apart a sum of 2,500*l.* out of pure personalty, and should, "so far as they or he lawfully could, without violating the laws enacted against the disposition of property in mortmain, apply a sum not exceeding

1,000*l.*, part thereof, in establishing an Independent chapel at A," and stand possessed of the residue upon certain trusts for providing a stipend for the minister of such chapel and otherwise for its benefit:—Held, that the first bequest was valid, inasmuch as it might be carried out without the purchase of land by the trustees, but that the second bequest in favour of the Independent chapel was void under the Mortmain Acts, because it, by its terms, directed the trustees personally to apply the money in the establishment of the chapel, and thus involved the purchase of land by them.

The testator, Joseph Jackson, of High Street, Shoreditch, cabinet warehouseman, by his will, dated the 27th of March, 1871, bequeathed to the plaintiffs, Thomas Biscoe and Walter Brown, the lease of his business premises at Shoreditch, together with the goodwill of the said business, and all his stock-in-trade, and the book-debts belonging to him in the said business, and the balance of any moneys which, after payment of certain legacies thereby bequeathed, should be in the hands of his bankers at the time of his death, upon trust to continue his business for a period of three years after his decease, and accumulate the net profits thereof in the way of compound interest as therein mentioned, and subject thereto he directed that his trustee or trustees should sell and convert into money the lease of his said business premises, and the goodwill of the said business, and the stock-in-trade and other effects belonging thereto, and should get in the outstanding debts, and out of such part of the moneys which should arise from such sale, getting in and conversion as aforesaid, and the accumulations of profits as aforesaid, as should be pure personal estate, and might by law be bequeathed for charitable purposes, the testator directed his said trustees or trustee to set apart the sum of 10,000*l.*, and as to 4,000*l.*, part thereof, to apply the whole of such sum of 4,000*l.*, or such part thereof as his said trustees or trustee should in their or his absolute discretion think fit, and the annual income of such part of the said sum of 4,000*l.* as should not, for the time being, be so

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applied (and which he authorised his trustees or trustee to invest in the meantime in the establishment of a soup kitchen for the parish of Shore-ditch, and of a cottage hospital adjoining thereto, in such manner as not to violate the Mortmain Acts; such hospital to be provided with not less than four beds for patients whose cases should be of an urgent character, and with all other necessary furniture and appliances. And as to 6,000*l.*, the residue of the said sum of 10,000*l.*, and any portion that might not be required of the said sum of 4,000*l.* for the purposes aforesaid, the said testator directed his said trustees or trustee to invest the same in their or his names or name in any of the investments thereafter authorised and to stand possessed thereof, and of the investments for the time being representing the same, upon trust out of the annual income thereof to pay a woman, who should reside at the said hospital, a sum not exceeding 15*s.* weekly to attend upon the patients, and to pay a sum of 60*l.* a year to a surgeon for such hospital, and to apply the residue of such annual income towards the necessities of the said hospital and for the benefit thereof, and of the patients who should from time to time be taken into such hospital, in such manner in all respects as his trustees or trustee should, in their or his absolute discretion, think fit; and the testator also directed that his trustees or trustee should set apart the further sum of 2,500*l.* out of such part of the moneys which should arise from such sale, getting in and conversion as aforesaid, and the accumulation of profits as aforesaid, as should be pure personal estate and might by law be bequeathed for charitable purposes, if sufficient, and, if not, then out of any other personal estate he might possess applicable for charitable purposes, and should, so far as they or he lawfully could without violating the laws enacted against the disposition of property in mortmain, apply a sum not exceeding 1,000*l.*, part thereof, in establishing an Independent chapel at Little Ashby, in the county of Westmoreland, and stand possessed of the sum of 1,500*l.* (or other the residue of the said sum of 2,500*l.*)

upon trust to invest the same in their or his names or name in or upon any of the investments thereafter authorised, and to pay the annual income thereof to the trustees or deacons, for the time being, of such chapel, to be applied by them in providing a stipend for a minister for the said chapel, or in such other manner for the benefit of the said chapel as such trustees or deacons for the said chapel, for the time being, should in their or his absolute discretion think fit. The will contained no residuary bequest.

The testator died on the 8th of July, 1871, and in the year 1872 the present suit was instituted by the plaintiffs, the trustees and executors of the will against the next-of-kin of the testator and Her Majesty's Attorney-General, as defendants, for the administration of the personal estate of the testator; and upon the cause now coming on to be heard on further consideration, the question arose, whether or not the above charitable bequests were respectively invalid under the statute of 9 George 2. c. 36.

Mr. Eddis and *Mr. E. Ward*, for the plaintiffs, submitted the question to the Court.

Mr. W. Pearson and *Mr. Cozens-Hardy*, for the defendants, the next-of-kin.—These charitable legacies are invalid because they necessarily involve the acquisition of land. In

The Attorney-General v. Hull, 9 Hare, 647,

a bequest of a legacy to be applied towards "establishing" a school at A., provided a further sum could be raised in aid thereof, if necessary, was held bad; and in

Dunn v. Barnas, 1 Kay & J. 596, there was a trust for "establishing" a hospital, and it was held that, as the Court could not execute this trust without providing permanently a house for a hospital, the gift was bad. To the like effect are

Tatham v. Drummond, 2 Hem. & M. 262; 34 Law J. Rep. Chanc. 1,

where the legacy was given towards the "establishment" of slaughter-houses, and

Hopkins v. Philipps, 3 Giff. 182; 30 Law J. Rep. Chanc. 671,

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where it was in aid of the deaf and dumb, to found a chapel for them in London.

The direction not to violate the Statute of Mortmain is not sufficient to validate a bequest which requires that a part of the *corpus* should be applied to a purpose of a permanent character. Moreover, if these bequests could be held valid as being gifts to establish these institutions, if and when land should be given for the purpose, they would still be void for remoteness, since that event might not happen until an indefinite period.

They referred also to

The Attorney-General v. Williams, 2 Cox, 387;

Grievs v. Case, 2 Cox, 301;

and

Cox v. Davis, 47 Law J. Rep. Chanc. 72; Law Rep. 7 Ch. D. 204.

Mr. Stirling, for the Attorney-General.

—I submit that these two legacies are valid. The testator has carefully guarded himself from infringing the Mortmain Act, and must be taken to have prohibited his trustees from investing any funds in the purchase of lands. The case is within the authority of

Philpott v. The St. George's Hospital, 6 H.L. Cas. 338; 27 Law J. Rep. Chanc. 70

(where a gift to found a charitable institution if land should be given for the purpose was upheld), and

Dent v. Allcroft, 30 Beav. 335; 31 Law J. Rep. Chanc. 211

(where bequests of sums to be applied "in or towards establishing, endowing, maintaining and keeping up a day-school, or otherwise for school purposes," and "in, about or towards establishing, endowing, maintaining or supporting almshouses," were held valid). I ask your Lordship to make a declaration that the legacies are valid, and to direct an enquiry for the purpose of ascertaining whether the sums bequeathed can be laid out and employed as directed by the will, as was done in

Sinnett v. Herbert, 41 Law J. Rep. Chanc. 388; Law Rep. 7 Chanc. 232;

and

Chamberlayn v. Brockett, 42 Law J. Rep. Chanc. 368; Law Rep. 8 Chanc. 206,

which cases also shew that the objection on the ground of remoteness is untenable.

Mr. W. Pearson, in reply.

HALL, V.C.—As to the first bequest, that of the 10,000*l.*, before stating my opinion upon that, I would only add to the authorities which have been referred to, which I do not mean to go through in detail, the observations made by the Vice-Chancellor Wickens in the case of *Pratt v. Harvey* (1). That was not a case of "establishing" a charitable institution, but of a bequest of 1,000*l.* to be applied towards building a church at Newark in connection with the Established Church; and the will provided that if the church should not be commenced during the testator's lifetime or before two years after his death, then the legacy was not to be payable. It was held there that the gift was void, and the Vice-Chancellor said this: "If the sentence had stopped at the conclusion of the words of gift, and before the clause containing conditions, no question could arise but that the gift was invalid. The question is, whether the conditions make it good. The rule of the Court is now well settled that in order to validate a gift of this kind you must find in the will a reference to an existing site on which the building contemplated shall be erected, or you must find words expressly excluding the application of the money given in the acquisition of land." Now if that be the rule, without further addition this gift of the 10,000*l.* is valid, because we have here, as clearly as can be, the testator's direction that in what is being done his trustees are in no way to violate the Mortmain Acts. The only way in which they could not violate the Mortmain Acts would be by establishing this soup kitchen and cottage hospital upon land already in mortmain, or by begging land or inducing somebody to give land. That is a mode of establishing which would be legal, and which I think must be taken to have been within the purview and meaning of this testator. It is a thing which, in accordance with the terms of

(1) Law Rep. 12 Eq 544.

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his will, can be legally and effectually done if some other person will find the land and devote it for the purpose. The only question is whether, in addition to what the testator has said, he ought, consistently with the authorities, to have in effect said, "Provided some person will buy and devote or give land to the charity." But is it necessary for him to say that? He says that it is to be done without violating the statute. It can be done without violating the statute if it be done in one of those ways, namely, by some person buying and devoting land to the charity, or some person, having land already, giving it for that purpose. I consider that I cannot hold that this is a bequest which entirely fails as being a gift of so much money to purchase land within the meaning of the statute. I would further observe that although the words are "the establishment of a soup kitchen, &c.," and although the word "establishment," as so used, may ordinarily import the buying of land upon which to build the charitable institution, yet it does not necessarily mean the same thing as the words "building" or "erecting." It is a more flexible word than those, and there is an amount of flexibility about the trust itself by reason of the fact that the money, or a portion of the money, is simply to be applied "in the establishment" of a soup kitchen—a phrase which is not materially different in meaning from "in or towards establishment" (see the observations of Lord Westbury in the case of *Tatham v. Drummond*), and also by reason of the fact that the testator expresses his wish that there should be four beds, and that there should be furniture and appliances. Now a considerable portion of that sum might very well be applied and laid out in the purchase of the furniture and appliances, and that I think enables the gift to be supported, there being to that extent no invalidity in the purpose of the gift.

On the whole, I consider that the gift is good and must be supported, and that there ought to be a declaration and an enquiry such as Mr. Stirling has asked for. The two cases which have been referred to of *Sinnett v. Herbert* and *Chamberlain v. Brockett* as bearing upon this

case, seem to me to have no application at all upon the main question here. Those authorities address themselves to a perfectly distinct question, namely, the validity of the charitable disposition, having regard to its undefined or supposed undefined commencement. I consider, upon that question, that those authorities and the earlier ones which have been referred to, and also the case of *Henshaw v. Atkinson* (2), before Sir John Leach, which was referred to in *Dent v. Allcroft*, govern this case, because I think that there is no postponement here of the charitable disposition to an undefined time, but that it is an immediate gift of this particular sum for this charitable purpose, and I think it is entirely within the observations of Lord Selborne in that respect in the two later cases which have been referred to. When the validity of the gift with reference to the law of perpetuity is in question, that which must be considered is whether or not the money is given at once, and the postponement of its application is only that which from the nature of the disposition is inevitable. The finding of the bricks and mortar, if they are requirements of the charity, and the finding of some person who is ready to assist in establishing the charity by finding the land, all those are matters which do not affect the validity of the gift of the money, where, according to the disposition, it is at once appropriated. Therefore that gift seems to me to be perfectly effectual.

The other gift is not expressed in the same way. It is a gift of 2,500*l.* which is directed to be dealt with by the trustees. They are, so far as they lawfully can, without violating the law against the disposition of property in mortmain, to apply a sum not exceeding 1,000*l.*, part thereof, in establishing an independent chapel at Little Ashby aforesaid, and stand possessed of the 1,500*l.* (or other the residue) upon trust to pay the income to the trustees, for the time being, of such chapel, to be applied in providing a stipend for the minister. I think, as regards that gift, treating it as a separate

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where it was in aid of the deaf and dumb, to found a chapel for them in London.

The direction not to violate the Statute of Mortmain is not sufficient to validate a bequest which requires that a part of the *corpus* should be applied to a purpose of a permanent character. Moreover, if these bequests could be held valid as being gifts to establish these institutions, if and when land should be given for the purpose, they would still be void for remoteness, since that event might not happen until an indefinite period.

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applied (and which he authorised his trustees or trustee to invest in the meantime in the establishment of a soup kitchen for the parish of Shoreditch, and of a cottage hospital adjoining thereto, in such manner as not to violate the Mortmain Acts; such hospital to be provided with not less than four beds for patients whose cases should be of an urgent character, and with all other necessary furniture and appliances. And as to 6,000*l.*, the residue of the said sum of 10,000*l.*, and any portion that might not be required of the said sum of 4,000*l.* for the purposes aforesaid, the said testator directed his said trustees or trustee to invest the same in their or his names or name in any of the investments thereafter authorised and to stand possessed thereof, and of the investments for the time being representing the same, upon trust out of the annual income thereof to pay a woman, who should reside at the said hospital, a sum not exceeding 15*s.* weekly to attend upon the patients, and to pay a sum of 60*l.* a year to a surgeon for such hospital, and to apply the residue of such annual income towards the necessities of the said hospital and for the benefit thereof, and of the patients who should from time to time be taken into such hospital, in such manner in all respects as his trustees or trustee should, in their or his absolute discretion, think fit; and the testator also directed that his trustees or trustee should set apart the further sum of 2,500*l.* out of such part of the moneys which should arise from such sale, getting in and conversion as aforesaid, and the accumulation of profits as aforesaid, as should be pure personal estate and might by law be bequeathed for charitable purposes, if sufficient, and, if not, then out of any other personal estate he might possess applicable for charitable purposes, and should, so far as they or he lawfully could without violating the laws enacted against the disposition of property in mortmain, apply a sum not exceeding 1,000*l.*, part thereof, in establishing an independent chapel at Little Ashby, in the county of Westmoreland, and stand possessed of the sum of 1,500*l.* (or other the residue of the said sum of 2,500*l.*)

upon trust to invest the same in their or his names or name in or upon any of the investments thereafter authorised, and to pay the annual income thereof to the trustees or deacons, for the time being, of such chapel, to be applied by them in providing a stipend for a minister for the said chapel, or in such other manner for the benefit of the said chapel as such trustees or deacons for the said chapel, for the time being, should in their or his absolute discretion think fit. The will contained no residuary bequest.

The testator died on the 8th of July, 1871, and in the year 1872 the present suit was instituted by the plaintiffs, the trustees and executors of the will against the next-of-kin of the testator and Her Majesty's Attorney-General, as defendants, for the administration of the personal estate of the testator; and upon the cause now coming on to be heard on further consideration, the question arose, whether or not the above charitable bequests were respectively invalid under the statute of 9 George 2. c. 36.

Mr. Eddis and *Mr. E. Ward*, for the plaintiffs, submitted the question to the Court.

Mr. W. Pearson and *Mr. Cozens-Hardy*, for the defendants, the next-of-kin.—These charitable legacies are invalid because they necessarily involve the acquisition of land. In

The Attorney-General v. Hull, 9 Hare, 647,

a bequest of a legacy to be applied towards "establishing" a school at A., provided a further sum could be raised in aid thereof, if necessary, was held bad; and in

Dunn v. Barnas, 1 Kay & J. 596, there was a trust for "establishing" a hospital, and it was held that, as the Court could not execute this trust without providing permanently a house for a hospital, the gift was bad. To the like effect are

Tatham v. Drummond, 2 Hem. & M. 262; 34 Law J. Rep. Chanc. 1,

where the legacy was given towards the "establishment" of slaughter-houses, and *Hopkins v. Philipps*, 3 Giff. 182; 30 Law J. Rep. Chanc. 671,

In re Wade and Thomas.

off, or the transferee of a mortgage on being paid off, has no right to keep copies of the deed of reconveyance or transfer, but, on the contrary, whatever copies he has, as a general rule, are copies properly paid for by the mortgagor, and are to be delivered up to him when he pays off the mortgage. This copy to keep, for instance, would be very properly paid for by the mortgagor, being a part of the transaction, the costs of which he has to pay; but the copy does not belong to the person paid off, but to the mortgagor who pays him off. In fact, this is taxation on the part of the mortgagor, because he pays them off. That is quite plain if you look at the form of decree on redemption. I am citing from page 1035 of the last edition of Seton. When he is paid off, the mortgagee is to "deliver up on oath all deeds and writings in his custody or power relating thereto"—that is to the said hereditaments—"to the defendant"—that is the mortgagor—"or to whom he shall appoint." He is not to keep anything relating to the hereditaments. Of course, when he is once fully paid off he has no concern with the title, and is not to keep what Mr. Yate Lee calls a record of title. It is the very thing the mortgagor would most object to, and, in my opinion, he has no right even to make a fair copy at his own expense of the deeds—a *fortiori* to make a fair copy at the expense of the mortgagor, and to keep that fair copy.

Just see to what extent that would go in the shape of expense if every mortgagee who executed a deed had a right to keep a fair copy of it at the expense of the mortgagor. First of all in this case there is a fair copy to keep for the trustees of Mr. Palin's will. But if the argument is worth anything each of them must have a copy. The next is, "Ditto for the trustees of Miss Jane Platt;" there might have been any number of them—two, three, four or half a dozen, and each one should have a copy. "Ditto for Miss Elizabeth Platt." "Ditto for Miss Menlove." "Ditto for Miss S. Masfield and Mr. R. Masfield." Therefore, if the argument is worth anything, in this instance there would be ten copies, and there might have been fifteen

or twenty, all to be paid for by the unlucky mortgagor. Our law of mortgage is quite oppressive enough, without adding to its badness and oppression by sanctioning any such doctrine as this, and I state my opinion that a mortgagee or transferee of the mortgage on being paid off has no right to make a copy of the deed, and still less to make a copy at the expense of the mortgagor and keep it. I think the Taxing Master's reasons would have been unanswerable if he had left out the words "copy of the deed." Under the circumstances, I shall refuse the application, and with costs.

Solicitors—Chester & Co., agents for Peele & Peale, Shrewsbury, for the applicants; Brownlow & Howe, for the opposing parties.

BACON, V.C. }
1881. } FORSTER v. PATTERSON.
March 2.

Statute of Limitations—Disabilities—Mortgagor and Mortgagee—Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), ss. 3 and 7—Statute of Limitations, 1833 (3 & 4 Will. 4. c. 27), ss. 16 and 28.

Section 3 of the Real Property Limitation Act, 1874, saving the rights of persons under disability, does not apply to section 7, which bars a mortgagor at the end of twelve years from the time when the mortgagee took possession.

Where, therefore, a mortgagee entered into possession in 1861, and had remained in possession ever since without any written acknowledgment, and a redemption action was brought in 1879 by the representatives of the mortgagor, who had been under disabilities of infancy and marriage,—

Held, that the Statute of Limitations was a bar to the action.

Trial of action.

In 1857 W. Forster mortgaged a copyhold tenement to the defendant, who was afterwards admitted thereto. W. Forster died on the 5th of February,

Forster v. Patterson.

1860, intestate, leaving his widow (who was entitled to freebench) and two infant daughters his coheireses-at-law. Interest was paid on the mortgage debt up to the 12th of May, 1861, when default was made, and the defendant entered into possession, and had remained in possession ever since, without giving any acknowledgment in writing to the persons entitled to the equity of redemption.

The two daughters of the mortgagor married under their respective ages of twenty-one, and on the 29th of October, 1879, the widow and the two daughters issued their writ in this action, claiming redemption of the copyhold tenement. The defendant pleaded the Statute of Limitations. The plaintiffs replied that from the time when a right to bring an action accrued, or up to a time within the six years immediately preceding the action, the plaintiffs (other than the widow) had laboured continuously under one or more of the disabilities mentioned in the Real Property Limitation Act, 1874, and other Statutes of Limitation.

Mr. Macaskie (Sir H. Jackson with him), for the plaintiffs.—The question is whether the saving as to disabilities contained in section 3 of 37 & 38 Vict. c. 57 applies to the enactment in section 7, which bars a mortgagor at the end of twelve years from the time when the mortgagee took possession, or from the last written acknowledgment. Those sections are in the identical words of sections 16 and 28 respectively of the old Act (3 & 4 Will. 4. c. 27), only altering the period to twelve years instead of twenty, and omitting any saving for absence beyond the seas, and the two Acts are to be read together. Section 16 applies to any "action to recover any land," and by section 1 the word "land . . . shall extend to . . . all corporeal hereditaments, . . . and also to any share, estate or interest in them." An equity of redemption is an estate in land—

Casborne v. Scarfe, 1 Atk. 603, 605;
Sinclair v. Jackson, 17 Beav. 405;
Du Vigier v. Lee, 2 Hare, 326; 12
 Law J. Rep. Chanc. 345.

It is true that by section 16 the saving clause is to apply if the person is under disability at the time the right to bring an action "shall have first accrued as aforesaid," pointing, it may be said, to the earlier sections (2 to 14). But it is clear that the saving clause in section 16 was intended to apply to the later section 24, providing that no suit should be brought in equity after the time when the plaintiff, if entitled at law, might have brought an action. The words "as aforesaid," therefore, furnish no ground for saying that section 16 does not equally apply to section 28. The 26th section, which provides that time shall not run in cases of concealed fraud, is analogous to section 16; and it will be admitted that section 26 controls all the provisions of the Act. Similarly section 25, which enacts that in cases of express trust the right shall not be deemed to have accrued until a conveyance to a purchaser, has been held to apply to the later sections—40 and 42—dealing respectively with money charged on land, and arrears of rent and interest—

Young v. Waterpark, 13 Sim. 204;
 15 Law J. Rep. Chanc. 63;

Oox v. Dolman, 2 De Gex, M. & G.
 592; 22 Law J. Rep. Chanc. 427.

From the analogy afforded by sections 26 and 25, as well as from the hardship that would result from the contrary view, it is contended that section 16 (or section 3 of the Act of 1874) must apply to section 28 (or section 7 of the Act of 1874).

The text-writers are in favour of this view—

Fisher on Mortgages (3rd ed.) pl.
 1204, p. 742;

Coots on Mortgages (4th ed.) by
 Mackeson, p. 936;

Barrington on Statutes of Limitation,
 p. 173.

Mr. Hemming and *Mr. Methold*, for the defendant.—The section which provides for the case of mortgagor and mortgagee is a distinct independent enactment, and is not controlled by the prior section as to disabilities. This was the opinion of Lord St. Leonards—

Sugden, Real Property Statutes (2nd
 ed.) pl. 45, p. 118;

Forster v. Patterson.

and in a recent case the Master of the Rolls has so decided—

Kinsman v. Rouse, ante, p. 486; Law Rep. 17 Ch. D. 104.

Mr. O. T. Simpson (*amicus curiæ*) stated the nature of that case, which was then unreported.

They also referred to

Raffity v. King, 1 Keen, 601; 6 Law J. Rep. Chanc. 87;

Harrison v. Hollins, 1 Sim. & S. 471.

Mr. Macaskie, in reply.—There is no authority in favour of Lord St. Leonards' view. In

Kinsman v. Rouse (*ubi supra*)

the question appears to have arisen under section 16 of the Act of 1833 on disability arising from absence beyond the seas, which is removed by section 3 of the Act of 1874.

BACON, V.C.—I have listened with great attention to Mr. Macaskie's ingenious and elaborate argument, but I cannot say that I entertain any doubt on this point. In reading the Act the interpretation clause in the earlier Act is applicable to the subsequent Act, and no doubt in a sense a redemption action is an action to recover land, and the definitions in section 1 must be attended to; but reading the statute as one entire thing, there can be no doubt as to what the intention of the Legislature was. The Legislature by the Act of Parliament having dealt with the general subject of actions in the earlier clauses, finds that the subject is not exhausted, but that there remained another fertile and frequent source of litigation, and makes a special enactment as to mortgages in express terms; and that enactment contains no provision as to disabilities. It would be unreasonable and unjust if I were to read into this clause the provisions as to disabilities which apply only to the earlier enactments. It is not my business to say what was the policy of the Legislature in enacting this section. I might imagine that the Legislature thought there was a difference between the two cases, and that, considering what the position of a mortgagee in possession is, and considering what he

may have done and what risk he runs if he takes possession, the Legislature may have thought that there should be an ending put to this dealing. Very often mortgagees in possession lay out large sums of money in improvements of the land, and it would be a burthen to the mortgagee if he were told that at any distance of time during disability the land may be wrested out of his hands with only the ordinary allowances. Whether such was the intention or not I do not know, and it is not my business to say. But I find this, that, as between mortgagor and mortgagee, twenty years shall be the limit, without any exception in cases of disability, and I cannot adopt the course to which I have been invited, of reading one clause into another and depart from what is a plain distinct legislative enactment.

That the point has not been lost sight of by the Legislature is clear from the subsequent enactment. It was thought that twenty years was too long a period, and a new law was passed substituting twelve for twenty years, in otherwise precisely similar terms. Am I to disregard that, or am I to consider that it is a hard thing that people under disability should be deprived of their property? I have no choice in the matter but to carry into effect the provisions of the statute. The statute has said that after twelve years you cannot redeem; however able or however disabled you may have been, you cannot redeem your estate.

The observation made by Lord St. Leonards that has been referred to, is not of course the same thing as the statute, but I should feel some hesitation in deciding the question differently from his authority. After going through the whole of the provisions of the statute as to limitation of actions, he adds his observation and treats it as a settled thing. The defence, in my opinion, is conclusive, and judgment must be for the defendant with costs.

Solicitors—Shum & Co., agents for John Dunlop, Berwick-on-Tweed, for plaintiff; Fluker, agent for R. B. Weatherhead, Berwick-on-Tweed, for defendant.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.
 JESSEL, M.R.
 JAMES, L.J.
 BRETT, L.J.
 1881.
 Feb. 10, 11.

Ex parte THE MERCHANT
 BANKING COMPANY OF
 LONDON; *in re* DURHAM.

Bankruptcy—Resolutions for Composition—Approval of the Judge—Fraud—Judicial Discretion—Bankruptcy Act, 1869, ss. 28 and 126.

When resolutions for composition passed by the proper majority of creditors under section 28 of the Bankruptcy Act, 1869, come before the Judge for his approval, it is his duty, in the exercise of his judicial discretion, to enquire into any relevant circumstances submitted to him by a dissentient creditor, and pronounce a judicial decision thereon. Proceedings under the 28th section differ from those under the 126th. The Judge under the former section has power to withhold his approval of resolutions passed even in the absence of any fraud in the proceedings. The Judge in giving or withholding his approval must have regard to the state of facts as shown before him to be then existing, and not that existing at the date of the meeting when the resolutions were passed.

This was an appeal from a decision of Bacon, C.J., reversing a former decision of the County Court Judge of Manchester who had declined to approve of a composition offered by the firm of Durham & Co. upon the ground that it was proposed to hand over the estate to the debtors upon payment of 10s. in the pound, by four instalments, without any security except for the last instalment.

The Chief Judge on appeal discharged the order of the County Court Judge, being of opinion that, in the absence of fraud, the Court had no power to withhold its approval to the resolutions which had been agreed upon by the majority of the creditors.

The facts shortly stated were as follows:—

Charles Durham, Vernon Cochrane, Burton Grindrod and William Hector carried on business as merchants in

London and at Manchester under the firm of Durham & Co.; at Rio de Janeiro under the firm of Charles Durham & Co., and at Colombo under the firm of Durham, Grindrod & Co. The business, which was managed in England by C. Durham and V. Cochrane, consisted principally in exporting Manchester goods and hardware.

On the 26th of August, 1880, the firm stopped payment, and on the 8th of November the partners filed a petition for liquidation, and the first meeting was held on the 3rd of December, at which the creditors resolved upon a liquidation by arrangement, and appointed Mr. Murray trustee. A committee of inspection consisting of five persons was also appointed, one of them, Mr. Angus, representing the appellant.

At this meeting a statement of the debtors' affairs was produced, dated the 6th of November, shewing unsecured liabilities 153,740*l.* 12*s.* 1*d.*, and estimated assets 99,724*l.* 9*s.* 1*d.* Among the assets was a sum of 44,175*l.*, which purported to represent the surplus of the assets of the Rio branch. In working out this surplus certain deductions had been made which the Court held upon the evidence to be unjustifiable, and which had the effect of making the Rio assets improperly under-estimated.

Another item in the statement of assets was 4,245*l.* 3*s.* 7*d.*, the estimated surplus from the separate estate of Durham.

Another item in the statement produced by Durham of his separate assets was a sum of 7,500*l.* as the value of his furniture, which sum again the Court held upon the evidence to have been grossly under-estimated.

Among the unsecured creditors the appellants were entered as creditors for 26,000*l.*, and the executors of William Durham, who died in January, 1880 (late a partner in the firm, and father of Charles Durham), as creditors for 46,661*l.* 18*s.* 1*d.*, less a sum of 6,000*l.* paid to them on the 23rd of August, leaving 40,661*l.* 18*s.* 1*d.*

This payment of 6,000*l.* was found by the Court to have been a fraudulent preference.

Another creditor was a widow of a former partner for more than 20,000*l.*

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Shortly after the meeting of the 3rd of December Durham and Cochrane proposed to Murray to purchase the assets of the firm on the terms of paying the creditors 10s. in the pound by four instalments of 2s. 6d. each. The first in cash immediately, the second in six months, the third in twelve months, and the fourth in eighteen months. Payment of the last instalment only was secured.

Murray summoned a meeting of the creditors to consider the proposal for the 23rd of December, under the provisions of the 28th section of the Bankruptcy Act, 1869.

On the day preceding the meeting Durham was examined before the Registrar of the Manchester County Court by counsel on behalf of the Merchant Banking Company.

The result of the examination went to prove that he had been guilty of the most reckless extravagance, his private expenditure for the five years from 1875 to 1880 being at the rate of 5,000*l.* a year, that he had laid out a sum of 40,000*l.* in furnishing and decorating a leasehold house, his total drawing from the firm in that period being about 80,000*l.*

He admitted also that he had been guilty of breach of trust in three cases at least by lending trust moneys to the firm.

On the 23rd of December the solicitor for the bank attended the meeting and opposed the acceptance of the offer on the ground that the assets were sufficient to pay a composition of 12s. 6d. in the pound. He also stated that the bank were willing themselves to buy the whole of the joint assets, on the term of paying the creditors a composition of 10s. 6d. in the pound, payable by four equal instalments at the same dates as those proposed by the debtors, or, if they preferred it, to pay immediately in cash at the rate of 10s. 2d. in the pound.

The proposal of the bank was not accepted. Cobbett, who represented at the meeting the executors of Mr. W. Durham (among other creditors), stating that the additional sixpence in the pound was not sufficient to induce them by accepting the bank's offer to take so large a firm as the debtors' off the Manchester market.

The creditors resolved to accept the debtors' offer, the bank and another small creditor being the only dissentients.

The resolutions passed were as follows:—

1. That the sanction of the creditors be and the same is hereby given to the acceptance by the trustee of an offer for the purchase of the whole of the property, estate and effects of the debtors distributable among the joint creditors made by C. Durham and V. Cochrane, two of the debtors, upon the following terms and conditions, and for the following consideration—that is to say: the purchasers to pay all the costs of and incident to the proceedings for liquidation, and also all preferential claims under the proceedings, and also to pay all and every the joint creditors of the debtors a composition upon their debts of 10s. in the pound, payable by the following instalments, namely, 2s. 6d. in the pound in cash on the 31st of January, 1881, provided that the approval of the Court be obtained thereto in the meantime; but if such approval shall not then have been obtained, then, within seven days from the date of such approval being obtained, the further sum of 2s. 6d. in the pound in six calendar months, from the 31st of January, 1881, the further sum of 2s. 6d. in the pound in twelve calendar months from the same date, and the remaining sum of 2s. 6d. in the pound in eighteen calendar months from the same date, the last instalment to be secured to the satisfaction of the committee of inspection or a majority thereof.

2. That the discharge of the debtors be and the same is hereby granted.

3. That the accounts of the trustee be audited.

- 4 and 5. That the close of the liquidation shall take place, and the trustee be released, on and from the 29th of September, 1882.

The Judge of the County Court, upon an application being made to him, refused to approve the resolutions on the grounds before mentioned.

This order was on appeal reversed by the Chief Judge.

The bank appealed from his decision.

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Mr. Benjamin, Mr. S. Taylor and Mr. Cabell, for the appellants, urged that there was a distinction between section 28 and section 126 of the Bankruptcy Act. It was the duty of the County Court Judge to consider the proposed resolutions, and fraud was not necessary to justify the Judge in withholding his approval. The County Court Judge had a discretion, and under the circumstances had rightly exercised that discretion, and it should not be lightly interfered with.

The Solicitor-General (Sir F. Herschell), Mr. Winslow and Mr. O. E. Jones, for the trustee, contended that the policy of the Bankruptcy Act was to make the creditors the judges of what was best for their own interests. The approval of the resolution by such a majority of the creditors was a strong reason for the Court giving its approval to them. The statement of affairs was produced by the debtor at the first meeting at which the debtor could be and was examined, and the creditors having decided to pass resolutions for composition, that was conclusive evidence that the debtor had complied with the statute as regards the statement of affairs, and full information was given to all the creditors at the first meeting. In the absence of fraud the Court would not overrule the decision of the majority of creditors, and it was immaterial that the creditors may have been influenced by feelings of partiality towards the debtor.

They referred to

The Bankruptcy Act, 1869, s. 125. sub-s. 3; Bankruptcy Rules, rule 301;

Ex parte Walter, 45 Law J. Rep. Bankr. 105; Law Rep. 2 Ch. D. 326;

Ex parte Linsley, 43 Law J. Rep. Bankr. 84; Law Rep. 9 Chanc. 290;

Ex parte Cowen, 36 Law J. Rep. Bankr. 41; Law Rep. 2 Chanc. 563.

JESSEL, M.R.—This appeal raises questions both of law and fact. As regards the question of law the Chief Judge was of opinion that the 28th section of the Bankruptcy Act, 1869, which requires

the approval of the Court to be given to a composition effected under a liquidation by arrangement, compelled him to give that approval unless fraud were shewn, and he likened it to cases under the 126th section of the same Act, where a composition arrangement had been approved by two meetings of creditors, in which case, no doubt, there are decisions that fraud must be shewn in order to destroy the effect of the resolutions of the two meetings. It appears to me that, as a matter of law, that decision was erroneous. The words of the 28th section are clear, that the resolution of the creditors "is subject, nevertheless, to the approval of the Court." There are no terms of approval laid down in the section, but the obtaining of the approval or sanction of the Court to some proceeding is a matter very familiar to all Courts, and more especially to the Judges of the Chancery Division; inasmuch as they have administrative duties to perform, there are no Judges who are more frequently called upon to approve or sanction arrangements. In section 1 of the Joint-Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104), the words used are almost the same. The sanction of the Court to a compromise with creditors may be given after a resolution of the creditors passed by the same statutory majority as under the Bankruptcy Act. I never heard the proposition doubted that where the approval or sanction of the Court is required—whether in an administration suit on behalf of infants or persons incapacitated, or in a partnership suit where there is a sale of assets, or under the Companies Acts where it is of constant occurrence to sell assets or to approve of arrangements—that it is the duty of the Judge fairly to investigate the objections brought before him to the proposed arrangements, and to give his opinion upon them, judicially, of course, and with sufficient reasons. I never heard that proposition doubted. Therefore, on general principles, unless there is some decision to the contrary, I should say that this section means what it says—that the resolution of the creditors is to be subject to the approval of the Court, to be given or withheld according to the weight and sufficiency of

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the reasons which are brought before the Judge to induce him to give or withhold that approval. In other words, it is the exercise of a judicial discretion, which means a discretion founded on sufficient reasons. And, like every other such discretion, the exercise of it is subject to appeal, but the Court of Appeal will not be ready to interfere with the Judge's exercise of his discretion unless it is shewn that he was clearly wrong. That, I should say, is the clear meaning of the section, and it is only necessary to refer to the 126th section to shew that the decisions upon it can have no bearing on the question what is the proper meaning of the 28th section. Under section 126 there are two meetings of creditors, and the second meeting may or may not confirm that which the first has done. Under the 28th section there is but one meeting, and the Court, so to say, as has been already observed by Lord Justice James, is in a somewhat similar position to the second meeting of creditors with regard to the confirmation of what has been done. It may well be that the second meeting may investigate everything which has been done, and may be of opinion that there has been a mistake; or there may be a subsequent discovery of important matters which will induce the second meeting to withhold its confirmation of the resolutions passed at the first meeting. Why should not similar reasons be brought before the Court when it is asked to confirm or approve that which was done at the only meeting? It appears to me, therefore, that the decisions upon the 126th section have no direct bearing upon the construction of the 28th section.

That being so, and being of opinion that the County Court Judge has a discretion to exercise, I now come to the second question, whether his decision was so wrong, so clearly wrong, that it behoves the Court of Appeal to reverse what he has done. On this point we have not the assistance of the Chief Judge, because he did not go into that question. He considered that in the absence of fraud the County Court Judge had no discretion to exercise, and he gave no opinion as to whether he had exercised his discretion wisely or not. As regards

the case before us it appears to me that whether I should or should not, as a Judge of first instance, have arrived at the same conclusion as the Judge of the County Court, I should not be prepared to say that he arrived at an erroneous conclusion; but, in common fairness to that learned Judge, I think I ought to say that I myself, if I had been sitting in the first instance, should have arrived at the same conclusion as he did.

[His Lordship then referred at length to the facts of the case, from which he was satisfied that Mr. C. Durham was guilty of reckless extravagance without regard to the interests either of his creditors or of himself, with the cognisance and permission of his partner, Mr. Cochrane, and proceeded:] I dilate upon these facts because it is said by the appellant creditors that a man who has been guilty of such extravagance is not a fit person to be entrusted with the future management of the business or the custody of the assets, and further that the person who allowed him to deal so is not fit to be so entrusted either. I agree. I think that such a man is not fit to be trusted commercially.

[His Lordship then referred to three cases in which Mr. C. Durham had, according to his own statement of affairs, been guilty of breach of trust in putting into the business trust funds which he was not authorised so to invest, and also to a case in which he had been guilty of a fraudulent preference in favour of members of his own family, all which facts confirmed him in the opinion that Mr. C. Durham and Mr. Cochrane were not fit to be trusted with the assets of the firm. He then read the proposed resolutions and proceeded:] Now the objection of the appellant creditors is this: they say, Assuming the first instalment of 2s. 6d. to be good, which it probably is, and assuming that the last instalment is satisfactorily secured, yet the two intermediate instalments depend entirely upon the management of the business by these two gentlemen, and we decline to trust them. I think that is a valid objection, and that the County Court Judge, in deciding that it was a valid objection, exercised a sound discretion. That was the only point which the County Court Judge decided,

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and it appears to me to be sufficient for the purpose.

But when the case came before us two other points were raised, both of which require very serious consideration. These points were raised by the affidavits before the Judge of the County Court, but he did not think it necessary to hear further argument and he stopped the counsel for the bank. But they were properly raised before him, and they are properly brought before us on appeal. It is said that the state of the assets was improperly described, that the assets are in fact much larger than they appear in the statement of affairs, and that improper deductions have been made with the view of making them appear smaller than they really are. Now that is a very serious charge, because the deductions could only have been made with the assent of the trustee and at the instigation of the debtors. The counsel for the appellants did not shrink from saying that he accused the trustee of being unfaithful to his trust. I am not willing on the present occasion to say that I think this charge is fully proved. It is not necessary to say so, because it appears to me that the obligation of proof is not on the appellants but on the respondents. Those who come to a Court of Justice for its sanction or approval of an arrangement are bound to shew the Court that the arrangement is a fair and proper one, and are, in my opinion, bound to bring before the Court all the facts which are necessary in order to enable it to decide upon the fairness and propriety of the proposal. I will say this, that I am far from satisfied that the statement of affairs does disclose the real state of the assets: without further explanation, I am of opinion that it would be impossible to approve of the proposal.

[His Lordship went through the statement of affairs, and on the evidence before him came to the conclusion that the deductions made were not justifiable, and considered that the Judge was at liberty either to refuse his sanction then and there, or to allow the case to stand over for the production of further evidence; and referred to one item in the statement which he considered to have been consi-

derably under-estimated, and proceeded:]

There is another matter which has impressed me very unfavourably. The appellants say that in reality this was an arrangement made by the friends and relatives of the debtors, to the prejudice of the creditors. 40,000*l.* was the sum due to the father's estate, and it was, so to speak, in the hands of friends. Other sums were also due to members of the family, and others were due to Manchester connections. The offer of the debtors was 10*s.* in the pound, half secured and half unsecured. The appellants, the Merchant Banking Company, said this: "We will give you 10*s.* 6*d.* in the pound, and if you don't like to take that at the dates offered by the debtors we will pay you in cash, allowing the bank rate of discount—10*s.* 2*d.* In other words, they offered 10*s.* 2*d.* cash in lieu of 10*s.* in four instalments—the first in cash, the second in six months, the third in twelve months, and the last in eighteen months. It seems to me impossible for anybody to argue that the offer of the bank was not more favourable to the creditors than the offer which was accepted, and it would be difficult to say on what principle such an offer could be objected to. It is not suggested for a moment that it was not a *bona fide* offer, or that the bank were not well able and willing to carry it out. They offered to carry it out before the County Court Judge, and they have renewed the offer before this Court. There was a suggestion that the bank had no power to enter into the arrangement, but the suggestion fell through. But we have the evidence before us of what took place at the meeting. Mr. Cobbett, who appeared for several creditors, stated openly in his speech that 6*d.* in the pound was not sufficient to induce them to accept the bank's offer, and thereby take so large a firm of merchants as the debtors off the Manchester market. That is not a legitimate motive. It may suit the Manchester creditors very well to keep established a large firm to buy Manchester goods. But the principle applicable to these cases has been laid down by the Court of Appeal, and I refer notably to the judgment of Lord

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Justice James in *Ex parte Page* (1). It is this, that the majority of creditors have power to bind the minority in reference to the benefit of creditors generally, but must not be actuated either by feelings of friendship or affection towards the debtor, or by a view to their individual profit. It does not appear to me that the decision of the creditors in this particular case was arrived at properly, having regard to this rule, but that it was arrived at from a totally different motive.

On all these grounds I am of opinion that the decision of the County Court Judge was correct, and that we must restore his order.

JAMES, L.J.—I have arrived at the same conclusion. It appears to me clear that the County Court Judge was not only authorised by the Act to enquire, but that it was his bounden duty to enquire, into any relevant circumstances submitted to him by the dissentient creditors. In this case it is true there was only one creditor, a very large creditor, who dissented from the proposition which was made. That creditor did submit to the County Court Judge very important, very relevant and very material facts indeed, upon which it appears to me it was in the power, and it was the duty, of the Judge to determine; and the Judge not being, as it appears to me, a mere ministerial officer to register the decision of the creditors, but being a Judge, and having to exercise judicial functions, it was his duty to enquire into and determine upon the facts submitted to him. There were circumstances, at least sufficient, well to warrant the decision at which he arrived, and he was right in taking as a sufficient ground for his decision, without going into the rest of the case, the point upon which alone he has determined. He was well warranted in so determining, and I cannot agree with the Chief Judge that the sole duty of the County Court Judge was to ascertain whether there had been anything amounting to fraud in the proceedings at the meeting of creditors. The County Court Judge had, at least, a power as consider-

able as that which is exercised by the second meeting of creditors under section 126. I agree that the proceedings under the 28th section are essentially different in their character from those which the Legislature has thought fit to say shall be transacted under the 126th section of the Act.

I think there is every reason to believe that, whatever mistakes may have been made, Mr. Murray was not acting in his own interest. He was probably giving up in this particular case a very profitable thing in assenting to what he conceived to be, and what no doubt was, the opinion of the great majority of the creditors—that the debtors ought to be set up again in business. He, no doubt, thought it was the right thing to do. I cannot help observing one thing, with the view of its being considered by the Legislature when a new Bankruptcy Bill comes under the consideration of Parliament: One has heard of a new way of paying old debts; one has heard of persons living upon the interest of their debts; one has heard in old comedies a frequent piece of satire in representing a citizen as having made his fortune by three successive bankruptcies; but I never, until the present case, understood, what I now realise, how it is possible for a man to be a penniless beggar, and still to make a considerable fortune out of bankruptcy. It appears that in the month of November last year the state of these debtors' affairs was this: there were assets amounting to 99,724*l.*, and liabilities amounting to 153,740*l.* The debtors said to the creditors, "Sell us the assets, 99,000*l.*, for 10*s.* in the pound." That would be about 75,000*l.*, and it might appear to them a reasonable enough offer. The debtor says, "The assets are 99,000*l.* You know perfectly well from your experience in bankruptcy or liquidation that the 99,000*l.* will never produce anything like that sum; if it produces two-thirds of it you may consider yourselves substantially lucky. Take the expense of a forced sale, the losses by such sale, the expense of all proceedings that may taken here and in Rio, and say, what you do think you can get out of the 99,000*l.*? You will probably say you will never get

(1) 45 Law J. Rep. Bankr. 119; Law Rep. 2 Ch. D. 323.

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75,000*l.* We will give 75,000*l.* for the 99,000*l.* of assets." And the debtors thus get 25,000*l.* as their net profit out of the liquidation. It is said this is not done at the expense of the creditors, but the debtors put into their pockets by way of gain the loss which their estate has escaped. This is a thing which I do not think the Legislature ever contemplated as the result of these compositions.

BRETT, L.J.—I should not have added a word to what my Lords have said, if I had not been compelled to be a Judge of fact as well as of law, and if it had not been necessary in the course of the case frequently to use the word "fraud."

I entirely agree with my Lords as to the construction of the statute. I wish particularly to notice that, although under the 28th section, if there were fraud proved, it would be fatal to the approval of the Court, yet the approval of the Court may be withheld although there is no symptom of fraud in the matter.

The 28th section is wholly different from the 126th, because the duty of the Court under the 28th section is described in terms different from those in which the duty of the Registrar under the 126th section is described. The enquiry which is to be made by the Registrar under the 126th is minutely described by the terms of the section, but in the 28th section the duty of the Court in giving or withholding its approval is described in terms so wide as to impose upon it the duty of considering, as a matter of judicial discretion, whether the resolution which has been come to is fair and reasonable with regard to the object of the creditors. And it seems to me that the time at which the consideration of the Court ought to be applied is the time when its approval is asked for. The resolution may, when it is passed, be perfectly fair, on the facts known to everybody at the time, and such as every reasonable man would come to; yet if new facts are disclosed between that time and the time when the Court is asked to give its approval, the Court must judge upon those facts whether the resolution is erroneous and whether the approval ought to be withheld. The question, therefore,

was, at the time when the case came before the County Court Judge, and upon the facts then before him, whether he was justified, as a matter of judicial discretion, in withholding his approval. It is true that he had before him the fact that the resolution had been agreed to by all the creditors but one, and I think that the approval of such a large majority of the creditors is a circumstance which he ought to have taken into account; but if, on all the facts then before him, he found that their decision was erroneous and not reasonably fair, he was bound to withhold his approval.

The word "fraud" has been used, and I desire to say that I can see no evidence which could justify me in coming to the conclusion that the high character which Mr. Murray has held in Manchester up to this time for honesty of purpose has been in the slightest degree blemished by anything which has occurred in this matter. But the question is, whether Mr. Murray's judgment was erroneous or not; and more than that, supposing his judgment when he acted was not erroneous, yet, when the matter came before the County Court Judge, and when the mode in which the debtor C. Durham had dealt with his property and his creditors, and the errors in his statement of affairs were disclosed, the question is whether the County Court Judge or Mr. Murray was right.

I agree in every particular with every comment which has been made by my Lords. I only thought it right to say that it is upon no suggestion of fraud in any of the gentlemen who are concerned in this matter that my opinion goes with that of the rest of the Court. It is entirely irrespective of fraud, in the existence of which I do not believe, except in the one particular of fraudulent preference, that I come to this conclusion.

Solicitors—Gregory & Co., agents for W. L. Welsh & Sons, Manchester, for the bank; Phelps, Sidgwick & Biddle, agents for Sale, Seddon & Co., Manchester, for the trustee.

KAY, J. }
1881. } SHARDLOW v. COTTERILL.
May 24, 25. }

Vendor and Purchaser—Sale of Land—Statute of Frauds, s. 4—Connection of Documents by Reference—Referential Force of word "Purchase"—Description of Subject-matter—"The property."

The auctioneer upon a sale of lands and chattels by auction gave the purchaser a receipt in writing for his deposit, "on property purchased at the Sun, in Pinxton," at a certain date and price named. At the foot of the conditions of sale, bearing same date, the auctioneer signed a memorandum of the sale of "the property." The conditions were headed "Property sale at Sun Inn, &c. (date), Mr. George Cotterill, owner":—Held, first (on the authority of Long v. Millar, 48 Law J. Rep. C.P. 596; Law Rep. 4 C.P. D. 450), that the word "purchased" in the receipt was referential to an agreement for sale, and enabled the receipt to be read with the memorandum of sale upon the conditions; secondly, that the words "the property" did not describe the thing sold with sufficient definiteness to satisfy the Statute of Frauds or permit the parcels to be shewn by parol evidence. A poster, circulated before the sale and announcing it at the time and place mentioned, was not admitted by reference to supply the wanting description.

On the 29th of March, 1880, the defendant's dwelling-house, stock-in-trade and plant were put up for sale by auction at the Sun Inn, Pinxton, by Mr. Henry Maiden, auctioneer.

The conditions of sale were as follows:—

"Property sale at Sun Inn, Pinxton. March 29th, 1880. Mr. George Cotterill, owner. Conditions of sale:—

"1. The highest bidder to be declared the buyer; should disputes arise between two or more bidders the property to be again put up and resold.

"2. At the close of the sale five per cent. to be paid down as deposit on the purchase by the buyer.

"3. The whole of the purchase to be completed on or before the 19th day of April next ensuing, and the money to be paid at the office of Mr. Ricketts, solicitor,

Alfreton, and the expense of the transfer to be paid by the purchaser.

"4. If the above conditions are not complied with the deposit money to be forfeited unless by special consent of the vendor.

"5. The amount of each bid to be regulated by the auctioneer. Further, Mrs. Cotterill agrees to give up entire possession of the property on the 26th day of April, seven days after purchase is completed."

The plaintiff was the highest bidder at 420*l.*; and the auctioneer signed the following memorandum at the foot of the conditions of sale: "The property duly sold to Mr. Arthur Shardlow, butcher, Pinxton, and deposit paid at close of sale. Henry Maiden, auctioneer."

The auctioneer also wrote and gave the plaintiff the following receipt:—

"Pinxton, March 29, 1880.

"Received of Mr. Arthur Shardlow the sum of 21*l.* as deposit on property purchased at 420*l.* at Sun, in Pinxton, on the above date. Mr. George Cotterill, Pinxton, owner.

"Received by Henry Maiden, March 29, 1880.

"Henry Maiden."

No particulars of the property were printed with the conditions. The auctioneer had circulated in the neighbourhood bills announcing the sale, which were so far as material in the following terms:—

"Pinxton, near Mansfield.—Mr. H. Maiden is honoured with instructions from Mr. George Cotterill . . . to sell by auction on Monday, March 29, 1880, at the house of Mr. T. Lee, Sun Inn, subject to conditions to be then and there read, all that convenient dwelling-house, brickyard and working plant comprising large kiln, clay mill, brick press, moulds, dies, barrows, planks, copper and other useful lots. . . . The brickyard and plant occupies about 1*a.* 3*r.* 2*p.*, the dwelling-house, stables, &c., being erected on and occupying about 400 yards in addition to the above land."

It was not shewn that the above bill was in the auction-room at the sale. The

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plaintiff asked for specific performance of the agreement for sale. The defendant pleaded the Statute of Frauds.

Mr. Rigby and Mr. J. G. Alexander, for the plaintiff.—The conditions and memorandum written at the foot of these conditions, and the receipt, are sufficiently connected together to be read as one writing for the purpose of the Statute of Frauds—

Long v. Millar (ubi supra) ;
Western v. Russell, 3 Ves. & B. 187 ;
Baumann v. James, Law Rep. 3
 Chanc. 508.

If "property purchased at Sun on the above date" is not a sufficient description of the subject-matter, we can go to the sale bill ; the receipt implies an offer, and the purchase a sale, and there was only one sale. Independently of that, however, the particular parcels may always be ascertained by evidence—

Ogilvie v. Foljambe, 3 Mer. 53 ;
Owen v. Thomas, 3 Myl. & K. 353 ; 3
 Law J. Rep. Chanc. 205 ;
Horsey v. Graham, 39 Law J. Rep.
 C.P. 58 ; Law Rep. 5 C.P. 9 ;
Macdonald v. Longbottom, 1 E. & E.
 977, 987 ; 28 Law J. Rep. Q.B.
 293 ; 29 *ibid.* 256.

[*KAY, J.*, referred to

The Duke of Beaufort v. Neeld, 12 Cl.
 & F. 249.]

Mr. Whitehorne and Mr. W. Fooks, for the defendant.—The plaintiff is bound to shew on the face of his document a clear description of the subject-matter—

Kennedy v. Lee, 3 Mer. at p. 451 ;
Seagood v. Meale, Prec. Ch. 560 ;
Williams v. Lake, 2 E. & E. 349, at
 p. 354 ; 29 Law J. Rep. Q.B. 1.

The receipt on sale by auction is not by the mere facts of the case connected with other documents relating to the sale so as to be supplemented by them—

Blagden v. Bradbear, 12 Ves. 466.

The necessary particulars must appear without oral evidence—

Williams v. Byrnes, 9 Jur. N.S. 363.

The cases in which the vendors are particularised only by description as "the proprietor"

(*Sale v. Lambert*, 43 Law J. Rep.
 Chanc. 470 ; Law Rep. 18 Eq. 1 ;

Commins v. Scott, 44 Law J. Rep.
 Chanc. 563 ; Law Rep. 20 Eq.
 11),

are no authorities for the sufficiency of such an uncertain reference to the subject-matter as the receipt or the receipt coupled with the memorandum contain. The supplementing of that by the sale bill is not warranted by cases upon contracts made out by correspondence, which is fairly read as a whole—

Rossiter v. Millar, 48 Law J. Rep.
 Chanc. 10 ; Law Rep. 3 App. Cas.
 1124.

Mr. Rigby was called on in reply.—The word "purchased" connects the memorandum and receipt together—

Long v. Millar (ubi supra).

The description of the property is sufficient—*id certum est quod certum reddi potest*—

Wood v. Scarth, 2 Kay & J. 33 ;
Cooper v. Hood, 26 Beav. 293 ; 28
 Law J. Rep. Chanc. 212.

KAY, J.—These cases involve very considerable difficulty, and one cannot help sometimes lamenting that so much latitude has been given in construing the words of the Statute of Frauds.

The question I have to consider is, whether there is in this case a sufficient writing to satisfy the requirements of the Statute of Frauds in a purchase of real and personal property. The writing chiefly relied on is a writing I will proceed to describe. The action is brought by *Mr. Shardlow*, the purchaser, against *Mr. Cotterill*, the alleged vendor of the property in question, and it seeks to have a declaration that a certain memorandum and receipt signed by *Mr. Maiden* on the 29th of March, 1880, or one of them, constituted a binding agreement between the plaintiff and defendant for the sale and purchase of the property mentioned in the statement of claim at *Pinxton*, and for specific performance. Now one of those documents is a document signed by *Maiden* in these terms: "*Pinxton, March 29, 1880. Received of Mr. Arthur Shardlow the sum of 211. as deposit on property purchased at 420*l.* at Sun in Pinxton on the above date. Mr. George Cotterill, Pinxton, owner. Received by Hy. Maiden, March*

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29, 1880." That is signed "Henry Maiden." Henry Maiden it seems was an auctioneer who on that day, the 29th of March, 1880, sold certain property at the Sun Inn at Pinxton.

Now the first question I have to consider is, whether there is any reference in that document to any other document; and most certainly if I were looking at this for myself, unaided by the authorities cited to me, I should say there was no such reference whatever. But then there is cited to me a case—*Long v. Millar*—where there was a receipt in these terms: "21st December, 1877. Received of Mr. Geo. Long the sum of 31*l.* as a deposit on the purchase of three plots of land at Hammersmith." I must say I think it would puzzle any ordinary man, not being a lawyer, applying himself to the niceties of these questions under the Statute of Frauds, to find any reference in that to any other document. However, the decision of the Court of Appeal of the highest possible authority, constituted of Lord Justice Bramwell, Lord Justice Baggallay and Lord Justice Thesiger, was that there was a reference in that receipt to another document; and the way that was arrived at was this: Lord Justice Bramwell says, "The point to be established by the plaintiff is that the defendant has bound himself, and a receipt was put in evidence signed by him, and contained the name of the plaintiff, the amount of the deposit and some description of the land sold. The receipt uses also the word 'purchase,' which must mean an agreement to purchase, and it becomes apparent that the agreement alluded to is the agreement signed by the plaintiff, so soon as the two documents are placed side by side." That is an expression of Lord Justice Bramwell's opinion that the word "purchase" in that receipt referred to some agreement to purchase, and that enabled him to connect a former agreement to purchase with the receipt. Lord Justice Baggallay says the same thing. He says, "But of these materials can a valid memorandum in writing be framed? I think it can. The true principle is that there must exist a writing to which the document signed by the party to be charged can refer, but

that this writing may be identified by verbal evidence. I think that in the present case by the words 'purchase of three plots of land' the receipt sufficiently refers to the document signed by the plaintiff. Therefore the contract seems to me to be complete." Lord Justice Thesiger says the same: "The receipt contains the word 'purchase,' which must refer to the purchase of the plots of land mentioned in the document signed by the plaintiff." That enabled them, therefore, to refer to what? To a document which was an agreement and not to anything else. They thought the word "purchase" implied an agreement, and the Court felt at liberty to refer to another document containing the agreement, and parol evidence was admitted to identify the document, and shew it was the only document which contained any such agreement. The document referred to was this: "I hereby agree to purchase the three plots (40 feet frontage) of freehold land in Rickford Street, Hammersmith, for the sum of 310*l.*, and I agree to pay as a deposit and in part payment of the aforesaid purchase-money the sum of 31*l.*, and to complete the purchase and pay the balance of the purchase-money on or before the 5th day of October next." That is signed "George Long." No doubt bringing those two documents together you found all the terms of a complete agreement. There was the name of the vendor, there was the name of the purchaser, and there was a very sufficient description of the property, and the price for which it was sold; but that is not an authority for connecting by means of the word "purchase" any other document except an agreement.

Now what have I got in this case? I have got a receipt that does not contain the word "purchase" but "purchased." That must be just as referential a word as any other. If there exists one agreement that can be identified by parol evidence—any agreement in writing—I am bound by *Long v. Millar* to say that the word "purchased" is a sufficient reference to that other agreement. There does exist another document that may fairly be called an agreement although not complete. It is in these terms: "Property sale at Sun Inn, Pinxton, March 29,

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1880." The date of that and the date of the receipt are identical. Then it says, "Mr. George Cotterill, owner." Then the conditions of sale are these: The highest bidder to be declared the buyer, and at the close of the sale five per cent. to be paid down as deposit on the purchase by the buyer. Then the whole of the purchase to be completed on or before the 19th of April next, and the money to be paid by the purchaser. Then there is a condition about forfeiting the deposit, and then a condition that the amount of each bid is to be regulated by the auctioneer. Then comes this: "Further, Mrs. Cotterill agrees to give up entire possession of the property on the 26th of April, seven days after the purchase is completed." Then at the foot there is this memorandum: "The property duly sold to Mr. Arthur Shardlow, butcher, Pinxton, and deposit paid at close of sale. Henry Maiden, auctioneer." I hold that I am bound by the authority of *Long v. Millar* to treat those two documents as connected. Then what do I find? I find the name of the owner Mr. George Cotterill; I find the name of the purchaser Mr. Arthur Shardlow; I find the price 420*l.*; but the only description of the thing sold is contained in these words in the receipt: "Property purchased at 420*l.*, at Sun in Pinxton, on the above date" (that is, the 29th of March, 1880). "Mr. George Cotterill, Pinxton, owner;" and the other document does not help me in the least in that respect.

Now the question is, first of all, stopping there, is that a sufficient description to satisfy the requirements of the Statute of Frauds? It is sought to aid this by introducing another document—a poster. That poster I cannot possibly look at unless I can find a sufficient reference to it in one or other of these documents which are so connected. Is there any such reference? According to *Long v. Millar* the referential word "purchase" only enables me to look at an agreement. I quite agree that in the case of correspondence the Court is at liberty to look at all the letters, but this is not correspondence. How am I to connect this poster with the two other documents, or to find a reference in either of the other documents to the poster? I

find myself quite unable to do that. Now that I know all about this poster, what I do know is that it was posted about in the neighbourhood, and sent round to the public-houses previously to the sale as a description of what was intended to be sold. I have no evidence that it was in the room at the time of the sale, and there is really nothing to connect it, if I could admit the parol evidence, with the actual sale except the fact that it had been posted in the district previously. I know of no case in which a poster has been held to form part of a contract for sale by auction, nor can I conceive it would be proper to do it unless the written contract referred with sufficient distinctness to that poster. Therefore I hold I am unable to connect the poster with the other two documents or to treat it as forming any part of the written contract.

Therefore the question reduces itself to this: Have I or not, on the face of these two documents, which I do connect on the authority of *Long v. Millar*, a sufficient description of the property sold and purchased to satisfy the requirements of the Statute of Frauds? It is said I have, because the property is described as property purchased at the Sun Inn on the 29th of March, 1880, and it is said that enables the plaintiff to give parol evidence of what was the property sold at the Sun Inn on that day, and that in that way you can apply the maxim *id certum est quod certum reddi potest*, and say there is a sufficient description on the face of that document to satisfy the requirements of the Statute of Frauds.

Now let me see what the authorities say on that subject. I do not pretend to go through them all, but I will take those which are most in point. The first case cited was the case of *Ogilvie v. Foljambe*. There was a correspondence in that case which is thus set out in the report: On the 26th of June the plaintiff wrote this: "Mr. O. has the pleasure to acquaint Mr. F. that Mr. Coutts agrees to allow the mortgage to continue for a year, it Mr. F. will be so good as to call and promise not to exceed that time without further arrangement. Mr. O. has, by the advice of Mr. Herman (the auctioneer), reduced the price of the house 2,000*l.*

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and he is confident that in a year or two it would sell from 2,000*l.* to 4,000*l.* more than he offers it at to Mr. F." Then there are some further extracts which I need not read. Then comes this: "At least, Mr. O. after the fullest consideration, and with every wish to conclude an agreement, cannot come down lower than 14,000*l.* for the house and fixtures of every kind—three French plate chimney glasses, two ditto pier glasses, with satin-wood tables, &c." That is a description of some of the fixtures, and then it goes on, "But to shew his desire of approximation, he will request Lady Mary's acceptance of a pier-table of the same kind, &c. (specifying several articles of furniture), Mr. F. agreeing to take the window curtains, carpets and furniture on the principal floor by valuation." There is more, but I need not read it. Then the answer was this: "Mr. Foljambe presents his compliments to Mr. Ogilvie, and is extremely obliged to him for his note, and for the very liberal and accommodating terms which he has proposed, and, in consequence of it, although Mr. F. is still of the same opinion as to the value of Mr. O.'s house, according to the times, he will not trouble Mr. O. with any further discussion, but agree to the terms first proposed—to give 14,000*l.* for the premises, including fixtures of every description, the pier and chimney-glasses, &c." Now I am told that is an authority for what the plaintiff contends for here—that "the property sold at the Sun Inn" is a sufficient description. I think that is as wide of this case as anything can be. The description there was of a thing which it was shewn the parties had been bargaining about—the house with fixtures. It did not say leasehold house or freehold house it is true, but still there was no doubt that would mean the fixtures in that particular house. There the description being of a house belonging to the vendor, which the vendor was selling, it was said by Sir William Grant that "the subject-matter of the agreement is left, indeed, to be ascertained by extrinsic evidence, and, for that purpose, such evidence may be received. The defendant speaks of 'Mr. Ogilvie's house,' and agrees 'to give 14,000*l.* for the pre-

mises'; and parol evidence has always been admitted in such a case to shew what house and to what premises the treaty related." Those words must be read with the light thrown upon them by the facts stated in the former part of the report. The "premises" there meant the house and fixtures described in the previous part of the correspondence, and although the name of the house was not given, the parties themselves could not be for a moment in doubt what they were bargaining about; and there was a description of a specific property—a house and fixtures to which that bargain related. Then it became merely a question of what may be called the curtilage, the ambit, the size and the position of the particular house about which it was apparent on the contract neither party had the faintest doubt in his own mind. I have not got anything like that here. I have no description. I do not know on the face of the contract, or by anything I am entitled to look at, whether it was real and personal estate or partly one and partly the other; and I have nothing except the vague description "property," and that it belonged to Mr. Cotterill the owner. There is a wide distinction between that case and the present.

Well, then, besides that I am referred to the case of *Wood v. Scarth*. There the contract was again by correspondence, and the correspondence was this: Scarth wrote: "Gentlemen, the terms for the intended new public-house at Putney are 30*l.* yearly rent to Lady-day next, and from that time 63*l.* on a lease of twenty-five years from the next quarter-day after obtaining the house. There will be no difficulty about Mr. Young; a neighbouring proprietor is wholly in my interest, and I have at ground rent and rack rent one hundred houses near it. Pray let me know if it suits you at your earliest convenience, as I am giving all the brewers who left cards the offer in rotation." I need not read the rest. Then there were some intervening letters, and the ultimate answer was this: "Dear Sir,—I was in hopes I might find you here to-day. I have viewed the premises, having had my clerk's report, and we are willing to take them of you. Any further

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communication addressed to the brewery shall be attended to." There could be no doubt in the world—it is elementary—that you must take a series of letters and read them all. There could be no doubt what the premises there were. That was not the objection. The objection raised in the case was that it was not shewn there was any written acceptance of the terms of the first letter; for the plaintiff's letter signifying he would take the house did not refer to the letter of the defendant. That was answered by the learned Judge, who said that unless the defendant could prove that some other terms were referred to, and not those in the first letter, he must take it as proved that those were the terms on which the plaintiff agreed to take the house; and the two letters taken together would form a complete agreement by which the plaintiff would be bound. He found in the two letters, putting them together, a complete description of the property, which was quite sufficient, and a sufficient description of the term and extent of the lease and of the rent to be charged. There was, therefore, no difficulty in that case such as arises here.

Then I am referred to two cases which seem to me to point to the distinction which I conceive exists between this case and the cases of *Ogilvie v. Foljambe* and *Wood v. Scarth*. The first case is *Salé v. Lambert*, where upon a sale by auction of real estate in lots the particulars stated that the sale was by direction of the proprietor; but the name of the vendor did not appear. A memorandum indorsed on a copy of the particulars was signed by the purchaser of one of the lots, and by the auctioneer on behalf of the vendor. It was held that the vendor was sufficiently described. The question was not the same as arises here, but it is a case which helps me to the solution of this question very well. The question was whether the "proprietor" was a sufficient description of the vendor, the statute requiring that the name, or a sufficient description of the vendor, shall appear on the face of the contract; and it was held it was, because there could be no doubt or reasonable dispute about who was the proprietor of the property to be sold, the property

itself being sufficiently described, and there being a sufficient description to enable the parties to adduce evidence to shew what his name was.

But the very next case decided by the same learned Judge—the Master of the Rolls—of *Potter v. Duffield* (1) shews where the line is to be drawn. In *Potter v. Duffield* (1) the description was not "proprietor" but "vendor," and his Lordship held "vendor" was not enough. The reason seems to me plain without looking at the judgment, because "vendor" is not necessarily the description of an individual proprietor. "Proprietor" means A B, somebody whose name can be put in the contract; but vendor may be very indefinite, and I adopt what was said in the argument that if you introduce parol evidence to explain who the vendor was, you are doing the thing which the Statute of Frauds intended to prevent. You may have a contest on that evidence, and it may be said, "It is very well for you to say A B is now the vendor, but he was not the person selling at the time." There may be precisely that contest of evidence which the Statute of Frauds was intended to prevent. That shews exactly the distinction between *Ogilvie v. Foljambe* and the present case. In *Ogilvie v. Foljambe* a particular house had been referred to as Mr. Ogilvie's house in the course of the correspondence which constituted a contract for sale and purchase. It was permitted to shew the position, the size and nature of the subject-matter, because there was a sufficient description of a definite particular thing which had been sold to allow that explanatory evidence. But in this case there seems no kind of description of that which is sold. There is only the word "property." The word "property" is quite as vague to my mind as the word "vendor" was in the case before the Master of the Rolls. It is because of the vagueness of that word that I do not feel myself at liberty to allow parol evidence to be introduced as to what the thing sold at the Sun Inn on that day was, about which there may be, for anything I know, a considerable contest. Suppose, for example, the vendor

(1) 43 Law J. Rep. Chanc. 472; Law Rep. 18 Eq. 4.

Shardlow v. Cotterill.

were to say, "I sold at the Sun Inn a certain house, certain plant, certain loose materials upon the ground, and I say what I sold were all these things," and he gives a list. Suppose the purchaser says, "I did not buy these things; I did not buy so many;" or "I bought those things and something else." Is not that the danger which the Statute of Frauds was intended to prevent? You must have on the face of the contract a sufficient definite description of the things sold to enable you to introduce parol evidence to shew what the articles were to which that description refers; but a mere description of the things sold as "property" is not to my mind sufficiently definite to enable any such parol evidence to be adduced.

There was one other case cited which it is necessary for me to refer to, which seems to me to make the same distinction very plain indeed—the case of *Rossiter v. Miller*, which went lately to the House of Lords. At p. 1140 of the Report in 3 App. Cas. Lord Cairns (then Lord Chancellor) said, "My Lords, the other two points in the case really are very small. As to the use of the term 'proprietors,' I own I was somewhat surprised to hear that question argued, for I am sure your Lordships have frequently seen conditions of sale, not merely by auction, but by private contract, in which it is stated that the sale is made, sometimes by the owners, and sometimes by the mortgagees, and a form of contract is annexed in which an agent signs for the vendors, and no other specification upon the vendor's part is inserted; and I never heard up to this time that a contract under those circumstances was invalid. In point of fact, my Lords, the question is, Is there that certainty which is described in the legal maxim *id certum est quod certum reddi potest*? If I enter into a contract on behalf of my client, on behalf of my principal, on behalf of my friend, on behalf of those whom it may concern, in all those cases there is no such statement, and I apprehend that in none of those cases would the note satisfy the requirements of the Statute of Frauds. But if I, being really an agent, enter into a contract to sell Blackacre, of which I

am not proprietor, or to sell the house No. 1, Portland Place, on behalf of the owner of that house, there, I apprehend, is a statement of matter-of-fact, as to which there can be perfect certainty, and none of the dangers struck at by the Statute of Frauds can arise."

There Lord Cairns drew the distinction between the words "proprietor," "mortgagee," and the like, and "my client," "my principal" and "my friend." Why cannot "my client," "my principal" and "my friend" be made just as certain if you introduce parol evidence as "the owner" or the "mortgagee"? There is no doubt it can; but the reason for the distinction I take to be this, that in the one case you have a description of the individual more or less definite, and in the other you have none. "My client" is not a description of any individual necessarily. "My friend" is not a description of an individual A B; and in the one case you may have parol evidence to render the description more certain, but in the other you may not, because you do not find on the face of the contract a sufficient description in writing to enable you to introduce the parol evidence.

I am not disposed to carry the law on this subject one hair's breadth beyond the decided cases, and I think I should be doing so if I were to hold that in this contract there is a sufficient description of the property. I hold that the only documents in writing to which I can refer are the receipt and the conditions, and the memorandum signed at the bottom of them, and I hold that in those two documents taken together, upon the authority of *Long v. Millar*, there is not a sufficient definite description of the property sold and purchased to enable me to receive parol evidence of what the subjects of that sale and purchase were. Having come to that conclusion, I am bound to dismiss this action, as I do, with costs.

Solicitors—Berry & Binns, agents for Thomas Heath, Derby, for plaintiff; Stevens & Co., agents for John Cutts, Chesterfield, for defendants.

HALL, V.C. }
1881.
May 14. }

GRANGE v. WHITE.

Practice—Partition Act, 1876 (39 & 40 Vict. c. 17), s. 6—Request for Sale by Married Woman.

In a partition action a request for sale on behalf of a married woman was directed to be made in writing, signed by her, authorising and requesting her solicitor to instruct counsel to ask for a sale.

This was a partition action in which the parties desired a sale. A husband and wife were co-plaintiffs, and the only question was as to the form in which the request for sale by the married woman should be made.

Mr. Bardswell, for the plaintiffs, proposed that the order should follow the form approved by Bacon, V.C., in

Orookes v. Whitworth, Law Rep. 10 Ch. D. 289,

namely, that it should be prefaced by a statement that the married woman, "by her counsel duly authorised," requested a sale. He mentioned, however, that in the recent case of

Wallace v. Greenwood, *Ante*, p. 289; Law Rep. 16 Ch. D. 362,

the Master of the Rolls had doubted the correctness of

Orookes v. Whitworth (*ubi supra*), and intimated an opinion that the request by the married woman should be made by some one separately and specially authorised on her behalf. If his Lordship declined to follow

Orookes v. Whitworth (*ubi supra*), then he proposed that the solicitor in the action should be specially authorised to make the request on her behalf. He referred also to

Bimington v. Hartley, Law Rep. 14 Ch. D. 630.

Mr. Methold, as *amicus curiæ*, stated that in a similar case, in which he was counsel, his Lordship (the Vice-Chancellor) had accepted as sufficient a written request by the married woman, authorising him, as her counsel, to ask for a sale.

Mr. A. O. Sim, for the defendants.

HALL, V.C., directed that there should be a request in writing, signed by the married woman, authorising and requesting her solicitor to instruct counsel to ask for a sale.

Solicitors—Burton, Yeates, Hart & Burton, agents for Parker & Parker, Thame.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.

JAMES, L.J.

BRETT, L.J.

COTTON, L.J.

1881.

March 24.

Ex parte WICKS; in re WICKS.

Bankruptcy—“Salary or income”—Payment to Trustees of Bankrupt of Part—Voluntary Allowance—Bankruptcy Act, 1869, ss. 89 and 90.

A voluntary allowance, to which the bankrupt has no legal or equitable claim, is not “salary or income” within the language of section 90 of the Bankruptcy Act, 1869, and is therefore not subject to an order of the Court of Bankruptcy directing payment of it, or any part, to the trustee; and it is immaterial whether the bankrupt was in receipt of such allowance before the bankruptcy, or whether it commenced subsequently.

John Wicks filed a petition for liquidation on the 16th of March, 1880. In the course of his examination it appeared that he was in receipt of an allowance of 200*l.* a year which commenced on the 1st of March, 1880. This allowance was a purely gratuitous one, to which the debtor himself admitted he had no legal claim.

The trustee in his liquidation applied to the Judge of the Kingston County Court for an order under the 90th section of the Bankruptcy Act directing payment to them of all or so much of the 200*l.* as to the Court should seem proper.

The Judge refused the application, holding that the allowance being voluntary did not fall within that section. The trustees appealed to the Chief Judge,

Ex parte Wicks; in re Wicks (App.), Bankr.

who, on the 31st of January, 1881, reversed the decision, holding that the allowance, although voluntary, and as such liable to be withdrawn, was, so long as it was paid, "income of which the bankrupt was in receipt," within the meaning of the 90th section. And he ordered 50*l.* out of every 200*l.* received to be paid to the trustees.

The bankrupt appealed.

Mr. Winslow and Mr. Herbert Reed.—

This is a mere voluntary allowance and cannot be held to fall within the 90th section.

They were stopped.

Mr. Horton Smith and Mr. Willoughby, for the trustees.—It is either property or income of the bankrupt. If the former it falls to the trustees under the 4th section, on his appointment. If not property it is "income," so long as it continues to be paid, within section 90. Income-tax would be charged upon this as an "allowance," under 16 & 17 Vict. c. 34. s. 1.

JAMES, L.J.—I cannot agree with the decision of the Chief Judge. I cannot conceive that a voluntary gratuitous allowance made by father, relative or friend to a bankrupt, can be made the subject of an order of the Court of Bankruptcy under the words "salary or income." The words must mean a salary or income to which the bankrupt has some legal or equitable claim, and not a mere voluntary payment.

BRETT, L.J.—I do not see that we have any right to reduce an Act of Parliament to a wicked absurdity.

COTTON, L.J.—Section 89 refers to the salary and income which the bankrupt is entitled to receive in respect of various services rendered by him—in other words, income to which he has a legal claim. Then section 90 follows, which sweeps in salary or income of a similar character, but which was not included in the former definition. When it speaks of a bankrupt being "in receipt of a salary or income," and the Court from time to time "making an order for payment," it shews that it does not mean something which he receives by the bounty of another person,

but something which he has a right to receive. Where there is a merely voluntary payment made from time to time, it does not matter whether the bankrupt was in receipt of it at the time of the bankruptcy, or whether the allowance is made after the bankruptcy for his maintenance. Could it be contended that such an allowance, or a sum given in that way for payment of bills for necessities for his support could be taken under section 90? Such a construction would be absurd. I consider it is impossible to make any order directing any part of this sum to be paid over.

The order must be discharged with costs here and below.

Solicitors—Wills & Watts, for trustees; T. D. Dutton, for bankrupt.

JESSEL, M.R.

1881.

April 29.

WALTER v. HOWE.

Copyright—Newspaper—Registration—Newspaper Article—Author—Injunction—Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 18.

A newspaper is a "periodical work" or "book" within the meaning of the 18th section of the Copyright Act, 1842, and requires to be registered under that Act in order to give the proprietor a copyright in its contents and a right to sue in respect of the piracy of any article therein. The proprietor must, moreover, shew that the article in question was composed on the terms that the copyright therein should belong to him and that he had paid the author for his services.

Cox v. The Land and Water Journal Company (39 Law J. Rep. Chanc. 152; Law Rep. 9 Eq. 324) not followed.

The defendants, Howe and Peddie, had printed and published a pamphlet entitled "The Life and Works of Benjamin Disraeli (Earl of Beaconsfield), reprinted from the *Times*," and which was in fact a reprint of the biography or memoir of the late Earl of Beaconsfield

Walter v. Howe.

which appeared in the *Times* newspaper on the 20th of April, 1881.

The plaintiff, who sued on behalf of himself and all other the proprietors of the *Times*, now moved for an injunction to restrain the defendants from printing, publishing, selling, advertising for sale or otherwise disposing of the said pamphlet or any copies thereof, or any reprint from the *Times* of the said biography, or any part of such biography, or any colourable imitation thereof, and from parting with the possession of any copies of the said pamphlet in their possession, and from otherwise infringing the plaintiffs' copyright in the said biography or memoir.

The publisher of the *Times* stated in his affidavit that the author of the biography had been paid for his literary services on behalf of the plaintiffs, but there was no other evidence that the proprietors of the *Times* had purchased or were entitled to the copyright in the memoir.

The author of the biography was not a party to the action.

The *Times* had not been registered at Stationers' Hall under the Copyright Act (5 & 6 Vict. c. 45).

Mr. Chitty and Mr. McSwinney, for the plaintiffs.—The plaintiffs are entitled to sue without being registered under the Copyright Act, 1842, on the authority of *Cox v. The Land and Water Journal Company* (*ubi supra*),

which is a distinct authority that a newspaper does not require registration, and that the proprietor may, without registration, sue in respect of a piracy. The plaintiffs have paid the author of the memoir for his services, and they therefore are entitled to the copyright in it under the 18th section of the Copyright Act.

Mr. Bond Cox, for the defendants, was not called upon.

THE MASTER OF THE ROLLS.—The evidence does not shew that the plaintiff has, within the 18th section of the Copyright Act, paid the author of the memoir "on the terms that the copyright therein shall belong to" the plaintiff, or, in

other words, that the plaintiff has bought and is entitled to the copyright, or that the author is not the owner of the copyright. Therefore, in my opinion, the plaintiff is not entitled to sue without the author. But even if the plaintiff has a copyright in the memoir, he is not entitled to sue, because the newspaper has not been registered under the Act. The 18th section says, that when any publisher or other person shall . . . have projected, conducted and carried on . . . any encyclopædia, review, magazine, "periodical work, or work published in a series of books or parts, or any book whatsoever," and shall have employed any person to compose the same, "or any volumes, parts, essays, articles or portions thereof, for publication in or as part of the same," and such work, &c., shall have been composed on the terms that the copyright therein shall belong to such proprietor, &c., and paid for by him, then such proprietor, &c., shall be entitled to copyright, and he is to be entitled to sue upon registration at Stationers' Hall under the 19th section.

Now the words of the 18th section are of the most comprehensive kind—any "periodical work"—a term which certainly includes a newspaper—"or any book whatsoever;" under the 2nd section the word "book" includes every "sheet of letterpress." In my opinion, therefore, to entitle the plaintiff to sue, his newspaper must have been registered under the Act.

I have been referred to the case of *Cox v. The Land and Water Journal Company*, in which Vice-Chancellor Malins held that a proprietor of a newspaper could sue without joining the author and without registration under the Copyright Act. But, with all respect, I must decline to follow that decision, for it appears to me to be opposed to the plain wording of the Act of Parliament. If I were to decide in accordance with it I should, in my opinion, be virtually overruling the Act.

I, therefore, refuse the motion, with costs.

Solicitors—F. L. Soames, for plaintiffs; G. J. Claxton, for defendants.

FRY, J. }
1881. }
April 12. }

MONEY v. MONEY.

Will—Construction—Period of Vesting.

A testator directed a legacy given to a son to be held on certain trusts in the event of the son's marrying a designated person:—Held, that the trusts took effect in the event of the son's marrying the designated person within a year of the testator's death, and before the legacy had been paid.

David Inglis Money by his will, dated February, 1880, bequeathed unto his younger son, Charles Leonard Money, then residing in Australia, the legacy or sum of 3,000*l.*, but in the event of his marrying Kate Grantham, spinster, the daughter of Captain Grantham, late of the 45th Regiment, the testator directed his executors and trustees to retain the said sum of 3,000*l.* in their hands upon certain trusts, for the benefit of Charles Leonard Money, Kate Grantham and the children of Charles Leonard Money. The testator also bequeathed a leasehold house at Petersfield to his trustees upon trust to permit his sister to occupy it at a rent of 45*l.*, and subject to such occupation in trust for his said son Charles Leonard Money. But if his said son should marry the said Kate Grantham, then, subject to the tenancy and occupation thereof by his said sister, he directed that the said leasehold house and garden ground and the rent thereof should be held by his executors and trustees upon trusts corresponding as nearly as the nature of the property and other circumstances would permit to the trusts of the said sum of 3,000*l.* and the income thereof in the event aforesaid.

The testator died on the 16th of July, 1880, and his son Charles Leonard Money married on the 23rd of October the lady designated in the will as Kate Grantham.

This action was brought by Charles Leonard Money to determine whether he was absolutely entitled to the legacy of 3,000*l.* and the leasehold house, or whether the trusts directed in the event of the plaintiff's marrying Kate Grantham took effect.

The defendants were the trustees and

executors of the testator's will and the plaintiff's wife. The latter demurred.

Mr. J. Pearson and Mr. Leake, for the demurrer, contended that the plaintiff did not become absolutely entitled to his legacies within a year from the testator's death, at any rate unless they had been actually paid him, and that on his marriage to his present wife within that period the trust took effect—

Witham v. Witham, 3 De Gex, F. & J. 758; 30 Law J. Rep. Chanc. 888;

Johnson v. Crook, 48 Law J. Rep. Chanc. 777; Law Rep. 12 Ch. D. 639;

Bubb v. Padwick, 49 Law J. Rep. Chanc. 178; Law Rep. 13 Ch. D. 578;

Halifax v. Wilson, 16 Ves. 168;

In re Yates's Trusts, 21 Law J. Rep. Chanc. 281;

Collinson v. Barber, 48 Law J. Rep. Chanc. 720; Law Rep. 12 Ch. D. 834.

Mr. North and Mr. Prior, for the plaintiff, contended that on the death of the testator without the marriage having taken place the plaintiff had an absolute interest. It was necessary that some date should be fixed at which the right would vest in him, for there was no direction that would empower the trustees to keep the fund in their own control, and the testator's death was the only definite date that could be fixed, or which it was likely that the testator referred to. They cited, in addition to the above cases,

Osborn v. Brown, 5 Ves. 527;

Garthshore v. Chalie, 10 Ves. 1;

In re Arrowsmith's Trusts, 2 De Gex, F. & J. 474; 30 Law J. Rep. Chanc. 178;

Minors v. Battison, 46 Law J. Rep. Chanc. 2; Law Rep. 1 App. Cas. 428.

Mr. Freeman, for the executors.

FRY, J., said—The testator here referred to the marriage of his son with Kate Grantham at a future time in words indefinite as to such time. There are three possible constructions to be put upon time: First, the words may apply

Money v. Money.

to a marriage in the testator's lifetime; secondly, to a marriage at any time before the payment of the legacy, and the assent of the executors to the bequest; or, thirdly, it was to take place at any time.

When I turn to the language of the will I find it is quite general. When I look at the object of the testator he seems to have desired the marriage and to have made provision for it, and it made no difference to him whether the marriage was in his lifetime or not. Therefore there seems no reason from that cause to limit the time at all. But there is this difficulty in extending the time indefinitely: There is an absolute bequest of the £3,000. to the son, which is to be invested in case of the marriage taking place, and there is no direction to invest it in the meanwhile. I am, therefore, bound to find some limitations in the time within which the marriage is to take place, and I think if I limit it to marriage which takes place before the times when the payment ought to take place, or when in fact it takes place, I put the utmost limit the circumstances require. I think it would not be a reasonable inference to limit the time to the life of the testator.

I think, therefore, that marriage before the expiration of a year or before the time at which the executors are ready to pay, and assent to the legacy is enough. On marriage within a time so defined the direction takes effect. It is immaterial for this case to determine between those two limits, because the marriage took place within the year, and before the executors were ready to pay. The language of the will is aimed at the time of payment. It means that, when you come to the act of payment, if you find the marriage has taken place you are to retain the money upon trust.

Solicitors—Lethbridge & Son, for plaintiff and defendants; Rogerson & Ford, for trustees.

[IN THE COURT OF APPEAL]

JESSEL, M.R.

BAGGALLAY, L.J.

LUSH, L.J.

1881.

June 24.

In re GOSMAN.

Petition of Right—Will—Intestacy as to Personal Estate—Next-of-kin—Solicitor to the Treasury—Moneys paid to Trustees for the Crown—Interest.

The Crown not having taken out letters of administration to an intestate is not liable for interest to the next-of-kin who subsequently establish their title to the fund in the hands of the Solicitor to the Treasury.

This was an appeal by the Crown from the decision of Malins, V.C. (reported 49 Law J. Rep. Chanc. 590), holding that, where moneys were paid by executors under a royal warrant to the Solicitor to the Treasury as trustee for the Crown on the supposition that there were no next-of-kin of the testator, on the next-of-kin coming forward and establishing their title under a petition of right, the Crown was liable to pay interest at four per cent. on all moneys come to the hands of the Solicitor to the Treasury from the times they were respectively received by him.

Mr. Stirling (*Mr. Rigby* with him), for the Crown, were stopped.

Mr. J. Pearson and *Mr. Romer*, for the respondents.—We submit that the Crown should pay interest. In 1875, at any rate, they had notice of our claim, and should have set aside the fund and allowed it to accumulate.

Mr. Higgins and *Mr. Murray*, for parties in the same interest.

JESSEL, M.R.—There is nothing to be said. The Crown never took out administration for this fund; why should it pay interest? Our law does not allow interest except by statute or contract or the law merchant. The appeal must be allowed.

BAGGALLAY, L.J., and LUSH, L.J., concurred.

Solicitors—Hare & Fell, for the Crown; Ewbank & Partington, for respondents.

BACON, V.C. }
 1880. }
 Dec. 21. } JONES v. STÖHWASSER.
 1881. }
 Jan. 11, 12. }

Mortgage by Administrator—Authority from Next-of-Kin—Breach of Trust—Priorities—Notice.

An intestate being entitled to the renewal of leases on completion of repairs, died in 1872, leaving his next-of-kin one son (his administrator) and three daughters. The daughters gave a written authority to the son to borrow money on the security of the leasehold houses for the repairs. The repairs were completed, and a lease granted to the son in 1872. No money was required to be borrowed for the completion of the repairs, but the son deposited the lease and the authority with S. to secure his private debt. In 1875 the son wound up the administration accounts, stating that no use had been made of the authority. In May, 1877, the son executed a legal mortgage to S. of his one-fourth share of the leasehold houses, and in December, 1877, a mortgage of the daughters' shares, purporting to be made under the authority. No notice was given by S. to the daughters of the previous deposit of the authority or of this mortgage:—Held, that the mortgage did not affect the shares of the daughters, and that they were entitled to a re-assignment.

James Jones was entitled to the renewal of the leases of Nos. 28, 29, 30 Laurence Lane, and No. 10 Trump Street, in the city of London, on completion by him of certain repairs, the management of which, shortly before his death, he entrusted to his son, F. Jones. James Jones died intestate, in January, 1872, leaving his three daughters, and his son, F. Jones, who took out letters of administration, his sole next-of-kin. On the 11th of May, 1872, the plaintiffs gave the following authority to F. Jones to enable him to raise sufficient money to complete the repairs:—

“In consideration of the outlay and liabilities you have incurred in connection with the estate of our father, the

late Mr. James Jones, we, the undersigned, being with yourself the only next-of-kin, do hereby require and authorise you to borrow upon mortgage or otherwise, as you may deem best, upon the security of the houses Nos. 28–30 Laurence Lane, and No. 10 Trump Street, held under an agreement for a lease from Miss M. J. Sayer, such money as you require for carrying out these matters, and to charge our respective shares with the interest thereof.

“E. E. Jones.

“Georgina Jones.

“A. E. Jones.”

The repairs were completed, and a lease of the houses was granted to F. Jones, as administrator, on the 4th of July, 1872. No money was, in fact, required to be raised for the completion of the repairs. The lease, together with the authority of the 4th of May, 1872, was shortly afterwards deposited with Stöhwasser to secure 3,000*l.*, which he had advanced to F. Jones, and F. Jones signed an agreement charging the lease with repayment. No notice of this deposit was given to the daughters by Stöhwasser. In 1875, F. Jones purported to wind up the administration account, and the three daughters then paid to him 428*l.* 16*s.*, shewn to be due to him as administrator. At the same time they were told that no use had been made of the authority of the 11th of May, 1872, but they did not insist on its being delivered up to them.

On the 22nd of May, 1877, F. Jones executed a legal mortgage of his one-fourth share of the leasehold houses (and other property) to Stöhwasser to secure 10,000*l.*, in which he was then indebted to Stöhwasser. It appeared that at that time Stöhwasser had mislaid the authority of the 11th of May, 1872, but he afterwards discovered it among his papers, and then insisted on having a mortgage of the entirety. A draft mortgage was accordingly prepared by counsel, to which the three daughters were made parties, as well as F. Jones, which, after reciting that 2,712*l.* 2*s.*, part of the 10,000*l.*, was advanced for the purpose of rebuilding the houses, purported

Jones v. Stöhwasser.

to mortgage the entirety for securing the said sum of 2,712*l.* 2*s.*

This draft was submitted to a Mr. Clarke, who acted, under the instruction of F. Jones, for the mortgagors; and F. Jones insisted on the names of the three daughters being struck out, telling Clarke that he must take his instructions from him without communicating with his sisters. The draft was accordingly altered into a mortgage by Jones of his three daughters' shares under the authority of the 11th of May, 1872, their names being struck out as parties, and the authority being recited, and in this form the deed was engrossed and executed, on the 13th of December, 1877, by F. Jones. Stöhwasser gave no notice of this deed to the plaintiffs.

In 1879 F. Jones became bankrupt, and the three daughters brought this action against his trustee in bankruptcy, and Stöhwasser, for the purpose of obtaining an assignment of their shares in the leasehold houses, offering to pay what, if anything should be found due to Stöhwasser on the mortgage of the 13th of December, 1877, which, in the opinion of the Court, the plaintiffs ought to pay. Stöhwasser died on the 22nd of February, 1880, since the institution of the action, and his executors were made parties. F. Jones was called as a witness, and also Mr. Pike, who acted for Stöhwasser in the preparation of the mortgage, and the nature and effect of their evidence is stated in the judgment. Clarke, the solicitor who acted for the mortgagors in the preparation of the mortgage, was not called as a witness.

Mr. Hemming and *Mr. Begg*, for the plaintiffs.—The defendants cannot rely on the legal mortgage of the 13th of December, 1877, as giving them any higher right than the deposit of 1872 gave them, and the authority then deposited gave no right as against the plaintiffs, first, because it was especially limited to moneys required for rebuilding, and no moneys were, in fact, required for that purpose; and secondly, because it was the duty of Stöhwasser to have made enquiry as to the purpose for which the money was borrowed, and to

have given notice to the three plaintiffs. F. Jones was not borrowing the money as legal personal representative, but under the authority, and therefore Stöhwasser was put upon enquiry—

Hill v. Simpson, 7 Ves. 152, 169;

M'Leod v. Drummond, 17 Ves. 152, 158;

Haynes v. Forshaw, 11 Hare, 93;

22 Law J. Rep. Chanc. 1060;

Lewin on Trusts (7th ed.) pp. 433, 434.

Mr. Buckley, for the defendant F. Jones, and his trustee in bankruptcy.

Sir H. Jackson, *Mr. Horton Smith* and *Mr. Meyricke*, for the executors of Stöhwasser.—This is a case where one of two innocent parties must suffer, and the loss ought to be borne by those who entrusted their agent with the written authority—

The Earl of Aldboro' v. Trye, 7 Cl. & F. 486, 463;

Judd v. Green, 45 Law J. Rep. Chanc. 108, 111.

Stöhwasser was not bound to make enquiries as to whether there were any debts—

Sabin v. Heape, 27 Beav. 553; 29 Law J. Rep. Chanc. 79.

The authority was given as a security and was irrevocable—

Gausson v. Morton, 10 B. & C. 731; 8 Law J. Rep. (o.s.) K.B. 313;

Smart v. Sanders, 5 Com. B. Rep. 380; 16 Law J. Rep. C.P. 39;

Abbott v. Stratton, 3 J. & Lat. 603;

Hill v. Wilson, 42 Law J. Rep. Chanc. 817; Law Rep. 8 Chanc. 888.

BACON, V.C.—This is one of those unfortunate cases which occur so frequently in this Court, where the question is upon which of two innocent persons the loss that has occurred must fall. The first thing to be considered is the nature and the meaning of the memorandum of the 11th of May, 1872. Four persons being entitled in equal shares to the beneficial interest in certain leasehold premises, it becomes necessary that money shall be expended for the purpose of improving their property, and they agree that they will bear in equal shares the necessary

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expenditure. One of them was an adult, a man of business, and also the legal personal representative of his late father; the other three were the daughters of the intestate; and they came to an agreement, the substance of which is contained in the memorandum which is the root and origin of the case before me. [His Lordship read the memorandum and continued:] Now what is the meaning of that? It contains a plain qualification on the face of it—"such money as you may require." The persons signing that memorandum have at least a right to be informed of what was required. If they had been informed they would have acted as seemed best to them; but it cannot be read to mean, "whatever sum you may say you require." Still less when it is presented to some person who is to become the mortgagee by virtue of the authority, would he be satisfied with the statement of Jones himself that he required that money in order to carry out those matters—that is, the outlay and the liabilities. I am considering the memorandum without reference to the subsequent transactions. He would have said, "It is all very well for your sisters to give that authority, and I dare say they will make it good, but I must let them know. First of all, I must enquire whether they know of the sum which you say you require; and even if that is not an indispensable necessity (as perhaps it was), I must give them notice the moment I lend you this money that you have mortgaged to me under that authority, and from that time I shall have a security upon their interest in this property." No such thing was done at any time; no notice whatever was given in his lifetime by Mr. Stöhwasser, a man of business, acute, and lending his money upon security. No notice whatever was given to these ladies, nor has any fact come out in the course of this long and somewhat complicated discussion which would lead me to believe that they had ever, until shortly before the filing of the bill in the suit, any notice whatever that any mortgage had been executed binding their interests. In 1872 it appears that Stöhwasser lent a sum of money to F. Jones upon a deposit of the lease of the houses in the city, which, as

the lease expresses it, had then been rebuilt and were completed in pursuance of the agreement between the lessor and their late father. That lease so procured by F. Jones, to whom it was granted in his character of legal personal representative of his father, was deposited beyond all question with Mr. Stöhwasser to secure a then present advance made to him. I think it must be taken as clearly in evidence that at the same time Jones deposited with him the authority which the sisters, the plaintiffs in this action, had signed. I say so notwithstanding that Mr. Jones has said upon his examination that his only object was to shew to Stöhwasser that his interest was one-fourth, and the interests of his sisters were the other three-fourths of their property. It was not in the slightest degree necessary, but if the object was to pledge the interest of the sisters then it was indispensably necessary; and if there was nothing else in the case, considering all Jones's evidence, than that, I should utterly discard and disbelieve what he said upon his examination here, that his only reason for depositing the memorandum was to shew what their respective interests were in this property. Deposit it he did. I think the evidence upon that subject is conclusive. From 1872, when the deposit was made, down to 1877, no notice was given by Stöhwasser of the interest which he supposed he had acquired. It appears from Mr. Pike's evidence that Stöhwasser must, I think, fairly be taken to have been always under the impression that the sisters' shares were mortgaged to him, although the particular document, the authority, had been mislaid. Mislaid it was, and not forthcoming until the 29th of May, 1877, at which time a more regular mortgage had been executed by Jones of his own share, and only of his own share, in this leasehold property to secure to Stöhwasser the 10,000*l.* which he owed him at that time.

Then arises what has given so much trouble in this case. Stöhwasser, searching among his papers, finds this authority. It is communicated by him to his solicitors, and he might reasonably say to them, "You see I was always right when I told

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you I had a security on the entirety of the leaseholds. I have found the paper which shews I have." That paper is laid before counsel, and then another deed is prepared for the purpose of giving effect to that authority, and a draft is prepared in the regular and proper form, and nobody after that interval of five years would have thought of preparing a document to which the sisters were not parties. A document is prepared to which they are made parties in the first instance, and that is submitted to a Mr. Clarke, who purported to act as their solicitor, whose absence I most sincerely regret. If Mr. Clarke were here he would enable me to know what weight I ought to attach to the positive statement of Mr. Jones that he (Mr. Clarke) had no authority from the sisters, and that he himself (Jones) chose, as he says, to follow his own course. He said that he instructed Clarke without any communication with his sisters: "Clarke asked to see my sisters. I said, he must take his instructions from me. I took upon myself to instruct him. I chose to take my own course." That being the course taken, the second mortgage having been prepared in the manner I have mentioned, the sisters were made parties to that instrument, and the recital in that instrument contains, amongst other things, this: "Whereas a part of the sum of 10,000*l.*, being 2,712*l.*, was advanced by Stöhwasser to Jones for the purpose of rebuilding the messuages, tenements and hereditaments comprised in the said indenture of lease." That undergoes no alteration. A very important alteration is afterwards made in the draft, for the sisters' names are struck out, Mr. Jones declining to make any communication to his sisters, and declining to let Mr. Clarke make any communication to them, and insisting that Mr. Clarke should take his instructions from him. Then the draft undergoes this alteration that the terms of the authority are then introduced into it, and it is made a mortgage of the entirety of the estate for the purpose of securing the 2,712*l.* Then correspondence took place between the solicitors on that subject, and it is found that 2,712*l.* is the entirety, and one-fourth of it ought to be deducted because

that is attributable to Jones's own beneficial interest, which was already mortgaged; and in that state the deed is executed.

The question before me is, whether that deed so then executed reciting the authority which the sisters had signed, and acting upon the authority, can prevail against them; and, in my opinion, it cannot.

I lay very little stress upon Mr. Jones's evidence, which is not to be relied upon. His conduct throughout shews that. I have alluded to the excuse he makes for depositing the authority in the first instance. I say, moreover, after that recital contained in the deed prepared and approved of by his own solicitor, containing the allegation that the money that had been advanced by Mr. Stöhwasser had been employed in the rebuilding of those houses—contrasting that deed under his hand and seal, with what he says in the box, I cannot believe what he now says in the witness-box, nor do I find on his part any kind of explanation except the general explanation: "Mr. Stöhwasser's money was not employed in rebuilding the houses; I did not pay any of Mr. Stöhwasser's money for the purpose." That is all he says about it. No account is produced whatever, and there is no statement whatever. Under those circumstances, in my opinion, the deed having been executed with full notice and knowledge to Mr. Stöhwasser, and (as the correspondence shews) the sisters not having been consulted (although it had been thought at first that they ought to be consulted, and their concurrence to make the mortgage valid was, in the opinion of Mr. Stöhwasser's advisers, absolutely necessary), I think that mortgage cannot prevail against their interest.

But there is one reason which is very forcible to my mind. The sisters have stated in their statement of claim, and they have proved in their evidence, that in the year 1875 a settlement of accounts was come to between them and their brother, from which it appears that a balance, amounting to 428*l.*, was then due to F. Jones, on the capital account of the intestate's estate. The plaintiffs then enquired of F. Jones if he had

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borrowed any money on the security of their shares, and he replied that he had not. They thereupon paid their fourth share of the 428*l.*, and the capital account was thereby closed and the authority retracted. From 1872 to 1875 three years elapsed. During that time the sisters might have enquired, and did enquire, according to their statement in the statement of claim and in their evidence, what had been done about this authority, and they had every reason to believe that what was then told them was true—that the authority had never been acted upon, and not having been acted upon there was due to Jones that 400*l.* odd, and that sum they paid. No doubt it was exceedingly rash and wrong on their part not to have insisted on the authority being delivered up to them—an imprudence for which I can find no kind of excuse, for they seem to have been alive to their own interests. They settled their account with Jones and they paid him what he said was due upon the account without any objection, and took his word that that authority which they had given had never been acted upon.

The consequence of that is that Mr. Stöhwasser's security is good for nothing. If they had then said to Jones, "Now produce to us the authority, because that must be cancelled; we cannot leave that in your hands; you might borrow money upon it and charge our estate"—if they had said that, the whole thing would have been found out, and Jones would have been exposed, and the manner in which he dealt with the estate would have been ascertained. It is unnecessary to go into all that enquiry which has been gone into, I do not say improperly, as to what took place when the instructions were given to Messrs. Pike and the mortgage security was executed. There was the first mortgage, and then the second mortgage reciting the authority. The plaintiffs had reason to trust their brother and no reason to doubt what he told them was true. They gave an earnest that they had no reason to doubt him by paying the 400*l.* odd, and, in my opinion, the second mortgage of 1872 cannot prevail against them. The plaintiffs, therefore, are entitled to the relief which they

ask, which is to have an assignment of their three-fourth shares of the property comprised in the lease.

I do not intend to make the defendant pay the costs, because I think the whole litigation has arisen from the imprudence of the sisters in first of all giving their authority, such as it was, which their brother had the means of making an improper and fraudulent use of. I think, moreover, that they ought to have required the delivery up to them of that authority, because they say they knew what the effect and meaning of it was. All that was present to their minds when they settled that account. If they had done that, which I think in all fairness they ought to have done, I think the suit would have been unnecessary and probably never would have been instituted. I cannot give them any costs because I find it is by their own imprudence and by the misconduct of their trusted brother that this litigation has become necessary. And I cannot give any costs to Stöhwasser either, although I am bound to say I think his conduct—even taking Mr. Jones's account of it—is open to no sort of imputation. I think, however, it was his plain duty as a man of business, and his plain duty in law, to give notice to the plaintiffs that their share had been mortgaged by the brother under that authority; and therefore I cannot give him any costs.

Solicitors—Duffield & Bruty, for plaintiffs; H. M. Pike, for defendant.

[IN THE COURT OF APPEAL]

JESSEL, M.R.

JAMES, L.J.

LUSH, L.J.

1881.

May 19.

In re Knapman's Estate.
Knapman v. Wreford.

Administration—Assignment for Value of Unpaid Legacy—Executor's Right of Retainer—Set-off against Legatee for Debt incurred to Executor in Administration.

An assignee for value of an unpaid legacy takes subject to liabilities attaching to the

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same as part of the assets, such as costs of administering the estate, and also subject to a lien for moneys owing by the legatees to the estate.

The husband of a feme covert legatee takes his wife's legacy subject to the same liabilities.

When expenses in the administration, chargeable by the executrix against the estate, had been caused by a legatee's conduct and were a debt from him to the executrix,—

Held, that his legacy was subject to a lien in the hands of the executrix for the amount, to the exoneration of the residuary and other legatees.

Decision of HALL, V.C., affirmed.

This was an appeal from the decision of Hall, V.C., fully reported 49 Law J. Rep. Chanc. 716.

Mr. J. Beaumont (Mr. Graham Hastings with him), for the plaintiffs in the action and for the assignees of certain other legatees, the appellants, urged the same arguments as in the Court below.

Mr. William Pearson and Mr. W. Karslake, for the executrix, the respondent, were not called upon.

JESSEL, M.R., said—I think the order of the Vice-Chancellor entirely right. Certain legatees of a testator commenced an action in the Probate Division to recall the probate of the will which had been granted to the defendant executrix, and to obtain administration themselves. They failed and became liable to pay the costs of that action. Those are costs which the executrix can recover from them as part of the testator's estate. Pending that litigation, but before judgment, the legatees assign their legacies. It is said that the assignees are not liable to pay the costs of the probate action, but it appears to me that the assignees, whether mortgagees or otherwise, took subject to all the liabilities of the legatees in respect of their legacies. Under these circumstances this action is instituted to obtain payment of the legacies. The executrix says there are sufficient assets to pay the legacies in full, but I claim to set off and deduct

from them the taxed costs the legatees have been ordered to pay in the probate action. In that, in my opinion, she is quite right. No legatee can take anything from the estate until he pays what is due from him to the estate. In my opinion, the payment into Court of the legacy did not in any way alter the position of the parties. It seems to me that there is good equity, as well as sound sense, in holding that the executrix is entitled to the set-off she claims. The appeal will be dismissed with costs.

JAMES, L.J., and LUSH, L.J., concurred.

Solicitors—Yorke & Wharton, for appellants; J. E. Fox & Co., agents for R. E. Bishop, Torquay, for respondent.

KAY, J.

1881.

May 21, 24, 25.

BANNER v. BERRIDGE.

Mortgagor and Mortgagee—Mortgage of Ship—Statute of Limitations—Sale by Mortgagees—Surplus Proceeds of Sale—Express Trust—Acknowledgment of Debt—Admission of Open Account—Consolidation—Interest on Mortgage Debt—Interest payable in Advance—3 & 4 Will. 4. c. 27. s. 25—Judicature Act, 1873, s. 25. sub-s. 11—9 Geo. 4. c. 14. s. 1—19 & 20 Vict. c. 97. s. 13.

A constructive trust of surplus proceeds of sale by a mortgagee arises (no trust being expressed in the mortgage-deed) when it is shewn that there is such surplus; but evidence that there is such surplus will not establish an express trust for the purpose of section 25 of the statute 3 & 4 Will. 4. c. 27.

Tanner v. Heard (23 Beav. 555) explained.

Semble, 3 & 4 Will. 4. c. 27. s. 25, is by the effect of the Judicature Act applicable to personal property as well as land.

Express trusts within that section are not confined to trusts expressed by deed, but cover a case where property wholly belonging to one party is put in the hands of another for the owner's benefit.

Semble, an unqualified admission of an

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account being open, or one which either party is at liberty to examine, implies a promise to pay the balance found due.

Correspondence and expressions with regard to an open account from which the Court collected (without resort to the above implication) a promise to pay the amount due.

A mortgagee cannot tack to his debt another mortgage debt, the property mortgaged to secure which has ceased to exist.

The contract of mortgage of a ship provided that interest should be paid half-yearly in advance. The mortgagee sold the ship shortly before a half-yearly day for payment of interest, and received the balance of purchase-money (covering his principal debt) three days after that half-yearly day:—

Held, that he was only entitled to interest in respect of the three days for that half-year.

On the 7th of January, 1873, John Lacy, the owner of the steamship *Georgian*, mortgaged her in the statutory form to the defendant, Richard Berridge, to secure 18,000*l.* and interest and moneys owing on an account current. An agreement of even date provided (among other things) that interest should be paid in advance half-yearly, on the 1st days of January and July; that Berridge should not exercise his power of sale as mortgagee or sue on the mortgage covenants, unless in case of default, as specified; and that Lacy should be at liberty at any time, in the event of loss of the ship, or otherwise, to repay to Berridge the principal due on the security of the *Georgian*, on payment of six months' interest in advance, in addition to the principal and interest due at the date of payment, and should also be at liberty to repay to Berridge the principal sum of 18,000*l.* and amount due to him on account current at any time after the expiration of six months from the date thereof upon giving six months' notice of intention so to do, or paying six months' interest in lieu of such notice.

On the 5th of February, 1873, Lacy made a second mortgage of the *Georgian* to J. & H. Keyworth & Co., to secure the balance of a current account. In Sep-

tember, 1873, Lacy became a liquidating debtor, and the defendant Chalmers was trustee of his estate. J. & H. Keyworth & Co. became liquidating debtors at the same date, and H. W. Banner was appointed trustee. He died in 1878, when the plaintiff J. S. H. Banner became trustee.

On the 10th of December, 1873, Berridge, by his broker Preston, sold the *Georgian*, and a deposit on the purchase-money was paid on that day. The purchase was to be completed within thirty days, and the balance of the purchase-money was paid on the 3rd of January, 1874, to Preston, who, on the 5th of January, gave to Berridge his account and a cheque for 17,739*l.* 0*s.* 4*d.*

839*l.* 1*s.* 1*d.*, representing freight, was, by arrangement between the two mortgagees, paid into a bank in the joint names of Preston and H. W. Banner. The balance of the captain's account, 95*l.* 4*s.* 10*d.*, was by the plaintiff alleged to have been paid to Preston as agent for Berridge. Berridge held security upon another ship belonging to Lacy, named the *Retriever*. The *Retriever* was lost in 1871, and the insurance-moneys were, in April, 1872, received by Berridge.

On the 28th of August, 1874, Mr. Berridge wrote as follows to Messrs. Harwood Banner & Sons:—

"In accordance with the promise given you, I herewith enclose statement of *Circassian* and *Georgian* accounts, in reference to which I will furnish any explanation required.

"There is a sum of 839*l.* 1*s.* 1*d.* standing to the credit of Mr. Preston and Mr. Banner, awaiting final settlement. . . ."

The account sent showed a balance of 329*l.* 8*s.* 10*d.* due from Berridge. There was debited in the account a sum of interest in lieu of notice on the *Retriever* and also six months' "interest in lieu of notice" on the *Georgian*.

On the same day Mr. Berridge wrote again:—

"Since writing to you, I find that there is a further sum in the hands of Mr. Preston of 95*l.* 4*s.* 10*d.*, the balance of the captain's account."

Then on the 30th of October, 1874,

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Messrs. Harwood Banner & Co. received a letter from a Mr. Cooper, as follows:—

"I am requested by Mr. Berridge to state that he has been expecting to hear from you in reference to his letter of the 28th of August and account accompanying the same, and that he will be obliged by your informing him if you are prepared to receive the balance."

The matter slept till the 24th of November, 1879, when the plaintiff's solicitors wrote to Mr. Berridge as follows:—

"The *Georgian*."

"We have been looking into this outstanding matter, and we see the last communication from you was on the 28th of August, 1874, to Messrs. Banner, with an account which shews a balance to the credit of 329*l.* 8*s.* 10*d.*, subject to an item on the other side of 500*l.*, Griffith Tate & Co.'s claim, and an item not carried out of Messrs. Hollam's law charges.

"We understand the 500*l.* in question has long since been settled, and nothing now is required to be in that account in respect of it, so that under any circumstances you have money in hand. There was a sum of 839*l.* 1*s.* 1*d.* and interest lodged in the names of Mr. Banner and Mr. Preston, and as you have money in hand, irrespective of this, we ask you to authorise Mr. Preston to concur in the payment out to Messrs. Banner of the 839*l.* 1*s.* 1*d.* and interest. Will you be good enough to render a perfect account to the present time?"

"There is not any wish to meet you adversely, but as Mr. Banner is a trustee he must make such enquiries and take such objections as will protect him from loss.

"We think it is well, without going into all the items of the so-called account sent on the 28th of August, 1874, to point out that we do not think you ought to charge for interest in lieu of notice, either on the *Retriever* or *Georgian*, and that the 17,739*l.* 0*s.* 4*d.* is not sufficiently explained. We ought to have the detail shewing how that is arrived at, as Mr. Preston was merely your agent, and his receiver was yours. We understand the ship sold for something like 18,500*l.*

"The writer and one of the partners in Messrs. Banners & Son will be in London on Monday next. If you will make an appointment by Friday or Saturday we can arrange an interview, when doubtless the various questions may be satisfactorily arranged."

Mr. Berridge answered on the 27th:—

"I am in receipt of your letter, . . . and in reply to your request for an interview, beg to say I shall be happy to meet you at Mr. Preston's office on Monday next, at 7 o'clock."

In December, 1879, Messrs. Martin, the plaintiff's solicitors, wrote again to Berridge:—

"The *Georgian*."

"We are still without the particulars asked for in our letter of the 24th of November, and promised by you at our interview in London. We must ask you to let us have the accounts by return of post, so that the matter may be properly settled. Will you be good enough also to send us the authority to Mr. Preston to concur in the payment out of the money in the bank in his and the owner's name to Mr. Banner."

Mr. Berridge replied on the 30th of December, 1879:—

" . . . Since my removal here my papers have been in a very confused state. I will endeavour to find those relating to the *Georgian*, and as soon as I have done so will write you thereon. The whole matter should be disposed of at the same time."

On the 3rd of January, 1880, Mr. Berridge wrote again:—

"In accordance with your request I enclose a copy of Mr. Preston's account, by which you will see how the sum of 17,739*l.* 0*s.* 4*d.* was arrived at. The vouchers for payments will be at your service for examination at any time.

"There will be some debits on *Circasian* account to charge to the *Georgian* account."

The writ was issued on the 5th of March, 1880. The plaintiff asked for an account of what was due to Berridge on his mortgage, and of the proceeds of sale

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and other moneys credited by him, and for payment of the balance with interest, and of the 839*l.* and 95*l.*, to the plaintiff.

The defendant paid into Court 329*l.* 8*s.* 10*d.*, being the balance appearing on the account sent by him to H. W. Banner on the 28th of August, 1874; disclaimed any interest in the 839*l.* and 95*l.*; and pleaded the Statute of Limitations.

The defendant Chalmers disclaimed and was dismissed, and the action was also discontinued, by leave, against Preston, he having paid over the 839*l.*

Mr. Bigby and *Mr. Warmington*, for the plaintiff.—The Statute of Limitations does not apply, there being a trust sufficient to defeat it—

Tanner v. Heard (*ubi supra*).

[*KAY*, J., mentioned

Kirkwood v. Thompson, 2 Hem. & M. 392; 2 De Gex, J. & S. 613; 34 Law J. Rep. Chanc. 305, 501;

and

Locking v. Parker, 42 Law J. Rep. Chanc. 257; Law Rep. 8 Chanc. 30.]

Those cases only shew that a mortgage is a mortgage—

In re Alison, Law Rep. 11 Ch. D. 284—

they do not negative the trust of surplus proceeds of sale, which would prevent the statute being set up—

Burdick v. Garrick, 39 Law J. Rep. Chanc. 369; Law Rep. 5 Chanc. 233;

Wilson v. Tooker, 5 Bro. P.C. 193;

Kemp v. Westbrook, 1 Ves. sen. 278.

At any rate, the correspondence supplies a sufficient acknowledgment to displace the bar of time. An acknowledgment of an account open is enough—

Prance v. Sympson, *Kay*, 678;

Banning on Limitations, p. 45;

Edmonds v. Goater, 15 Beav. 415; 21 Law J. Rep. Chanc. 290;

Colledge v. Horn, 3 Bing. 119; 10 B. Mo. 431; 3 Law J. Rep. (o.s.) C.P. 184.

An admission of a right to have the account taken is enough—

In re The River Steamer Company;

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Mitchell's Claim, Law Rep. 6 Chanc. 822.

There are other cases as to the effect of applying for an account—

Skeat v. Lindsay, 46 Law J. Rep. Exch. 249; Law Rep. 2 Ex. D. 316;

Quincey v. Sharpe, 45 Law J. Rep. Exch. 347; Law Rep. 1 Ex. D. 72.

Mr. Northmore Lawrence (with him *Mr. Higgins*), for the defendant.—There is no express trust to take the case out of the statute. On the Act of James 1 a clear distinction was drawn between express and constructive trusts in

Beckford v. Wade, 17 Ves. 87.

On this point he also referred to

Petre v. Petre, 1 Drew. 371;

Lockie v. Lockie, Prec. in Chanc. 518,

mentioned in

Know v. Gye, 42 Law J. Rep. Chanc. 234; Law Rep. 5 E. & L. App. 656;

Hovenden v. Annesley, 2 Sch. & Lef. 607;

Watson v. Woodman, Law Rep. 20 Eq. 721.

The acknowledgment here is insufficient, if the statute applies—

In re Hindmarsh, 1 Dr. & S. 129.

The only authority against me is the opinion of Mellish, L.J.—

In re The River Steamer Company, Law Rep. 6 Chanc. at p. 828.

Merely sending an account is not enough.

He referred to

Francis v. Hawkesley, 1 E. & E. 1052; 28 Law J. Rep. Q.B. 370;

Routledge v. Ramsay, 8 Ad. & E. 221; 7 Law J. Rep. Q.B. 156;

Hart v. Prendergast, 14 Mee. & W. 741; 15 Law J. Rep. Exch. 223;

Spong v. Wright, 9 Mee. & W. 629; 12 Law J. Rep. Exch. 144;

Williams v. Griffith, 3 Exch. Rep. 335; 18 Law J. Rep. Ex. 210;

Cockrill v. Sparke, 1 Hurl. & C. 699; 32 Law J. Rep. Exch. 188.

KAY, J.—This action is brought by the second mortgagees of the ship *Georgian* against the first mortgagee and the trustee in bankruptcy of the mortgagor.

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The ship, which was sold in December, 1873, under the statutory power of sale, did not produce enough to pay in full the first and second mortgages; and the principal question is whether the action brought to make the first mortgage account fails by reason of the Statute of Limitations. The sale having been made in December, 1873, the purchase-money was received by the defendant in January, 1874, and just over six years from that time the action is brought, and to it the defendant pleads the Statute of Limitations. The first reply to that defence is that Berridge was bound by an express trust as to the moneys received by him on the sale. In this case there was no express trust in writing. There is an ordinary kind of express trust in mortgages of land, where the mortgage-deed expresses that the mortgagee selling shall hold the surplus purchase-moneys, after payment of the expenses and of his principal and interest, in trust for the mortgagor, his heirs or assigns. There is nothing of that kind expressed here. The power of sale which was put in force was the statutory power under the Merchant Shipping Act, 1854, contained in section 71 of the Act. The section says that every registered mortgagee shall have power absolutely to dispose of the ship or share in respect of which he is registered, and to give effectual receipts for the purchase-money. In that provision there is plainly no express trust of the purchase-money. But then I was referred to cases, of which I will mention one or two, to shew that a mortgagee selling under that power became affected with an express trust. The first case I will notice was *Tanner v. Heard*. There I observe that the Master of the Rolls, in his judgment, carefully puts the case, not on the ground of the defendant being mortgagee, but on a separate and distinct ground. He says, "The question in this case is as to costs, which are claimed by both sides." It was only a question of costs. Then he says, "I am of opinion that this is not a case in which the principles which obtain in a suit between mortgagees are applicable; I think it distinguishable. It is a case of this

description: The defendant was first mortgagee of a ship, the plaintiff was the second. The defendant, with the sanction and authority of the plaintiff, sold it at Amsterdam, and received the proceeds of the sale. Being entitled, in the first place, to the amount due on his mortgage and the expenses of the sale of the ship, and there being a surplus, he was bound to account to the plaintiff in the character of trustee." The Master of the Rolls, if I understand him, carefully distinguishes the case from the ordinary case of a mortgagee selling, and holds that, because the ship was sold by arrangement between the two who were, both of them, interested in the property, the one who received the money was trustee of the surplus for the other. That, therefore, is no authority that a mortgagee selling a ship under the statutory power is a trustee.

Kemp v. Westbrook is not the case of a mortgagee at all, and the pledgee had no power to give receipts. It gives no assistance in this case.

Then, enquiring, upon general principles, what does constitute an express trust, I am referred to *Petre v. Petre*. Vice-Chancellor Kindersley comments as follows on the 25th section of 3 & 4 Will. 4. c. 27 (which section, I may observe, seems now, by the effect of the Judicature Act, to apply to personality as well as land): "The 25th section is also confined to express trusts—that is, trusts expressly declared by a deed or a will or some other written instrument; it does not mean a trust that is to be made out by circumstances; the trustee must be expressly appointed by some written instrument, and the effect is that a person who is under some instrument an express trustee, or who derives title under such a trustee, is precluded, how long soever he may have been in enjoyment of the property, from setting up the statute. But if a person has been in possession, not being a trustee under some instrument, but still being in under such circumstances that the Court, on the principles of equity, would hold him a trustee, then the 25th section of the statute does not apply, and if the possession of such a constructive trustee has coa-

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tinued for more than twenty years, he may set up the statute against the party who, but for lapse of time, would be the right owner. That is the construction that I put on the 25th section of the statute."

I do not think that this passage exhaustively defines express trusts, for it would confine the term in that section of the Act to trusts expressed in a deed.

The next case which I shall mention shews that it is not so confined. However, Vice-Chancellor Kindersley's observations are valuable—as all that fell from him was—in attempting to draw the distinction between an express trust and a constructive trust. In *Burdick v. Garrick* Lord Hatherley says, "It would indeed be a strange thing if this Court should be obliged to hold that if a person, for instance, were to deposit plate or jewels with his bankers, intending to be absent from home for a great number of years, and those chattels were converted by his bankers to their own use, in fraud of the owner, and the owner were to come back at the end of seven or eight years, he is utterly remediless, either in the shape of an action at law or of a suit in this Court, because the dealing with his property has been in the nature of an agency. I apprehend that the true rule applicable to these cases is to be found in the case of *Foley v. Hill* (1), where it is clearly stated by Lord Cottenham, who distinguishes between the confidence reposed in a factor or agent and the confidence reposed in a person who is merely in the position of banker. A mere banker who takes charge of his customer's money is not in any fiduciary relation whatever to him with respect to the particular coins or notes deposited, because it is the ordinary course of trade to make use of them for his own profit. He does make use of them, and he invests the money deposited with him; and his customer does not require from him those very coins or exchequer bills which he deposited with him. But in the present case we have an agent who is intrusted with those funds, not for the purpose of being re-

mitted when received to the principal, but for the purpose of being employed in a particular manner in the purchase of land or stock, and which moneys the factor or agent is bound to keep totally distinct and separate from his own money, and in no way whatever to deal with or make use of them. How a person who is entrusted with funds under such circumstances differs from one in an ordinary fiduciary position, I am unable to see. That being so, the Statute of Limitations appears to me to have no application to the case."

That observation enlarges the Vice-Chancellor's definition and points out that a man having no property in goods, but holding them by a deposit from the real owner and without even a word to declare a trust, would be an express trustee within Lord Hatherley's definition. In the case of *Burdick v. Garrick* itself there could be no doubt about the trust, because the money was obtained under a power of attorney, which was a power to collect money, and therewith to purchase land, and to procure the same to be conveyed to or in trust for the donor of the power, and to invest the residue of the money either in his name or in the name of any other person in trust for him. Therefore there was as plain an expression of the trust as could well be. Still, Lord Hatherley's words go further—they go to a case where the property belonging wholly to one party is deposited with another for the benefit of the depositor. Then I have to consider if the facts bring this case within that doctrine. In the first place, this case is not quite analogous, for the mortgagee has himself an interest in the proceeds of sale of the mortgaged property. If the security is deficient they would belong entirely to him. Then as to the general distinction between the position of a mortgagee and a trustee properly so called, I referred during the argument to *Kirkwood v. Thompson*—a case in which Vice-Chancellor Wood adopts with approval the language of Vice-Chancellor Wigram in *Dobson v. Land* (2). He says, referring to that case (at p. 400), "The question there was, whether

(1) 2 H.L. Cas. 36.

(2) 8 Hare 216; 19 Law J. Rep. Chanc. 484.

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a mortgagee in possession who in the absence of covenant insured the property could be treated as having insured for the benefit of the mortgagor and be allowed to charge the premiums against him. The Vice-Chancellor, after stating the argument that the mortgagee was a trustee for the mortgagor in respect of the policies, says, 'In the absence of authority I am not prepared to adopt that conclusion. I may observe that I do not see how the question could be affected by the circumstance that the mortgagee was in possession. Now, that a mortgagee is in some sense a trustee for the mortgagor may be admitted; for every person in whom the legal estate is vested with a beneficial interest for another person, in a sense is a trustee for that person. In some sense a mortgagee is in a worse position than a trustee; for a trustee in an ordinary case is not liable to a decree for wilful default, unless a special case be proved against him, whereas such a decree is merely of course as against a mortgagee in possession. On the other hand, a trustee can never make a benefit to himself by any dealing with the trust property; but if a second mortgagee should buy in the first mortgage for half its amount, or even obtain an assignment without consideration from the first mortgagee, I can have no doubt he would be entitled to charge the mortgagor with the full amount of the first mortgage in addition to his own. And other cases of a like kind might be put.' So far Vice-Chancellor Wigram. Now in *Kirkwood v. Thompson* Lord Hatherley had to consider the case where the second mortgage was in form a trust for sale and the second mortgagee bought. He says, 'The defendants, no doubt, were trustees for sale; but, until they do sell, they cannot on this account be put in a worse position. . . . I see no difference between the case of an ordinary mortgage and that of a trust for sale. It is not such a trust as would enable the mortgagor to file a bill to have the property sold, because the discretion as to selling or not is in the mortgagee alone. On the other hand, the mortgagee cannot file a bill to foreclose, but is limited to his remedy by sale. But these distinctions make no substantial difference in his position,

which is that of mortgagee." That certainly was a very strong decision, because as far as words could go there was a trust expressly. Nevertheless, Lord Hatherley said that the true position of the party was that of mortgagee. That case is commented on by Lord Justice James in *Cocking v. Parker*. [His Lordship stated the facts in the latter case.] Lord Justice James said (at p. 40 of the report in *Law Rep. 8 Chanc.*), "It is said, however, that there is an express trust in the deed with reference to the sale moneys. The Solicitor-General in his argument admitted that there might be an express trust with reference to the sale moneys exactly in the same way as where a mortgagee sells under the powers of a common mortgage. In that case, when the estate has been sold, there is an express trust of the surplus money for the mortgagor. If, then, there had been any allegation in this bill, or any evidence that there were any surplus moneys, the bill might have been sustained for those surplus moneys." Earlier in his judgment the Lord Justice comments on *Kirkwood v. Thompson*: "I am of opinion that it is nothing more than a common mortgage security taken by way of a trust for sale, and taken for very obvious reasons in the name of a third person. Now if it be a mere mortgage security, it appears to me to fall entirely within the language of the late Lord Chancellor, when Vice-Chancellor Wood, in *Kirkwood v. Thompson*." He quotes the words which I have read from *Kirkwood v. Thompson*, and proceeds: "I entirely concur not only in those words but in the spirit of those words, that it is not for a Court of equity to be making distinctions between forms instead of attending to the real substance and essence of the transaction." Well, then, there are a series of decisions (there are other cases besides those I have gone through) shewing that even where the words are emphatic the Court is loth to hold a mortgagee to be a trustee. The last case, of *Cocking v. Parker*, shews that even an ordinary express trust of the surplus moneys is not a trust enforceable by the mortgagor except as to surplus moneys. But I have here no such express trust at all; and I am asked to hold that a simple

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mortgage creates an express trust. I must look at the consequences. If the doctrine suggested is right, any mortgagor might file a bill alleging a surplus, and compel the mortgagee to account, though no acknowledgment had been made within twenty years. That would be a very serious position for mortgagees, and I should be very reluctant to conclude that to be law. But the true principle in these cases, where there is no expressed trust, is that no trust can arise until it is shewn that there is a surplus. The trust then arising seems to be a constructive trust, only arising when it is shewn that there is a surplus. If so, the ordinary rule of equity would apply, that after the bar by statute nobody could go into evidence to raise that trust—that is, to shew a surplus in order to raise the trust. Therefore the case attempted to be raised by the plaintiff against the first mortgagee is not good. If there were a surplus, he would be a trustee of it; but after six years the statute is a bar; and the Court acting by analogy to the statute would prevent the constructive trust from being raised.

But then it is said there was an acknowledgment. Upon the law as to that some cases were referred to. In *Prance v. Sympton* Lord Hatherley says, referring to the letters on which the question there turned, "The plaintiff's letter is, 'A'Beckett before he goes ought to settle the Bridgewater and Minehead account;' and that expression alone seems to bear strongly the meaning that there was a balance which ought to be paid to the plaintiff. The letter continues, 'Because if he is under any idea that there is a balance due to him he is grossly mistaken, as such balance is due to yours ever, V. Prance.' The answer to that letter is, 'My dear Prance.—Bridgewater and Minehead.—I have had a long talk with my partner about this matter. He says and insists that there is a large balance coming to him, but I have put the matter right with him, and you and I must go into it and settle the account.' It may be said that there is some ambiguity in this, but the following words entirely remove it; and I should have thought, even without

them, that settling the account meant by paying any balance that might be due. The letter, however, continues: 'I have allowed him a sum to satisfy him, as, if you remember, there was 1,000*l.* paid to you for your preliminary expenses to be accounted for. It is necessary that we should sit down to this matter and put it on the square.' What can that mean but an engagement that any balance that might be due should be paid? It is argued that the claim referred to in this letter is of money due from or to A'Beckett; but the plaintiff could not at that time have such an account with him alone, for he was one of the partners in the firm of A'Beckett & Sympton, and no account is stated in the bill, nor did any account apparently exist between him and the plaintiff simply. The plaintiff says to Sympton, 'Your partner is going abroad and ought to settle this account before he goes. The answer is, 'I have put it right with my partner, and you and I must go into it and settle the account, and we must put this matter on the square.' I am of opinion that these letters contain a sufficient acknowledgment of the existence of an unsettled account."

That case I take to decide that the letter contained not merely an admission of an unsettled account, but an engagement to pay. However, a different view of the case was taken by a most learned Judge in *In re The River Steamer Company*. Lord Justice Mellish there says, "A variety of cases have been cited, but in my opinion every one of them is perfectly within the rule laid down by Lord Chief Justice Jervis, to which I have referred"—having previously cited a passage from *Jervis's New Rules*, p. 350*n* (a). He then refers to *Prance v. Sympton* in these terms: "Lord Hatherley acted strictly in accordance with the rule." Those words are very important, because, whether his version of *Prance v. Sympton* is accurate or not, he says that decision, according to his version of it, was according to the rule. Then he gives his version of *Prance v. Sympton*: "From that the Vice-Chancellor inferred that there was a promise to pay what might be found due on the taking of that account, just as here we might infer from

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the promise to refer to arbitration a promise to pay what the arbitrators might have found due if the arbitration had taken place. With that all the other authorities are perfectly consistent."

Now I venture to say I doubt whether that is a precisely accurate description of *Prance v. Sympton*, for in that case the Vice-Chancellor found not merely an admission of an account being open, but he also found in the reference to settlement a promise to pay. But, be that as it may, *In re The River Steamer Company* shews the opinion of Lord Justice Mellish, that, if there is an admission of an account to be taken and a right to take it, it is consistent with the cases to infer from that a promise to pay. That seems to me to be reasonable. An unqualified admission of a debt implies a promise to pay. So it seems to follow, if there is an admission of a pending account which either party is at liberty to examine, you have an admission from which you may infer a promise to pay.

Then do the letters here bring the case within the rule? [His Lordship read the letter of the 28th of August, 1878.] In that letter was enclosed an account bringing out a balance of 329*l.* due from Berridge in respect of the *Georgian* mortgage, subject only to a claim on the other side and to law charges not paid. There was, therefore, an admission that a balance was due to the plaintiff as second mortgagee unless the claims swept it away. Then he offers to furnish explanations with reference to the account. So that this letter and the account sent in are a clear admission of a pending account and even an admission that there will be a balance due from Berridge unless the claim for law charges should be exorbitant. Resting there, the evidence would be enough to take the case out of the statute; but the matter does not rest there. On the same day he writes again that there is a further sum in the hands of Mr. Preston, thus making it more probable that something would be coming to the second mortgagee. Then there is the letter of the 30th of October, 1874. By section 13 of the Mercantile Law Amendment Act this letter, though written by an agent, may be a sufficient acknowledgment. It

puts it beyond doubt that in October, 1874, Mr. Berridge was prepared to pay over the balance. The matter slept till the letter of Messrs. Martin of the 24th of November, 1879, which was answered on the 27th. [His Lordship read these letters.] In December, Messrs. Martin wrote again, and the answer to that letter is also very material. With obvious reference to a request contained in Messrs. Martin's letter to authorise Mr. Preston to pay out the money in his name, Mr. Berridge in effect says, "I decline till the account is settled." The correspondence continues, and on the 3rd of January Mr. Berridge writes again. Every line of that letter shews that he treated the account as being perfectly open and unsettled. The result of the correspondence, to my thinking, is a clear admission by the defendant that there was an account open which required to be arranged and vouched, and a promise that he would pay what was due. It therefore becomes unnecessary to call in aid the words of Lord Justice Mellish, because I have here, besides an acknowledgment of an open account, a clear promise to pay what might be due. The operation of the statute is avoided by a sufficient acknowledgment. There will be the usual account directed with regard to the *Georgian* mortgage as against a mortgagee in possession from the time when the defendant took possession.

Another question submitted to me was whether certain items are properly chargeable against the second mortgagee. First, interest in lieu of notice is claimed with regard to the *Retriever* mortgage. The question is, whether moneys due in respect of that mortgage can come into the account at all. At Christmas, 1871, the *Retriever* was posted as missing, and the insurance-moneys on her were paid, and received by Berridge more than a year before the sale of the *Georgian*. The only way in which the *Retriever* account could be brought into the account of the *Georgian* would be by tacking, and owing to the fact that the *Retriever* had ceased to exist, that is inadmissible, as appears by the case of *Ex parte Williams* (3).

(3) *Ante*, 187; Law Rep. 16 Ch. D. 117.

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The next point is with regard to interest in lieu of notice on the *Georgian*. The agreement, contemporaneous with the mortgage, expressed that interest was to be paid half-yearly in advance. Therefore on the 1st of January, 1874, there would be half a year's interest payable in advance. But what were the facts? Before that 1st of January—that is to say, on the 10th of December, 1873—Mr. Berridge had contracted to sell the ship and received the deposit. The purchase was to be completed within thirty days, which would extend over the 1st of January. Still he had before that date contracted to sell, and the purchase-money might have been received sooner: it was in fact received on the 3rd of January. Now, if a mortgagee has voluntarily sold the mortgaged property before the day when interest becomes payable in advance, and receives the purchase-money two days after, it would be in the highest degree inequitable to allow him interest for a period during which (except for two days) he has the money in his pocket. I will, therefore, allow interest only down to the 3rd of January.

There will be the usual decree against Berridge, as mortgagee in possession, and he will pay the plaintiff's costs up to and including the hearing.

Mr. Lawrence observed that the plaintiff's pleadings did not seek an account with wilful default; and Mr. Bigby did not press for this.

Solicitors—W. W. Wynne & Son, agents for T. & T. Martin, Liverpool, for plaintiff; Hollams, Son & Coward, for defendant.

[IN THE COURT OF APPEAL]

JAMES, L.J.
BRETT, L.J. } *In re PARKER. BENTHAM v.*
COTTON, L.J. } *WILSON.*
1881.
April 4.

Will—Gift to Second Cousins—Exclusion of Children and Grandchildren of First Cousins.

Bequest of one-third to first cousins, and two-thirds to second cousins:—Held (affirming the MASTER OF THE ROLLS), that the words "second cousins" did not include a son or a grandson of a first cousin.

This was an appeal from a decision of Jessel, M.R., upon a Special Case, holding that a gift to a testator's "second cousins" did not include a son or a grandson of a first cousin. The case is reported below (49 Law J. Rep. Chanc. 587).

Mr. Chitty and Mr. Byrne, for a son and a grandson of a first cousin, contended that the words "second cousins" had on the authorities no technical meaning, but would include all cousins intermediate between first cousins and second cousins. They cited the same cases as were cited below, and, in addition,

Slade v. Fooks, 9 Sim. 386; 8 Law J. Rep. Chanc. 41;

In re Blower's Trusts, 42 Law J. Rep. Chanc. 24; Law Rep. 6 Chanc. 851;

and endeavoured to produce evidence to shew that the testator was in the habit of calling the children of first cousins second cousins on the authority of

Grant v. Grant, 39 Law J. Rep. C.P. 140, 272; Law Rep. 5 C.P. 380, 727.

Mr. Bagshawe and Mr. Wiglesworth, for second cousins, were not called upon.

JAMES, L.J.—I am of opinion that the decision of the Master of the Rolls must be affirmed. I think that he has made good his observations as to the case before Lord Kenyon—*Mayott v. Mayott* (1), and I agree with him in thinking that it does not decide what is stated in the head

In re Parker, App.

note. In *Silcocks v. Bell* (2) the will mentions the first or second cousins of the testator or the representatives of such first or second cousins, and the word "representatives" might very properly be taken as meaning "descendants" or as statutory next-of-kin. The observation of Lord Cottenham in *Sanderson v. Bayley* (3) as to the principle of *Mayott v. Mayott* (1), *Silcocks v. Bell* (2) and *Charge v. Goodyer* (4) does not extend to a case like this, or affirm any such principle as is here contended for. In that case, although endeavouring to find a principle in those cases, he was shewing that they did not affect the case before him. Those were cases of gifts to first and second cousins, and meant to include all, and he considered the principle of those cases to be that a gift to first and second cousins equally meant to include all intermediate persons. Here there were two distinct gifts not united in any way, one to first cousins and the other to second cousins.

It appears to me that this case is new, and we shall not be shaking any old cases, for we do not consider them applicable.

BRETT, L.J.—I think the decision of the Master of the Rolls was right. It seems to me that where words have obtained a generally accepted meaning by the generality of mankind, they ought to be construed according to that general meaning in a will unless it is clearly shewn by the context that they are to be used in a different sense. There are two phrases in this will which have obtained a general meaning. The words "first cousins" have obtained such a meaning, and so have the words "second cousins." I agree with the Master of the Rolls in thinking that the cases cited do not lay down any general principle of construction at all, but each was decided on its own merits; but if any general principle was laid down as is suggested by Lord Cottenham in *Sanderson v. Bayley*, it does not apply to a gift like that in this case.

COTTON, L.J.—If any general rule of construction applicable to this case has

been laid down by the authorities, the Court ought to be slow to make exceptions or to depart from it, but we must not assume that the construction applicable to a word in one form of gift must be applied to it when it occurs in another. In my opinion the distinction between the present case and the cases which have been cited, appears by the observations of Lord Cottenham, where, referring to the cases, he says, "In all those cases the gift was to all the testator's first and second cousins, and in all first cousins once removed were held to be entitled, but not because they were first cousins, but because they were within the degrees of second cousins." His Lordship does not say whether he approves of those cases, it not being necessary for the purpose of his decision; but he treats the rule, if any, to be this, that where there is a gift to one class called "first and second cousins," it ought to be held to apply to all persons within the limit of that class.

But here we have no gift to one mixed class, but two distinct gifts to two distinct classes. These cases, therefore, do not apply.

The Corporation of Bridgnorth v. Collins (5) is a direct authority against the claim of the appellants. I agree with the Master of the Rolls that the three cases cited do not lay down any general rule.

As regards the application to admit evidence that the testator was accustomed to call his first cousins once removed second cousins, that is answered by saying that as the parties chose to come here on a Special Case evidence is not admissible. I do not, however, at all encourage the idea that such evidence could be admitted in this case. The gift is to "second cousins"—that is a well-recognised class, and on the facts, as appears from the case, there are persons answering that description. The case of *Grant v. Grant* went on the ground that the words of the will were as applicable to one party as to another, so that there was a latent ambiguity. Whether that case is correct or not, there is no such ambiguity here.

Solicitors—Ridsdale, Craddock & Ridsdale, agents for W. Hartley, Settle, Yorks, for all parties.

(2) 1 Sim. & S. 301; 1 Law J. Rep. Chanc. 187.

(3) 4 Myl. & Cr. 56; 8 Law J. Rep. Chanc. 18.

(4) 3 Russ. 140.

(5) 15 Sim. 538.

BACON, V.C. }
 1881. } THORNEWELL v. JOHNSON.
 May 6. }

Restrictive Covenant—Retailer of Wine and Beer—Covenant by Purchaser of Freehold—Breach by Sub-tenant—Notice—Vendors and Purchasers Act, 1874, s. 2.

A sub-tenant is liable to a restrictive covenant entered into by the purchaser of the freehold for himself and his assigns, though neither the sub-tenant nor his lessor has actual notice of it, and in spite of the provision of section 2 of the Vendors and Purchasers Act, 1874, preventing the examination of the title to the freehold.

In the conveyance in 1875 to F. of part of a building estate purchased by him, F. covenanted for himself, his heirs, executors, administrators and assigns with the owner or owners for the time being of the remainder of the property, not to carry on the trade of retailer of wine, spirits or beer on the land purchased. F. leased to D., who sub-leased to J., neither D. nor J. having actual notice of the restriction. J. opened a shop for the sale of wine and beer to be consumed off the premises.

Upon a motion for an injunction by T., the purchaser of another part of the building estate,—

Held, that J. was liable to the covenant.

Motion.

In November, 1874, the British Land Company, owners in fee of a building estate at Dulwich, put it up for sale by auction in a great number of lots. The lots then to be sold (including lot 648), as well as other lots to be sold subsequently (including lot 712), were marked on a plan, upon which were also set out stipulations relating to the different lots. At that sale T. Firminger bought lot 648, some of the stipulations with reference to which were, that the trade of retailer of wine, spirits or beer should not be carried on upon it, and that covenants should be entered into by the vendors and the purchaser of each lot to observe the stipulations, the purchaser's covenant to be with the vendors and the other owners for the time being of the land to which the stipulations related (which included lot 712). On the conveyance, dated the

2nd of January, 1875, of lot 648 to Firminger, the latter covenanted for himself, his heirs, executors, administrators and assigns, with the vendors and the owners or owner of any other land to which the benefit of the stipulations on the plan was attached, and their, his or her respective heirs and assigns, to observe the stipulations. Firminger subsequently granted a lease of lot 648 to Dean, who built a house, No. 1, Cyprus Terrace, upon it, and agreed to grant a lease of it to the defendant from Christmas, 1880. The restrictive covenant was not mentioned in the lease to Dean or in the underlease to the defendant, nor did the latter himself enter into any such covenant, nor had either he or Dean any express notice of it. In May, 1876, the plaintiff purchased from the British Land Company lot 712, which was conveyed to him in May, 1879. Lot 712 was exactly opposite No. 1, Cyprus Terrace. The defendant had opened a shop for the sale of wine and beer to be consumed off the premises.

The plaintiff now moved for an interim injunction.

Mr. Marten and Mr. Woodhouse, for the plaintiff.—It has been held that the sale of wine and beer to be consumed off the premises is a breach of such a covenant as exists in the present case—

The Bishop of St. Albans v. Battersby, 47 Law J. Rep. Q.B. 571; Law Rep. 3 Q.B. D. 359;

The London and Suburban Land and Building Company v. Field, Ante, p. 549; Law Rep. 16 Ch. D. 645;

and we submit that the defendant is affected with constructive notice of it, whether his lessor was precluded from enquiring into the freeholder's title or not—

Wilson v. Hart, 35 Law J. Rep. Chanc. 569; Law Rep. 1 Chanc. 463;

Fielden v. Slater, 38 Law J. Rep. Chanc. 379; Law Rep. 7 Eq. 523.

Mr. Millar and Mr. Dauneay, for the defendant.—

Fielden v. Slater (ubi supra)

only decides that we are fixed with the

Thornewell v. Johnson.

notice which our lessor had; but in this case he had no notice, and

Carter v. Williams, 39 Law J. Rep.

Chanc. 560; Law Rep. 9 Eq. 678, decides that the rule as to constructive notice determined in

Fielden v. Slater (ubi supra)

does not extend to a sub-lessee. But, besides that, the Vendors and Purchasers Act, 1874, has been passed since

Carter v. Williams (ubi supra), and adds to its strength; for by section 2 a lessee is precluded from enquiring into his lessor's title.

Mr. Marten, in reply.—In

Carter v. Williams (ubi supra)

the restrictive covenant was contained in a separate agreement; so an inspection of the lessor's title would not have given the lessee any notice of it.

BACON, V.C.—In this case there was a contract, between the persons purchasing different parts of an estate, that the enjoyment of certain of those parts should be subject to restrictions, and the land now held by the defendant was, in fact, conveyed subject to a restrictive covenant. That restriction is inherent in the possession of the property affected by it into whosoever hands it may come. Notice or no notice the result is the same. All that the Vendors and Purchasers Act, 1874, enacts is, that a lessee shall not be able to compel his landlord to shew the title to the freehold, so that no protection is afforded by that to this defendant. The case of *Carter v. Williams* was a case of a collateral agreement, which would not appear on the title, and has, therefore, no application to the present case. The other authorities are clear and distinct; but even if that were not so, the principle is plain that upon the distinct contract between the parties the property is subject to this restriction into whosoever hands it may come. The plaintiff is, therefore, entitled to an injunction until the hearing (1).

Solicitors—S. F. Langham, for plaintiff; E. W. Parkes, for defendant.

(1) See next case.

JESSEL, M.R. }

1881.

May 13. }

PATMAN v. HARLAND.

Lease—Restrictive Covenant—Notice of Lessor's Title—Representation that no such Covenant exists—Vendor and Purchaser Act, 1874 (37 & 38 Vict.), s. 2. sub-s. 1.

A lessee has constructive notice of his lessor's title, such notice being of the usual title deducible on a purchase, and he will be fixed with constructive notice of any restrictive covenant affecting the property notwithstanding that he may have an express contract with the lessor allowing a breach of the restrictive covenant, and notwithstanding that a representation may have been made to him that the property is not subject to any such restrictive covenant.

The above rule is not altered by section 2, sub-section 1, of the Vendor and Purchaser Act, 1874, which provides that a lessee shall not be entitled to call for the title to the freehold, the effect of the section being simply to put a lessee into the same position as if he had before the Act stipulated not to enquire into the lessor's title.

Wilson v. Hart (35 Law J. Rep. Chanc. 569; Law Rep. 1 Chanc. 463) considered.

Motion.

By an indenture, dated the 25th of October, 1876, two freehold lots of land, Nos. 49 and 50, forming part of the South Park Estate, South Wimbledon, the property of the plaintiff, J. P. Patman, were conveyed to Edwin Hervé in fee, subject to the covenants and conditions contained in an indenture of mutual covenants, also dated the 25th of October, 1876.

The said Edwin Hervé executed the said indenture of mutual covenants of the 25th of October, 1876, in respect of lots 49 and 50, such indenture being an indenture made between Patman of the one part, and the various purchasers of the South Park Estate of the other part, and relating to the user, development and buildings upon the estate.

By the indenture Hervé, for himself, his heirs, executors, administrators and assigns, covenanted with Patman, his heirs and assigns, and also with the other purchasers, their heirs and assigns, to observe the several stipulations and conditions con-

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tained in the schedule thereto, comprising *inter alia* a provision that on lots 49 and 50 "private dwelling-houses" only should be erected.

Hervé subsequently sold lots 49 and 50 to the defendant Robert Harland, and by an indenture, dated the 18th of July, 1878, the said two lots were conveyed to Harland, subject to the covenants and conditions contained in the said indenture of mutual covenants of the 25th of October, 1876.

A private dwelling-house was erected by Harland on lots 49 and 50, and by an indenture of lease, dated the 29th of March, 1881, the premises were demised to the defendant Louisa Jane Bennett for a term of seven years. The lease contained the usual covenants to repair and to deliver up all erections to the lessor at the determination of the term, subject to a proviso "that the said Louisa Jane Bennett, her executors, administrators and assigns, shall be at liberty to erect in the garden belonging to the said premises a studio, with necessary rooms connected therewith, of corrugated iron on a brick foundation, and to remove the same at any time during the continuance of the term, making good any damage occasioned thereby." The lease also contained a covenant by the lessee not to carry on any trade, business or employment on the premises without the consent in writing of the lessor, but to use the premises as a private dwelling-house, "provided that the user of the said premises for the purposes of a school for instruction in art or otherwise shall not be deemed a breach of any covenant herein contained."

The defendant Bennett had taken the house for the purposes of an art school for ladies, and she stated that she had no notice of the restrictive covenant above mentioned when she took the lease. Her solicitor, who negotiated the lease, also stated he had no notice of the restrictive covenants, and that they were never mentioned to him by Harland. The defendant Bennett had recently commenced erecting a corrugated iron structure to be used as an art studio in connection with the art college in accordance with the terms of the proviso contained in the lease.

The plaintiff now moved for an injunction

to restrain the defendants Harland and Bennett from continuing to erect and from permitting to remain the art studio in question, and from erecting or permitting to remain any building other than a private dwelling-house on the land.

Mr. Ince and Mr. Shebbeare, for the plaintiff.—The art studio is clearly not a "private dwelling-house" or an adjunct thereof, and the erection thereof is a breach of the covenant contained in the indenture of mutual covenants of the 25th of October, 1876. Such covenant is binding on the defendant Bennett, who must be taken, according to the settled law, to have had constructive notice thereof.

Mr. Byrne, for the defendant Bennett.—I submit that Miss Bennett did not have constructive notice of the restrictive covenants. In

Wilson v. Hart (ubi supra), Turner, L.J., says (at p. 468) that if an actual representation to the tenant had been made that the property was not subject to the restrictive covenant there in question, then he considered a Court of equity ought not to have enforced the covenant against the tenant, and that *dictum* I say exactly applies to the present case. Here it is clear that a representation was made to Miss Bennett by Harland that she could erect the art studio, as a proviso to that effect was inserted in the lease. Neither she nor her solicitor had actual notice of the restrictive covenants, and when an express representation is made that the property is not subject to such covenants, that prevents the lessee having constructive notice thereof—

Carter v. Williams, 39 Law J. Rep.

Chanc. 560; Law Rep. 9 Eq. 678, where James, V.C., held that a tenant from year to year was not fixed with constructive notice of a covenant not to use a house as a public-house, although he held his immediate lessee had notice of the covenant, and on the ground that if the tenant had asked if the property was subject to the covenant he would probably have been told it was not.

Then I also submit this erection is not a breach of the covenant,

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Mr. Crossley and Mr. Simmonds, for the defendant *Harland*, submitted that he was not a necessary party to the motion, and further that no breach of covenant had been committed.

Jones v. Smith, 1 Hare, 43; 11 Law J. Rep. Chanc. 83; on appeal, 1 Ph. 244; 12 Law J. Rep. Chanc. 381,

and

Fielden v. Slater, 38 Law J. Rep. Chanc. 379; Law Rep. 7 Eq. 523,

were also referred to.

THE MASTER OF THE ROLLS.—I must say that on the point of law I have a very clear opinion, and not the less so because there are *dicta* in the books which at first sight appear to lead to a different conclusion. I say at first sight, because when carefully examined they do not bear out the argument which has been supposed to be fortified by them.

The first question I have to consider is the notice which a man who takes a lease has of his lessor's title. It has been settled for more than a century that he has constructive notice of his lessor's title. Lord Eldon, at all events, treated it as settled law some seventy years ago. That means this, that the man who takes a lease is in a similar position as regards constructive notice as a man who buys. There could not be any reason for any distinction between purchasing a fee-simple and taking a lease for 10,000 years. If a man who purchases a fee-simple is bound to look into the title in a regular way, so is a man who takes a lease for 10,000 years or 1,000 years or for 100 years, and, as you cannot cut it down, any lease at all—he is bound to make reasonable enquiry into the lessor's title. Well, what is reasonable enquiry? It has been held that he is to take the usual title, whatever the usual title may be.

In this case the lessor's title began in 1878, and if he had only asked to see the conveyance to him—that is, without going back forty years—the lessee would have found that the land was subject to this restrictive covenant; because the grantor, in 1876, took care to convey the land subject to the covenants, though the

covenants themselves were in a separate deed.

Now it is not to be supposed that I am going to restrict the doctrine by looking at the actual conveyance. Not at all; because that would be to destroy the effect of the notice altogether. A lessee has constructive notice of the title. If the lessor had a conveyance made to him the day before, that would not do. The lessee must ask for the conveyance to the lessor, also a fair and reasonable deduction of title. In this case, as I said before, the actual conveyance to the lessor discloses the covenant, but if it had not shewn it, I should have come to the same conclusion. The result, therefore, is, that the lessee had constructive notice.

Now it has been argued before me that if the lessee, having this constructive notice, be told by the lessor that there is no restrictive covenant, that that representation will in equity do away with the effect of constructive notice. I entirely dissent from that proposition. Constructive notice of a deed is constructive notice of its contents, subject to what I am going to say in a moment. If, therefore, you have notice of a deed relating to the title, and forming part of the chain of title, you have notice of the contents of that deed, and it is no excuse for not asking to look at it to say that you were told that the deed contained nothing which it was necessary for you to look at. Otherwise, in every case, you might be satisfied with a statement of the contents of the deed without going to look at it. Of course, there may be cases when the deed cannot be got at, or for some other reason where, with all the exercise of prudence in the world, you cannot see it, and then there may be no constructive notice; but that is another question; where you know, it is no answer at all to be told that it does not prejudicially affect your title. If you know a deed affects your title you are bound by its contents. There is a class of cases, of which, I think, *Jones v. Smith* is the most notorious, in which it was held that where a person was told of a deed which might or might not affect the title, and was told at the same time that it did not affect the title, then that he

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had not constructive notice of that deed. Suppose you are buying land of a married man, and you are told he made a settlement on his marriage, and you are told at the same time that the deed does not affect the land in question, you have no constructive notice of the deed, because, although you know there is a settlement, you are told it does not affect the land. If every marriage settlement necessarily affected all a man's land, then you would have constructive notice, but as a settlement may not relate to his land at all, or only to some other portions of it, the mere fact of your having heard of a settlement does not give you constructive notice of its contents, if you are told at the same time it does not affect the land. I take it, under the modern practice, you are not even bound to enquire, because the abstract furnished you is an abstract of every document affecting the land, and although you have heard that the man made a marriage settlement, you are not entitled to assume that the solicitor suppressed improperly the deed of settlement. But that line of cases has no bearing at all on a case where you know a deed does affect the land, and the question to what extent it affects the land is to be ascertained only by looking at the deed. In such a case you have no right to rely on the statement of somebody else that the deed you can look at does not contain something which it does in fact contain.

I have said so much about this point because there is no doubt one observation let fall by Lord Justice Turner in *Wilson v. Hart*, which does to some extent countenance the contrary doctrine. As regards the case of *Carter v. Williams*, before Vice-Chancellor James, that case, as I read it, entirely confirms my view. It is not fair to criticise the words used by the Vice-Chancellor, but when you look at the argument addressed to him, the objection there was that the covenant was contained in a collateral deed, which was not recited. In *Cole v. Sims* (1), cited in *Carter v. Williams*, the re-

strictive covenant was recited in the conveyance. The Vice-Chancellor, in *Carter v. Williams*, says that the covenant is contained in a separate deed; but what he means is this, that the deed is not noticed, either by way of recital or by being referred to in the deed of conveyance, so that a person might get a complete chain of title without any notice of the deed of covenant. That is what he means; and that being so, of course, if the tenant had asked for his landlord's title and got it, he would not, by any means, necessarily have got the information as to the restrictive covenant. The solicitor ought to have put it on the abstract if he knew of it, but he would not necessarily know of the deed. Then the Vice-Chancellor came to the conclusion that as the deed was not recited in the deeds of title he could not hold that the tenant had constructive notice. Therefore it appears to me that case rather follows out the doctrine of *Jones v. Smith*, and by no means affects the other cases cited, where the document in question affecting the title is recited, or otherwise noticed in some way in the title-deeds. In *Carter v. Williams* any one might have accepted the title without being aware of the document containing the covenant.

I am therefore of opinion that the constructive notice which the lessee obtained in this case would not have been done away with by the most express statement obtained on the part of the lessor that there was no such restrictive covenant. I must say that I am not satisfied in this case that there was any such representation. What appears to have occurred was this: The lessor did not, of course, shew his title, but he was aware that the lessee intended to use this property in the way she has attempted to use it, and that there was a proviso which excepted such user from the covenant in the lease, and consequently a person reading that lease would have assumed, and fairly assumed, that she had a right to use it in the way mentioned in the exception from the covenant. In that way there was a representation—an indirect representation—and there were, in addition to that,

(1) 5 De Gex, M. & G. 1; 23 Law J. Rep. Chanc. 258; affirming Kay, 56; 23 Law J. Rep. Chanc. 37.

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some further words in the lease which tended in the same direction. Therefore I think there was sufficient to put the lessee off her guard, if I may say so, if it were not that she had constructive notice, the effect of which no representation could have destroyed.

I only wish to notice one other point. It is said that the new law as to the extent of title to be required by purchasers or lessees alters the rule. I do not think it does at all. All the Vendor and Purchaser Act does is this—it makes an express stipulation necessary to see the lessor's title; whereas, formerly, the rule was the other way, that without express stipulation the lessee had a right to see it. Formerly if the lessee had expressly stipulated not to look into his lessor's title, it would not have affected the doctrine of constructive notice. A man may bargain to shut his eyes, but if he does wilfully shut his eyes, whether as a bargain or not, he will still be liable to the consequences of shutting his eyes. If, therefore, as formerly, a lessee expressly bargains to take a lease without looking into the lessor's title, the lessee will still have constructive notice, and now, under the statute, where there is no proviso entitling the lessee to look at his lessor's title, it is exactly the same as if he had bargained expressly not to look into his lessor's title. Therefore, although a lessee may refuse to take a lease without looking into the title (in some cases, especially in the case of building leases, lessees do look into their lessor's title, though in other cases they do not), still it seems to me that the law is unaltered, and therefore that the doctrine of *Tulk v. Mozhay* (2), and that line of cases, applies.

His Lordship then went into the facts, and dealt with the question as to whether a breach of the covenant had been committed, and held that the erection of the art studio was a clear breach of the covenant to erect only private dwelling-houses on the plots in question, and he accordingly granted an injunction against the defendant Bennett to restrain the further erection of the building

until the trial, but he refused to make any mandatory order for the removal of the studio before the trial, as he said it might be altered so as to be a reasonable adjunct to a private dwelling-house. His Lordship said he should not grant any injunction against the defendant Harland, and he made the costs of all parties costs in the action (3).

Solicitors—W. H. Bennett, for plaintiff; John Mackrell & Co., for defendant Bennett; Edmund Newman, for defendant Harland.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.

JAMES, L.J.

LUSH, L.J.

1881.

May, 24, 27.

In re THE CAMPDEN
CHARITIES.

Charity—Administration—Construction of Charitable Bequests—Charitable Gifts for Doles and Apprenticing—Charity Commissioners—Scheme—"Cyprès"—Diversification of Funds to Educational Purposes.

When a scheme has been settled by the Charity Commissioners the Court will not interfere unless the commissioners have exceeded their jurisdiction or have made some slip or gross miscarriage which calls for the intervention of the Court.

Lord Campden, by his will, in 1629, gave 200l. "to be yearly employed for the good and benefit of the poor of the town of K., in such manner as" certain specified persons "and the churchwardens of the parish of K. from time to time should think fit to establish for ever."

Lady Campden, by her will, in 1643, gave to nine specified parishioners of K. and the churchwardens for the time being, 200l., on trust to purchase land of the yearly value of 10l., "one-half whereof should be applied from time to time for ever for and towards the better relief of the most poor and needy people of good life and conversation that should be inhabiting within the said parish of K., and the other

(2) 2 Ph. 774; 11 Beav. 571; 18 Law J. Rep. Chanc. 83.

(3) See last preceding case.

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half thereof should be applied yearly for ever to put forth one poor boy or more of the said parish to be apprenticed; the said 5*l.* due to the poor to be paid to them half-yearly for ever, at Lady Day and Michaelmas, in the church or the porch thereof at K." By a deed of feoffment, in 1651, a piece of land known as "Cromwell's gift" was conveyed to certain parishioners of K., but no trust was declared thereof.

The three charities were for many years administered by the same body of trustees, the income of Lord Campden's charity being applied in pensions to the deserving poor of the parish, the income of Lady Campden's charity half in pensions and half in apprenticing boys, and the income of Cromwell's gift three-quarters in pensions and one-quarter in apprenticeships. The income of the united charities now exceeded 3,500*l.*, but there was in the parish of K. no lack of deserving recipients of the charities as thus administered.

In 1879 the Charity Commissioners made an order confirming a new scheme for the administration of the charities, under which one moiety of the entire income was in effect devoted to the advancement of the education of the children resident in K. attending public elementary schools.

This scheme was objected to by the trustees on various grounds, and on petition to the Court to set aside or vary the scheme, HALL, V.C., held that the scheme departed substantially from the proper application of the income of the charity by diverting to educational purposes a large portion of the income which was originally intended for eleemosynary objects—that is, doles and the apprenticing of poor boys—and remitted it to the commissioners for their reconsideration. On appeal by the commissioners,—

Held (by the Court of Appeal, reversing the decision of HALL, V.C.), that the scheme was in accordance with the modern practice in such cases and must be affirmed.

This was an appeal from the decision of Hall, V.C., reported 49 Law J. Rep. Chanc. 676, remitting to the Charity Commissioners, for their reconsideration, a scheme that had been settled by them for the administration of the Campden

charities, on the ground that such scheme departed substantially from the proper application of the income of the charity by diverting to educational purposes a large portion of the income which was originally intended for eleemosynary objects—that is, doles and the apprenticing of poor boys.

Mr. Davey, Mr. Vaughan Hawkins and Mr. O. Russell, for the appellants, the Charity Commissioners.

Mr. Graham Hastings and Mr. Lewin, for the respondents, the trustees of the charity.

The arguments were the same as in the Court below.

JESSEL, M.R.—This is an appeal from the decision of Vice-Chancellor Hall refusing to confirm a scheme of the Charity Commissioners for the future management of three charitable gifts—one by Viscount Campden, one by Viscountess Campden, and one by an unknown donor, who is supposed to have been Oliver Cromwell, although that is not actually known, but it is called Cromwell's gift.

In the first place the scheme is made in pursuance of what is commonly known as the *cypres* doctrine, which is applied in cases like this, where, from lapse of time and change of circumstances, it is no longer possible beneficially to apply the property left by the founder or donor in the exact way in which he has directed it to be applied, but it can only be applied beneficially to similar purposes by different means.

In the present case the property has increased enormously in value. The property left by the Viscountess Campden produced 10*l.* a year. No doubt 10*l.* a year in the time of Queen Elizabeth was a very different sum to 10*l.* a year now; but still a moderate sum compared with the present value of the property, which is about 2,200*l.* The property left by the Viscount Campden has increased in the same way from 10*l.* a year to 1,040*l.* a year; and the property purchased from Cromwell's gift, which appears to have been 45*l.*, now produces something like 1,000*l.* a year. In the next place the persons who were to be

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benefited were poor parishioners of Kensington, subject to what I am about to say about the different instruments. The then village of Kensington was a small village about a mile and a-half from Hyde Park corner, and in the old documents it is called a village. As it grew it called itself a town, but it seems never to have been legally a town in the sense of having a market and franchises and so on. Now it is what we know—a suburb of London, very thickly inhabited with many thousands of persons, and containing a large number of houses of great magnitude and value, inhabited by wealthy people. The whole of the circumstances of the place have changed. That which was a provision for the poor inhabitants of a village is now a provision for the numerous inhabitants of this large town or part of a town. Again, circumstances have changed in another way. The habits of society have changed, and not only men's ideas have changed but men's practices have changed, and in consequence of the changes there has been a change of legislation, and both laws have become obsolete or have been absolutely repealed, and also habits have become obsolete, or have fallen into disuse, which were prevalent at the time when these wills were made. The change indeed has become so great in the case that we are considering that it is eminently a case for the application of the *cypres* doctrine, if there is nothing to prevent its application.

Now, as regards the will of Lord Campden, there is no question at all. It is a provision for the poor of Kensington, as the trustees for the time being shall, in their discretion, think it desirable to distribute the fund. Therefore any change which was acquiesced in by them (and the present scheme was made at their request by the Charity Commissioners) is within the actual terms of Lord Campden's will. No difficulty arises, therefore, as to the disposal of the funds given by that will, nor has any argument been addressed to us as regards that portion of the property. As regards Cromwell's gift there is no evidence at all as to what the founder's intention was. There is evidence that it

has for a great number of years past been vested in the same trustees as the trustees of Lord and Lady Campden's charity, and has been applied practically as part of those charities or of one of them; but in the absence of evidence all that I think that proves is, that it was a gift for the benefit of the poor of Kensington; but whether it was on the terms of Lord Campden's will, or of Lady Campden's will, or on any other, is unknown, and consequently, as regards that part of the gift, there can be no objection to a proper appropriation of it for the benefit of the poor of Kensington. The great stress of the argument was as regards the will of the Viscountess Campden, and as to that there are definite directions to be found, which, it is alleged, will be contravened by sanction being given to the proposed scheme of the Charity Commissioners.

Now, as to that, it is necessary to see what they are. She gives money (200*l.*) to be laid out in land to produce 10*l.* a year on trust; that the trustees, who are the parishioners of Kensington and the churchwardens of the parish for the time being, shall apply the rent in this way: "One moiety from time to time for ever for and towards the better relief of the most poor and needy people that be of good life and conversation that should be inhabiting within the said parish of Kensington, and the other moiety or half part thereof shall be applied yearly for ever to put forth one poor boy or more, being of the said parish, to be apprenticed; and the 5*l.* due to the poor to be paid to them half-yearly for ever at Lady Day and Michaelmas in the church or the porch thereof at Kensington;" and that is the whole. Now it is said that as regards the apprenticing of the poor boys we are to apply 1,100*l.* a year in exactly the same way that the testatrix directed the 5*l.* a year to be paid. The answer, I think, is very plain. In giving 5*l.* a year to apprentice one poor boy or more, she evidently thought that there might occasionally be a chance of more than one boy, but her notion was that there would be enough for one boy, and no doubt that was so at that time, and having regard to the 5*l.* a year,

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which was all she gave. But did she imagine, or can anybody suppose she imagined, she was going to spend 1,100*l.* a year to apprentice any number of boys that might be living in the parish? Of course she was not dealing with anything of the kind. The amount has so increased that we have no knowledge, nor can we even guess, what she would have done with it if she had anticipated any such increase. But then there is this further observation to be made, that at the time when this will was made apprenticeship was compulsory by the law of England. It was actually part of the then legislation, by the Act of 5 Elizabeth, that nobody should exercise a trade in this kingdom without he had been apprenticed. He need not have been bound by indenture, but he must have been apprenticed for seven years; and by some of the subsequent Acts that was extended beyond the trades mentioned in that Act to other trades and callings, and the legislation so remained until the fifty-fourth year of King George 3, so that we can perfectly well understand why she directed the boys to be put out and apprenticed. It was the only way in which the poor boys of the parish could be enabled to earn a livelihood, and it was not, therefore, that she desired an apprenticeship *per se*, but she wished to benefit the poor by enabling the poor boys of the parish to earn their living as mechanics or otherwise, having regard to the trades specified in the statute of Queen Elizabeth. That was her object. Times have changed, as I said before. Ideas have changed. All that legislation has been repealed. It is no longer obligatory on the poor boys to be apprenticed. They can be taught in other ways a knowledge of their trade in much shorter periods, and can thereby be enabled to earn their living. Besides this, the same ideas which produced a change in legislation have also produced a change in the habits of mankind in this country. Apprenticeship, though not quite obsolete, is rapidly becoming so. Fewer masters take apprentices, and fewer boys are apprenticed. Here again we must have regard to the existing

usages of society and the existing wants of the poor who are intended to be benefited. It appears to me this is exactly the case which was pointed out by Lord Westbury in *Clephane v. The Lord Provost of Edinburgh* (1), where he says, "You look to the charity which is intended to be created, and you distinguish between it and the means which are directed for its accomplishment." Now the means necessarily vary from age to age. Here the end to be kept in view is such an education to be given to the young poor of the parish as will enable them to gain their livelihood in an honest and respectable manner. It therefore appears to me to be quite reasonable that, while leaving to some extent the direction contained in Lady Campden's will, so as to ensure some apprentices being still bound—there being still, as it appears by the evidence, some masters willing to take apprentices and some boys desirous of being apprenticed—we should not confine the discretion of the trustees by directing them to expend the whole of this large fund in binding boys as apprentices, but leave them a discretion, beyond the small number which we think it should be compulsory on them still to bind apprentice, to apply the rest of the fund either in apprenticing boys, which they still may do, if it is found desirable, or any other similar purposes for the benefit of the poor of the parish. I think that disposes of the objection, which I must say on the part of the respondents was not much insisted upon as to the extent to which the funds should be applied in apprenticing children. The next point is as regards the other half of Lady Campden's charity, which is given in what we technically call "*doles*." It is 5*l.* a year to be distributed in two half-yearly payments to the poor "at Lady Day and Michaelmas in the church or porch thereof." That means 50*s.* each half-year, to be paid in money—in shillings and sixpences and half-crowns—to the poor people of the village who come to church. That is the practice in many parishes in Eng-

(1) *Law Rep. 1 Sc. App.* 417, 421.

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land, and it is a practice which I think would be more honoured in the breach than in the observance. There is no doubt that it tends to demoralise the poor and benefit no one. With our present ideas on the subject, and our present experience, which has been gathered as the result of very careful enquiries by various committees and commissioners on the state of the poor in England, we know that the extension of doles is simply the extension of mischief. That is a very good reason for not extending them if we can help ourselves. Here, again, no one has contended that 1,100*l.* per annum shall be distributed in two half-yearly portions in coin to the poor at the church porch. We have not to overrule any objection on this ground, for no objection has been made. No one suggests that such a mischievous practice should be continued. It has been in fact abandoned for a very great number of years. The trustees have not at all followed this direction of the will. But ought we, sitting here simply to interpret the law, to hold ourselves bound by the words of the will to distribute this large sum of money in doles in this fashion? I think we ought not. As I said before, we must consider not only the change in amount but the change in circumstances. That which might be tolerable—that is the distribution of 50*s.* in each half-year—among a few poor people in a small village, as I said before, would be intolerable in a large town like Kensington. But was it the intention of the testatrix? Here, again, I should say emphatically No. Could she have intended to distribute 500 sovereigns every half-year among the poor of a large town like Kensington? There was no such idea in her mind. She was, as I said before, giving this comparatively small sum of 50*s.* to a few poor people in the village. Probably she thought the distribution would be carefully superintended by the churchwardens who would know the deserving poor—which is the class of the poor she intended to benefit—and would not do any mischief, and might be productive of some good. It seems to me, when you consider the change in money and the surrounding

circumstances, you cannot impute to the testatrix an intention to distribute this large sum in the way I have mentioned; and I must add, in favour of the petitioners, that it was not suggested on their part that any such course should be adopted. That being so, and we being bound to administer the funds *cypres*, what is the principal object which the testatrix had in view, as distinguished from the means by which she wished that object to be carried out? The principal object was to provide for the poor; and what poor? For the relief of the most poor and needy that be of good life and conversation that should be inhabiting in the parish of Kensington. Now the trustees have done this—they have altogether departed from the will, and I think without sufficient authority. It is not necessary, perhaps, to go minutely into that question. Some reliance was placed on an order of Vice-Chancellor Stuart in 1852, but when the matter came to be examined into, it was found that the order referred back to the Master's report, and the Master's report reported that the trustees distributed the money regularly—three-fourths among the poor and one-fourth for the apprenticing of the boys. Therefore the order of Vice-Chancellor Stuart merely confirmed that, and did not empower the trustees to do what they have been doing. Now what they have been doing is this: (I am not saying they have done anything wrong; on the contrary, what they have done has been a more beneficial application of the funds than if they had obeyed the directions of the will)—what they have been doing is to make a new scheme of their own motion, which, though it might have been lawful as regards the trusts of the will of Lord Campden, where they had a discretion, and possibly may have been lawful as regard Cromwell's gift, as to which we know nothing, could not have been lawful as regards Lady Campden's will without the sanction of the proper authority—either the Charity Commissioners or the Court of Chancery. They have made a new scheme for themselves, and their scheme has been this: instead of giving these doles twice a year, they have elected

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pensioners—persons who take small annuities as long as they shall conduct themselves properly and be inhabitants of the parish. They have limited the class of recipients in various ways, not consistent with the terms of the will. Instead of giving the pensions (which are not authorised by the will, because doles are only casual payments as distinguished from permanent payments) to the most poor and needy people (which are the words of the will), they have given them to what I may call the next class of people, the people who, according to the evidence, have some means—not sufficient to support themselves comfortably, but some means. They are certainly not the most poor and needy people. Then they have restricted the gifts to people, as a rule, who have been resident for fifteen years in the parish. That is a very wholesome restriction (of course, I do not say the number of years; that has been reduced by the commissioners to seven), and wholesome in this way—if you did not adopt that restriction, people would come and live in the parish a week before with a view of getting a share of this charity; and, of course, it was felt that it was desirable to prevent a pauper population flocking into Kensington merely attracted there by the existence of these charities—a thing which has happened in some parishes in England; and to avoid that mischief they made the rule as to fifteen years' residence. I am not finding any fault with them except that they did it without authority. Then they restricted it to people above the age of 60. There is no such restriction in the will. Although under the rule persons who have been long in the parish and are of considerable age might be entitled to a preference, they had no right to impose any such restriction. On the whole they have administered the charity for a great number of years past, I will not say in utter oblivion of the directions of the will, but with a complete disregard of those directions, and although what they have done has been very beneficial it was not legal. The consequence is that it is impossible for the present petitioners to say that what the trustees have done is not to be reviewed. There is no

legal scheme authorising what they have done as regards Lady Campden's charity and no legal authority, and therefore a scheme must be established. Having arrived at that conclusion I have only now to advert shortly to their objections to this scheme as regards the disposition of the fund which was given to the poor by way of doles. It has been suggested, that inasmuch as a dole is a payment direct to a poor person, that in carrying out the new scheme the Court is bound by that portion of the direction of the old scheme or will which directs the dole to be paid. The answer is very simple. If you do not direct it to be laid out in doles at all, the mere incident of a dole, that it is paid to some person direct, cannot be regarded as a direction given by the testatrix. The testatrix directs the dole to be paid, and nothing else, and the personal payment follows; but if you get rid of the dole altogether, on the ground that it is no longer desirable to keep it in continuance, how can you say you are bound to respect that which is not a direction of the testatrix but a mere incident to the direction—the personal payment to the poor people. It appears to me that that objection is wholly unfounded. Then there were some minor objections which have been to a certain extent conceded, which I will not advert to. They were matters of detail, which, as a general rule, are dealt with in chambers. Then I will come to the general principle of the scheme. Now it is a scheme of great magnitude and involving a great number of details. I have looked at them. I have had no inconsiderable experience as to the settlement of schemes. I find the scheme is in accordance with what is now the modern practice as to settling schemes, and, speaking for myself, I see no objection to the details. But if I did I should not think it part of our duty to interfere. This is a scheme settled by a competent authority—the Charity Commissioners—persons not only of great, but of special experience in these matters, and persons entrusted with the supervision of these matters as a separate body by the Legislature. For that very reason it would

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not, in my opinion, be sufficient for a Judge to say he thought some detail might well be different, or that if he himself had originally settled the scheme he should have put in some other arrangements than those which are specified in the scheme. He must be satisfied that the Charity Commissioners have gone wrong, either by disobeying those rules of law which govern them as well as they govern Courts of justice, or by making some slip or gross miscarriage, which calls for the intervention of the Court to set aside and remodel the scheme. As I said before, with regard to these matters of detail one or two have been pointed out as to which alterations have been made or have been agreed to be made, and subject to those alterations I think the scheme ought to be confirmed. The result will be that the Vice-Chancellor's order will be discharged, except as to costs; that the scheme will be confirmed subject to the alterations specified; and, as it is a case in which the funds are very large and in which the inhabitants were heard by permission of the Attorney-General, and have secured by their intervention some alteration of the scheme, I think, having regard to all the circumstances of the case, it would be proper that the costs of the respondents as well as of the appellants should be provided for in the usual way out of the income of the charity funds.

JAMES, L.J.—I am of the same opinion. The main question and the real question that has been raised on this appeal is whether the commissioners have, in fact, exceeded their jurisdiction in what they have done. I think, when we are dealing with a scheme settled by persons like the commissioners, that we should consider this, that the Court of Chancery, to which an appeal is given by the statute, is really sitting more as a Court of prohibition than as a Court of appeal, or review; that is to say, that it ought to be satisfied that the commissioners have done something which they ought not to have done, having regard to the instruments creating the trust. Now the main question argued before us, was, that in fact they have done that—that is, that

they have disregarded the special directions of the instruments creating the trusts. With regard to all but Lady Campden's charity it appears to me that there is no foundation whatever for that suggestion. The gift of Lord Campden is for the poor generally, and that is to be applied in the manner which the proper authorities should think best for the poor, having regard to all the circumstances of the case, and the circumstances and feelings and habits of the times. There seems to be no ground, as I said, for supposing that, having regard to Lord Campden's charity, there is any question at all as to the jurisdiction of the commissioners. With regard to the charity that resulted from Cromwell's gift, that appears to me to be exactly the same. All we know about that is that it was a gift for the benefit of the poor of the parish of Kensington. With regard to Lady Campden's charity, no doubt there is an apparent difficulty which has to be dealt with, because Lady Campden by her will beyond all question has given a specific direction; that is to say, she has directed one moiety of the income of her estate shall be distributed in eleemosynary gifts of a particular kind, and with regard to the other half she has directed that it shall be applied in putting out poor boys to be apprenticed. Now, with regard to the first half, of course, if the direction is to be strictly followed, it must be, as the Master of the Rolls has pointed out, by a distribution among the most poor and needy of the parish in small doles. As has been observed, it ought to be divided into as many shillings as there would be most poor and needy, and to whom a shilling would be an object of moment; and they ought, instead of increasing the amount to a few, to increase the number and distribute it in that way—that is, if the will be strictly followed. But in truth that has not been done, and nobody has ever thought it possible to do it. At the time when this charity was founded no doubt it might have been done reasonably enough. The churchwardens were to distribute it in the church or at the church porch among the people, and it was supposed at that

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time they knew every inhabitant of the parish, and would know exactly who the poor people were to whom they ought to give these periodical gifts. But that of course has become utterly impracticable, and the trustees have now for centuries—at least for a very long period of time—established themselves a *cyprès* application of that moiety; and if they had a right to establish a *cyprès* application by reason of the change of circumstances, it is certainly a very strong thing to say that the Court of Chancery had not the same power, and a strong thing to say that the commissioners, who in this respect have succeeded to the powers of the Court of Chancery, had not at all events as much power to make a *cyprès* application as the trustees themselves, who thought it necessary and beneficial to do it. The real mode in which the objection was addressed to us was this: "Ours is a more *cyprès* application than yours." That does not appear to me to be a valid objection. There is no such thing as more or less *cyprès* on the question of jurisdiction in dealing with what ought to be done with the fund under the change of circumstances. The trustees have been dealing with it according to their *cyprès* scheme, and it appears to me that the suggestion that their scheme is more *cyprès* than that which the commissioners propose to make, at all events, does not go to the jurisdiction of the commissioners to determine what, according to their judgment, is the best mode of dealing with the fund. It appears to me, therefore, that the objection fails. Then, with regard to the apprenticeships, I quite agree with what the Master of the Rolls has said, that we are dealing with a fund different in amount and different in substance. We are dealing with a fund so large that that itself would afford a very good and reasonable ground for applying it *cyprès*. But what strikes me as the strong point is this, that to confine the application of that charity in the present state of things, in the present state of feeling and the present state of the law, to those persons only among the poor of Kensington whose children would be willing to become apprentices to

tradesmen or otherwise, and to exclude from the charity all that other large mass of poor people who have just the same claim, and who do not now find it beneficial for their children to be put out as apprentices, would be in fact to exclude from the charity the great number of that class of poor, whom, it is obvious to my mind, Lady Campden intended to receive the benefit of her charity, and that in doing that we should be in truth defeating the spirit of Lady Campden's gift by following strictly the letter, when that letter becomes inapplicable. I therefore entirely agree with the view which the Master of the Rolls has taken, and say that I would not myself as a Judge interfere, there being jurisdiction to begin with in the commissioners, with the mode in which they have exercised that jurisdiction, on any view of my own as to whether they or I take the right view as to the beneficial mode of dealing with the fund; unless I was satisfied that they were doing something in which they ought to be restrained as exceeding their jurisdiction. I think they know more about it than I do, and I should defer to them instead of asking them to defer to me.

LUSH, L.J.—I do not think it necessary to add anything to the elaborate judgments delivered by my learned colleagues, or to say anything more than that I concur in all that they have said, and especially as to the principles on which this Court should act when reviewing the decision of the Charity Commissioners.

Solicitors—J. M. Clabon, for respondents; John Jordan, for petitioners.

FBY, J. }
1881. }
May 2. }

In re MORGAN.
PILLGREM v. PILLGREM.

*Executor — Business — Trade Assets —
Judgment Creditor — Execution.*

A., an executor, carried on the business of his testator for nine years in his own name, at premises where he lived, under a power to postpone the sale of the business and carry it on in the meanwhile:—Held, that a creditor of A. was not entitled to execution against the trade assets. Held also, that the executor had no power to pledge the lease of the business premises.

John Morgan, of Brixton, by his will dated January, 1870, gave all his estate to his brother-in-law, the defendant John Pillgrem, who was residing with and assisting the testator in his business, on trust to sell his business of a cowkeeper and dairyman, and live stock, carts, implements of trade and lease, and, after payment of debts and funeral and testamentary expenses, to retain the sum of 200*l.* for his own use; to invest the trust funds and hold them on trust to pay the income to Margaret Pillgrem, the wife of John Pillgrem and the testator's sister, for her separate use without power of anticipation, and, after her death, to hold the trust property for the persons to whom she should by will appoint.

The will contained the following clause: "And until a sale can be effected at a fair price of my said business and houses at Peckford Place, I desire the said John Pillgrem to continue the said business, and to hold any profits that may accrue, after maintaining himself, his wife and son in the same manner as they now live, upon the like trusts as to the income of the invested proceeds above mentioned."

The testator died in June, 1870. John Pillgrem carried on the business of the testator and lived at the testator's house, down to the commencement of this action in August, 1879.

On the 27th of August, 1879, a receiver appointed in the action entered into possession of the testator's business premises at Peckford Place and took possession of the trust property. William Hilliard, a judgment creditor, issued execution, and

the sheriff seized, on the 13th of September, 1879, certain furniture and stock-in-trade then in possession of the receiver. A motion was made by the receiver to commit the sheriff, which resulted in the payment into Court by the receiver of the sum of 354*l.* 3*s.* 2*d.*, the amount of the judgment debt and costs; and the matter was referred to the chief clerk, who found that 66*l.*, part of the judgment debt, had been applied in the business, and the rest of the money advanced by Hilliard had been used for John Pillgrem's own purposes, and that Mr. Hilliard was entitled only to 66*l.* out of the fund in Court. This was a summons to vary the certificate taken out on behalf of the judgment creditor. He also held under a deposit the lease of the premises which had been renewed in John Pillgrem's name since the testator died.

The summons was for the purpose of varying the chief clerk's certificate in three particulars—first, to have it certified that the applicant was entitled to a charge upon the chattels seized to the extent of 318*l.* 18*s.* 2*d.*; secondly, that he had a charge on the lease; and thirdly, that he ought to pay no part of the possession-money claimed by the sheriff.

Mr. Glasse and Mr. Methold, for the summons, argued that, under the circumstances of the present case, where the debtor carried on the business in his own name at a house of which the lease was vested in himself, and where he resided, evidently supporting his wife out of the business, and where the sale directed by the testator had been postponed so long, the debtor had converted the property to his own use so far as to make it liable to his debts—

Ray v. Ray, Coop. C.C. 264.

The property was in the order and disposition of the debtor—

Fox v. Fisher, 3 B. & Ald. 135.

The leasehold at any rate was the property of the debtor, and if not, the creditor was entitled to a lien on the lease itself—

Heath v. Crealock, 44 Law J. Rep. Chanc. 157; Law Rep. 10 Chanc. 22.

Mr. J. Pearson and Mr. Daniel Jones,

In re Morgan.

for the plaintiff, said the executor was carrying on the business in strict accordance with his testator's directions, and the property of his testator was in no way liable for the private debts of the executor—

In re Johnson, 49 Law J. Rep. Chanc. 745; Law Rep. 15 Ch. D. 548;
Farhall v. Farhall, 41 Law J. Rep. Chanc. 146; Law Rep. 7 Chanc. 123;

Berry v. Gibbons, 42 Law J. Rep. Chanc. 89; Law Rep. 8 Chanc. 747.

Mr. Glasse replied.

Williams on Executors (8th ed.), 958;

Scott v. Tyler, 2 Dicken, 724;

Lord Vane v. Rigden, 39 Law J. Rep. Chanc. 143, 797; Law Rep. 5 Chanc. 663,

were also referred to on the question whether the trade assets were liable for the debt; and

Stroughill v. Anstey, 1 De Gex, M. & G. 635; 22 Law J. Rep. Chanc. 130,

on the power of the executor to pledge the lease.

Fry, J., stated the facts, and said—Let me say that it appears to me that the principles which regulate applications of this sort are very clear. As I understand them, where a trustee or executor carrying on business under the directions contained in the will, and in that character, contracts a debt, the debt is one for which the action is to be brought against the executor personally, and for which judgment must be obtained *de bonis propriis* of the executor; that no action can be successfully brought against the executor as executor on such account; and that no execution can be had *de bonis testatoris*, for the very simple reason that the debt was not the debt of the testator. In making these observations I say nothing about a right which undoubtedly the executor has to come against the assets and estate of the testator.

Now is this case made in any way different by the fact that these things were in the ostensible possession of John Pillgrem, and that, so far as it appeared, no person looking at John Pillgrem and his place of business would know they were the property of the testator? It has been

long ago decided that it makes no difference. There is a case which has not been referred to, but which I will nevertheless mention—the case of *Dawson v. Wood* (1)—where an action for trespass was brought against the sheriff for seizing certain property of which defendant was in the apparent possession. It turned out that it was not his property, and it was held that a trespass could nevertheless be maintained. The marginal note is this: “The plaintiff having purchased a public-house for which he could not himself obtain a licence, because he resided in another tavern, put B, an insolvent person, into the house as his servant, to keep it for him, and supplied him with money to pay for the licence which was granted to B:—Held, that the sheriff was not entitled to take under the execution against B the plaintiff's liquors and chattels in the house committed to B's custody.” Now there it is quite true that the Lord Chief Justice took a different opinion, but the majority of the Court decided the case, and Mr. Justice Heath said, “I cannot agree with my lord. It is not sufficient that Pyke is the ostensible owner of the goods; if so there would have been no need of the statute 21 Jac. 1; and so to hold would be extending that statute to all other cases as well as bankruptcy.” But then it is said that although that may be the rule in a case which happens shortly after the death of the testator, that does not apply to a case which arises many years after the death of the testator. In other words, it is said, I suppose, that an inference arises that the goods became the property of the person in whose ostensible possession they are. In some cases undoubtedly that lapse of time, coupled with the consent of the beneficiaries, and an enjoyment of the goods in a manner inconsistent with the trust, may raise an inference of gift or alienation by the persons beneficially entitled to the persons ostensibly in possession. But where the possession is in accordance with the trusts, and where the time is also, if I may use such an expression, in accordance with the trusts, there neither time nor ostensible possession raise any such inference of gift by the beneficiaries. Now that

(1) 3 Taunt. 256.

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point again is not a new one, for as long ago as the 2nd Queen's Bench Reports the point came before the Court in *Fenwick v. Laycock* (2), and was determined accordingly. The marginal note is this: "When the goods of a defendant who alleges that he holds them solely as trustee are taken in execution, the defendant in his character as trustee may in general dispute the seizure, and the sheriff in such cases is entitled to the benefit of an interpleader rule under section 6 of statute 1 & 2 Will. 4. c. 58." There it was shewn that the trustee had been in possession for a long time, and Lord Justice Denman, in delivering the judgment of the Court, referring to an earlier case of *Gaskell v. Marshall* (3), is reported to have said, "If the plaintiff had been in possession of the goods for a long time it might have been otherwise, and here the possession has been long; but then it is a possession consistent with the will and necessary to the execution of the trust reposed. It follows, therefore, that in my judgment neither the ostensible possession of Pillgrem nor the lapse of time make any difference. The moment it is found that this property was really the trust property in his hands, the judgment could not be levied upon that property. The argument before me has almost gone the length of suggesting that trust property in the hands of a trustee may be seized by an execution creditor. I take the liberty of observing that in my judgment nothing is plainer than that property taken under the execution is only the property to which the execution debtor is beneficially entitled, and no property of which he is trustee can be taken. Now the case of *Ray v. Ray* has been very properly cited and relied upon. That was a case in which the Court dissolved an injunction. It did not finally determine the point, but it thought the circumstances were such as raised an inference of gift by the creditor to the persons who claimed, and when the case arises in that form I shall follow *Ray v. Ray*. But this case is very different.

The next case for determination is with

(2) 2 Q.B. Rep. 108; 11 Law J. Rep. Q.B. 146.

(3) 1 Moo. & R. 132.

regard to the leasehold property. That again has been put upon two grounds: First, there is the question on the execution itself pure and simple, but that of course is the same question as I have already disposed of with regard to the chattels. The next point is this: It has been said that by virtue of a deposit the execution creditor is entitled to a charge upon this property. Now with regard to that it appears to me to stand simply in this way—that the execution creditor, the applicant, Mr. Hilliard, claims an equity on that lease by virtue of the deposit. The estate claims an equity in the lease by virtue of the renewal. Neither equity is denied by the person entitled to the opposite equity. But here the equity of the estate attached the moment the lease was granted, the equity of the deposittee attached only when the deposit was made, and the equity of the estate therefore is prior to the charge against it. It appears to be a case in which the maxim *qui prior est tempore potior est jure* applies. There is no superiority in the one equity above the other which would make me displace the preceding right. Then it is said that the sale of the leasehold property took place under a consent order, and that therefore I am bound to look to the rights of the parties in these circumstances. Now, according to the case of *Heath v. Crealock*, and the cases there cited, it would be impossible for the persons interested in the estate to take the lease away from the deposittee and chargee who claims as the equitable owner for value without notice. Now those propositions, if made out, appear to me to justify the argument that the money realised from the sale of the lease would go to satisfy the charge in the first instance, because the sale could not have been made without the lease being given up. But is Mr. Hilliard, the owner of this property, without notice? Now in order to shew that it must be shewn that he took all reasonable care and made enquiry, and that, having taken that care and made that enquiry, he received no notice of the trust which affected this property; it is not in evidence that he made any enquiry of the sort. I am bound to presume if he had called for an

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abstract of title, an honest abstract would have been furnished to him, and he would have seen that it was affected by prior title; and in my judgment a person who shuts his eyes and takes without enquiry cannot say he is a purchaser without notice, when if he made enquiry and an honest answer had been given he would have had notice. I hold, therefore, that also fails. The other part of the summons, with regard to possession-money, being merely consequential, it follows I refuse the whole of the summons with costs.

Solicitors—J. P. Murrough, for creditor; Allen Edwards, for plaintiff.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.
JESSEL, M.R.
JAMES, L.J.
LUSH, L.J.
1881.

May 12, 19, 26.

Ex parte WALTON;
in re LEVY.

Lease — Under-lease — Bankruptcy of Lessee — Disclaimer by Trustee of Bankrupt — Bankruptcy Act, 1869 (32 & 38 Vict. c. 71), s. 23 — Bankruptcy Rules of 1871, rule 28.

It is a rule of construction of statutes, that the literal construction of a section ought not to prevail if it results in an absurdity or an inconsistency with the intention of the Legislature, as apparent from the statute.

The generality of the words of the 23rd section of the Bankruptcy Act must be so far limited as to have the effect merely of relieving the estate of the bankrupt and his trustee from liability, and entitling those whose rights, as regards the enforcement of liabilities against the bankrupt or trustee, are interfered with by the disclaimer, to prove against the bankrupt's estate for the amount of the injury they may have sustained. The rights of third parties are not to be affected by the disclaimer.

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"When a statute enacts that something should be deemed to have been done, which in fact was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to"—per JAMES, L.J.

W. granted a lease of a house to L. for ten years, at the yearly rent of 70l. L., a few days after, in consideration of a premium of 100l., sub-let the house to M. for a term of nine and a-half years, at the yearly rent of 56l. L. filed a liquidation petition, and his trustee applied for leave to disclaim the lease, which the Registrar granted in spite of the opposition of W.

On appeal by W. the order of the Registrar was affirmed, the Court holding that W.'s right as against M. to receive the rent reserved by, and to enforce the covenants contained in, the original lease was not affected by the disclaimer.

Leave given to M. to prove against L.'s estate in respect of the loss sustained by him by reason of his liability to pay the higher rent.

John Walton, William Walton and Henry Walton, trustees of the will of William Walton, by a lease dated the 11th of August, 1879, leased to Hyam Levy and Moss Hyam Levy a house for a term of ten years, at a rent of 70l. This lease contained the usual proviso for re-entry.

The lessees, by an under-lease, dated the 29th of August, 1879, demised the same premises to Hermann Michaelson, for nine and a-half years, at the yearly rent of 56l. 11s. 3d. The lessees received from their sub-lessee a sum of 100l. by way of premium.

The Messrs. Levy filed a petition for liquidation by arrangement or composition with their creditors on or about the 17th day of January, 1881, and at a meeting held on the 2nd of March, 1881, Messrs. Crump and Foreman were appointed trustees.

Upon an application being made by the trustees to the Court of Bankruptcy for leave to disclaim all their interest under the lease of the 11th of August, 1879, an order was made by Mr. Registrar Haslitt, sitting as Chief Judge, on the 8th of April, 1881, authorising such disclaimer. Messrs.

Ex parte Walton; in re Levy (App.), Bankr.

Walton opposed this application, no one appearing for Michaelson, the sub-lessee.

From this order Messrs. Walton brought this appeal.

The appeal was first heard on the 5th of May, when the case was adjourned for the purpose of, if possible, carrying into effect an arrangement proposed by the lessors, namely, that the trustees, instead of being allowed to disclaim, should assign the lease to a nominee of the lessors, the latter indemnifying the trustee against any claim or liability incurred by the trustee in so doing. The proposed arrangement, however, fell through.

Notice of the proceedings on the appeal was, upon the suggestion of their Lordships, given to Michaelson.

May 19.—*Mr. John Henderson*, for the appellants.—Leave to disclaim ought not to have been given unconditionally. The object of the 28th rule of the Bankruptcy Rules, 1871, which requires the leave of the Court to be obtained before the trustees may disclaim a leasehold interest, is to prevent the rights of third parties being prejudiced by their disclaimer. According to the statement, the lease is to be deemed to have been surrendered, and by that surrender, under the 8 & 9 Vict. c. 106. s. 9, the intermediate term removed, and the superior landlords will become the immediate reversioners of the sub-lessee, and will no doubt get the benefit of the rent and covenants stipulated for from the sub-lessee, but the rent of the sub-lease is 56*l.*, instead of the 70*l.* reserved by the original lease.

Suppose a freeholder grants a term for ninety-nine years at 500*l.* a year; the lessee, in consideration of a premium, assigns the whole lease at a peppercorn rent, and then becomes bankrupt, and his trustees disclaim; is the freeholder to be virtually disseized? The proviso for re-entry in the original lease will fall with the disclaimer and he cannot eject the under-lessee—

Smalley v. Hardinge, 50 Law J. Rep. Q.B. 367; Law Rep. 6 Q.B. D. 371.

In

O'Farrell v. Stevenson, 4 Law Rep. Ir. (Com. L.) 715,

in the Court of Appeal in Ireland, it was suggested that the word "surrender" should be restricted so as to liberate the bankrupt and his estate from liability—

Ex parte Buxton; in re Muller, Law Rep. 15 Ch. D. 289.

The sub-lessee is the person who ought to suffer. He should have enquired into his lessor's title—

Wilson v. Hart, 35 Law J. Rep. Chanc. 569; Law Rep. 1 Chanc. 463.

Mr. Winslow and *Mr. Finlay Knight*, for the trustees.—We admit that the main object of the Act was to relieve the bankrupt and his estate and the trustee from all liability under the lease; but as between all other parties interested in it, the lease may be held subsisting—

The London and Westminster Loan Company v. Drake, 6 Com. B. Rep. N.S. 798; 28 Law J. Rep. C.P. 297.

An actual surrender of a lease by a lessee to his lessor was held not to affect the right of third parties. (See *Co. Litt.* 338*b*—where he says that as between the parties to the surrender the estate is drowned; but as regards strangers "the estate surrendered hath in consideration of law a continuance.")

So in

Smyth v. North, 41 Law J. Rep. Exch. 103; Law Rep. 7 Exch. 242,

the disclaimer by the trustee of the assignee of a lease was held not to affect the rights and liabilities *inter se* of the lessor and the original lessee.

They also referred to

Ex parte Davis; in re Sneesum, 45 Law J. Rep. Bankr. 137; Law Rep. 3 Ch. D. 463.

Mr. Methold, for Michaelson.

JESSEL, M.R.—This appeal raises important questions as to the construction to be put upon the 23rd section of the Bankruptcy Act, 1869. Before considering the exact wording of the section, I should like to say a few words as to the rules which govern all Courts in the construction of statutes and other instruments. Whatever may have been the

Ex parte Walton; in re Levy (App.), Bankr.

case in the past as regards the interpretation of statutes, the rules now are settled. They are so well recognised as to become binding on this and every other Court; and to shew what those rules are I am going to cite from the last case on the subject the rules as laid down in the House of Lords in *The Caledonian Railway Company v. The North British Railway Company* (1). It was an appeal from the Court of Session in Scotland, but as rules of construction are the same in Scotland as in England that makes no difference.

The appellant there contended that the literal construction should be given to a particular section, although it defeated what appeared from the preamble of the Act to be the main object of the Act. That contention did not prevail. Lord Selborne laid down the rule of construction thus: "The more literal construction ought not to prevail if (as the Court below has thought) it is opposed to the intention of the Legislature as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated." Then the judgment of Lord Blackburn in the same case (p. 131) cites with approval the rule laid down by Lord Wensleydale in the well-known case of *Grey v. Pearson* (2), which he called "the golden rule for construing all written engagements," which was this: "I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in Courts of law in Westminster Hall, that in construing wills, and indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument. In that case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further."

Now, having these rules before us, I proceed to consider the object of the

statute as dealt with in this 23rd section, and then to consider whether the literal construction of the words will lead to any absurdity or inconsistency. The object of the statute is plain—when a man becomes bankrupt, he is not to remain liable for engagements attaching to his property, when that property has been taken away from him. The Legislature intended to release him from personal liability when it took away his property. That was one object; but there was another, which is this: The property of the bankrupt vested in a trustee on behalf of the creditors, and no one would accept the position of a trustee if he were to be treated as liable to all the liabilities which attached to that property in law by reason of the transfer to him of the property.

The manifest intention of the Legislature was that a trustee should not be compelled to acquire the property subject to that liability; and that when he finds that the property acquired will not produce a surplus over that liability, he may be at liberty to disclaim and get rid of the property as well as of the liability. He could not keep the property without the liability. That was the object of the Legislature, and the only object. Another thing to be considered in treating of all legislative enactments is this, that it never is the object of the Legislature to confiscate property of individuals without any reason. Such a construction would lead to an absurdity, and an inconsistency with the object of the statute.

Now I will consider the section itself. It speaks first of "land of any tenure burdened with onerous covenants." These words apply not only to ordinary leaseholds, but they will include also freeholds subject to perpetual rentcharges which are common in the north of England. Then the section speaks of "unmarketable shares in companies." This must mean shares from which the trustee can obtain no profit, which are as a rule burdened with liability to pay calls. Then come the words "unprofitable contracts." These words are general, but they must mean contracts which are unprofitable as regards the bankrupt's estate, and which, if they were carried on, would involve the trustee in liability. Then come the words,

(1) Law Rep. 6 App. Cas. 114.

(2) 6 H.L. Cas. 61; 26 Law J. Rep. Chanc. 473.

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"any other property that is unsaleable or not readily saleable by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money." In all these cases the trustee may, by writing under his hand, disclaim such property, and "upon the execution of such disclaimer the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication; and if the same is a lease, be deemed to have been surrendered on the same date; and if the same be shares in any company, be deemed to be forfeited from that date; and if any other species of property, it shall revert to the person entitled on the determination of the estate or interest of the bankrupt, but if there shall be no person in existence so entitled, then in no case shall any estate or interest therein remain in the bankrupt." Now take this case—a contract by a builder to build houses on another man's land, the owner of the land agreeing that on the completion of the houses he will grant leases of them to the builder—a mere contract. This contract is pledged by the builder, either for his own debt or the debt of another, and the builder afterwards becomes bankrupt: can it be supposed that the Legislature ever intended that because the original contracting party has become bankrupt, and his trustee has disclaimed, the equitable assignee of the contract was to lose his property? That would be the result of a literal construction of the section. I have known many cases where many thousands of pounds have been lent on the security of pledges of such contracts to a builder who is engaged in building speculations. The builder becomes bankrupt. Can it be supposed that the lender is to lose the benefit because the builder's trustee has disclaimed? The same principle would apply to a commercial contract in which a third party has become interested, and acquired, in fact, though not in form, the whole benefit of that contract. The notion that a trustee could by disclaimer defeat the interest of third parties would amount to a confiscation, without any reason for it, to the benefit of the person who would thus by the

mere accident of bankruptcy get the property.

Next, a lease is to be deemed to have been surrendered, &c. There are many cases in which the literal construction would work the greatest possible injustice. A lease may be pledged by way of equitable mortgage; the lessee becomes bankrupt: it would be a strange result if the mortgagee were to be held to have lost his money because the mortgagor's trustee has disclaimed the lease. Again, you may have the case of a legal mortgage of a lease by way of under-lease at a peppercorn rent: if section 23 is construed literally, the lessor would by the disclaimer of the trustee lose his rent for the benefit of the mortgagee, who would get not only his mortgage-money, but would be able to keep the property free from the obligation of paying any rent for it. These ridiculous consequences would follow from adopting the literal construction of the section. Then, again, "shares are to be deemed to be forfeited," &c. Shares may be and are pledged every day. Assume that they are valuable, but worth nothing to the estate because they have been pledged for more than their value: is it to be asserted that the trustee can by disclaiming these shares forfeit them for the benefit of the company because the shareholder is bankrupt? That would be manifestly absurd.

The general words "any other species of property" would include a kind of interest common in the north where lands are sold for fee-farm, rents. I go through this section in detail to shew the absurdity of the results which would follow from a literal construction of its words. But the provision towards the close of the section which enables any person interested in any disclaimed property to apply to the Court, and the Court upon such application to order possession of the disclaimed property to be delivered up to him, or to make such other order as to the possession thereof as may be just, seems to point to the fact that the Legislature was dealing with property which the Bankruptcy Court had power over. The words "order possession of the property to be delivered up," &c., are not very apt words as

Ex parte Walton ; in re Levy (App.), Bankr.

regards contracts or shares, but seem to shew that the Legislature only intended to deal with property of which the Court of Bankruptcy could dispose. But, on the other hand, it is obvious that the power conferred on such party interested, and the Court, cannot be restricted to those cases where actual possession of the property can be given by the Court. Take the common case of a lease to a man who afterwards becomes bankrupt, and an under-lease made by him before his bankruptcy—the Court of Bankruptcy could not take away possession of the property from the underlessee, and yet the trustee must be able to disclaim the liabilities under the original lease; the clause which orders possession of the property to be delivered up cannot control the former words of the section.

Under these circumstances it seems to me that the words of the section must be read with this qualification—so far as regards the rights and liabilities of the bankrupt and his trustee on the one hand, and the person entitled to the benefit of the covenants and liabilities on the other, but not so as to affect the rights of third parties, onerous property shall, as between these persons, for the purpose of relieving the bankrupt and the trustee of the bankrupt's estate from liability, but not further, be deemed to be determined, surrendered or forfeited, as the case may be.

The generality of the words of the section must be so far limited as to have the effect merely of relieving the estate of the bankrupt and the trustee from liability on the one hand, and on the other entitling those whose rights as regards the enforcement of liabilities against the bankrupt or trustee are interfered with by the disclaimer to prove against the bankrupt's estate for the amount of the injury they may have sustained.

It is not necessary for me, sitting here, to shew the exact words which should be introduced for the purpose of giving apt expression to this limitation, but it appears to me in accordance with the principle that I have laid down, that the disclaimer has been properly allowed in the present case, but that such disclaimer will not in any way affect the rights of

the lessors to distrain upon the property for the rent reserved by the original lease, or to re-enter for the breach of the covenants contained in that lease.

JAMES, L.J.—I have arrived at the same conclusion. When this case was first mentioned a fortnight ago, I was startled at the consequences which appeared necessarily to result from a literal construction of the words of the section. I have since considered the question, and the conclusion at which I have arrived may be expressed as follows:—

By the law of England a lessor has a double right—a right *in personam* on the contract, a right *in rem* by distress on the property demised, and by the power of re-entry for non-payment of rent or breach of covenant.

Where the lessee makes a sub-demise the sub-tenant is not liable on the contract, but he takes the property subject to all the lessor's rights *in rem*, and it would be very unjust and unreasonable if a lessee who takes the property subject to liabilities could by any arrangement whatever with a third party derogate from the lessor's rights.

Of course the lessee may enter into any contract he pleases with his sub-lessee by which he (the lessee) expressly or impliedly undertakes to discharge the obligations of his own lease. But it would be a violation of every principle of law and justice, and against all common-sense, to permit two men by bargaining with one another to affect any right of property whatever in another man, particularly any right of the owner, from whom both derive title—the first immediately the second mediately; and although from want of privity no action of covenant lies against the sub-lessee, yet equity always prevents the sub-lessee from any active violation of the stipulations in the original lease. And it would seem to be equally against principle and against common honesty that a lessee by becoming bankrupt should deprive the lessor of his remedies *in rem*, or release a sub-lessee from the legal liabilities and obligations which the property was in his hands liable to before the bankruptcy. If the lessee were insolvent, but not made bankrupt—if the

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lessee had died insolvent, the lessor's remedies as against the estate itself and the sub-lessee's liability to distress and forfeiture would remain. Is it possible to conceive that the insolvency resulting in bankruptcy should confiscate the lessor's right and give the lessee an absolute immunity from such distress and forfeiture? The object of the bankruptcy laws was merely to regulate the distribution of the bankrupt's assets between his creditors, and to relieve the bankrupt and his estate from future liability to his creditors. But it was never intended to affect rights and liabilities as between the creditor and a third party. A surety, for instance, is not discharged by the bankruptcy of his principal.

But to revert to the position of lessor and lessee. Take the case of a lease with a surety for the payment of rent. Could it ever have been intended that the bankruptcy of the lessee was to release the surety? Take the case of a lease to two as joint tenants, with the usual joint and several covenants. The survivor becomes bankrupt. Can the disclaimer of his trustee relieve the estate of the other joint tenant from his liability? It has been held that the disclaimer does not destroy the interest of his sub-lessee. But supposing that instead of there being a sub-lease there had been a charge created by way of equitable mortgage or a rentcharge: is it possible that a trustee can surrender so as to destroy that charge?

Possibly these considerations, and a great many more that could be suggested, might lead to the conclusion that where the statute says that the disclaimer should operate as a surrender there must be an implied condition that the trustee had in himself full right to surrender not the lease, but the thing—the property, freed and discharged from all estates and interests—and that the rule which requires the assent of the Court to any disclaimer is obligatory on the trustee, and that the Court ought not to give such assent unless satisfied that it can do so without injustice to the lessor or to anyone else, and without prejudice as to any rights or remedies of or against any third person. But seeing that that would not give the

trustee the immunity it is intended that he should have, the more complete and satisfactory solution of the riddle may be found in the following principle: When a statute enacts that something should be deemed to have been done, which in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to.

Now the bankruptcy law is a special law, having for its object the distribution of an insolvent's assets equitably amongst his creditors and persons to whom he is under liability, and upon this *cessio bonorum* to release him under certain conditions from future liability in respect of his debts and obligations.

That being the sole object of the statute, it appears to me legitimate to say that when the statute says that a lease which was never surrendered in fact (a true surrender requiring the consent of both parties, one giving up and the other taking) is to be deemed to have been surrendered, it must be understood as saying so with the following qualification, which is absolutely necessary to prevent the most grievous injustice and the most revolting absurdity: "Shall, as between the lessor on the one hand, and the bankrupt, his trustee and estate on the other hand, be deemed to have been surrendered."

LUSH, L.J.—I have felt very great difficulty in coming to a conclusion that is satisfactory to my mind as to the proper construction of this section. I have however, after much thought, ultimately arrived at the same conclusion as my learned brethren, that we must insert some qualifying words into the section so as to carry out the obvious intention. To construe the words literally would, in my opinion, be to violate the obvious meaning of the Act.

The obvious intention of the Act was to free a bankrupt from future liability; and the obvious intention of this section was to free his estate from covenants, burdensome contracts, unprofitable shares and any kind of property which could not be productive of any benefit to the

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estate, but a burden to it. That was the object, but there was no intention of going any further, or affecting the rights and liabilities of other persons further than was absolutely necessary to effect that object, and we must find such a meaning for the words as will enable us to carry out that intention.

The section authorises the trustee to disclaim a lease if it contains burdensome covenants; and if he does disclaim it the lease shall "be deemed to have been surrendered" on the date of the order of adjudication. If it is necessary to give full effect to the literal words—if the lease has been surrendered—the lessor would have been deprived of his rights under it. But the object of the clause was to put the trustee in the same position as if the lease had never vested in him, and that is all that is necessary to carry out the intention of the Legislature. Any qualifying words, therefore, which are of avail thus to restrict the operation of the section may be inserted in it.

I was at first disposed to think that the section would not apply at all to a lease when an under-lease had been made by the bankrupt, because in such a case the Court cannot order possession of the demised property to be given up to the lessor. But upon consideration I think that the clause which enables the Court to make an order for the delivery up of possession must be qualified so as only to apply to a case where, the possession of the property being in the trustee himself, the Court is able to give up possession. That solution will, I think, carry out the object of the Act. I believe that this is the first time that the precise point has come before the Court for decision.

In the case of a lease, rule 28 of the Rules of 1871 provides that the trustee, before executing a disclaimer of the lease, must apply to the Court for leave to do so, and the Court may call any person interested in the lease before it; and I think the object of that provision was that the Court might see that the trustee did not waste property that might be of value to the estate.

In the case of *Smalley v. Hardinge* the question of the effect of a disclaimer of a lease came before us in another form,

and the point which has been now raised was not then present to our minds. There the trustee of a bankrupt had disclaimed a lease, and the lessor thought that he had a right to recover possession of the property out of the hands of an under-lessee of the bankrupt, and he brought an action for ejectment against the under-lessee. Mr. Justice Mathew held that he was entitled to eject the under-lessee. The Court of Appeal reversed that decision. The point was, whether the disclaimer of the lessee's trustee had the effect of destroying the property of the under-lessee; and no doubt some expression may be found in our judgments in which we did treat the disclaimer as having the same effect as an actual surrender of the lease. But what I wish to say is this, that the particular point now before us was not then present to our minds at all. But now that it has arisen I think that we should still decide the case of *Smalley v. Hardinge* over again in the same way.

JESSEL, M.R.—As regards the costs of the appeal, the appellant, not succeeding, of course cannot get any costs. But he could not safely have abstained from taking the opinion of the Court, and therefore we cannot order him to pay any costs.

Mr. Methold.—The under-lessee is entitled to prove against the estate for the difference in value between the rent reserved on the under-lease, and the 70l. reserved on the original lease, which he will now have to pay.

JESSEL, M.R.—Yes (1).

Solicitors—Henderson & Buckle, for lessors; H. Montagu, for trustees; Baddeley & Sons, for under-lessees.

(1) The order made was as follows: "This Court being of opinion that the disclaimer by the trustees will not affect the right of the lessors to receive the rent reserved by and enforce the covenants contained in the original lease by distress or entry, this Court doth affirm the order made by the Registrar and doth dismiss this appeal with costs. And it is further ordered that Michaelson may be allowed to prove against the estate of the said debtors for the loss he may sustain by reason of his being made liable to pay the increased rent reserved by the said lease granted to the said debtors."

BACON, V.C. }
 1881. }
 April 7, 8, 9, } KEATE v. PHILLIPS.
 10, 13, 26, 27. }

Mortgage—Priorities—Holders of Forged Leases—Estoppel—Equitable Mortgagee of Freehold—Costs.

In 1874 T., as lessee under a fictitious lease from a fictitious freeholder of freehold property in Surrey, mortgaged it by sub-demise to Keate. Shortly afterwards M., as lessee under another fictitious lease from a fictitious freeholder of the same property, mortgaged it by sub-demise, which mortgage became vested in Phillips. In these frauds T. and M. were confederates with D., a solicitor, who in 1873 had become transferee of genuine mortgages on the freehold, which he sub-mortgaged. The property was sold by the sub-mortgages in 1875 under his power of sale to a trustee for M., and in 1876 that trustee conveyed the property to M., who was a trustee for D. In 1877 M., purporting to be beneficially entitled, obtained an advance from McStephens on deposit of the genuine title-deeds. This advance was afterwards confirmed by D. as equitable owner, and a further advance was obtained by D. The frauds being discovered, and an action brought to decide the question of priorities,—Held, that (assuming that D. was answerable for the acts of T.) still this gave Keate only a personal equity against D., and not an equitable charge on the land. Held also, that the sub-demise by M. to Phillips was not perfected by estoppel on M. acquiring the legal estate as trustee. Held also, that McStephens, as deposittee of the genuine title-deeds, alone had a charge upon the land. No order as to costs.

By a fictitious lease, dated the 8th of March, 1870, one Leighton purported to demise certain freehold property situate at Banstead, in Surrey, to Tait for a term of ninety-nine years, at a ground rent of 20l. 15s., and on the 17th of August, 1874, Tait mortgaged the same property to the plaintiff by way of under-lease, for the residue of the term, excepting the last three days, to secure 4,860l., and interest at five per cent.

By another fictitious lease, also dated

the 8th of March, 1870, Tait purported to demise the same property to one Moore for a term of ninety-nine years, at a ground rent of 37l. 10s., and on the 16th of November, 1874, Moore mortgaged the same property by way of under-lease to the Queen's Benefit Building Society to secure 4,400l. and interest, which was afterwards reduced to 2,700l. and interest, and on the 10th of October, 1874, this mortgage was assigned to the defendant Phillips.

In these transactions Dimsdale purported to act as solicitor for Tait and Moore. The title of the alleged freeholders was not enquired into, but the lease of the 8th of March, 1870, from Leighton to Tait, was handed over to the plaintiff; and the lease of the 8th of March, 1870, from Tait to Moore, and the mortgage of the 16th of November, 1874, by Moore to the Queen's Benefit Building Society, was handed over to the defendant Phillips. Dimsdale paid interest on the mortgages.

The dealings with the legal estate in the property were as follows: In 1873, Dimsdale had become transferee of two mortgages on the freehold, and on the 12th of September, 1873, Dimsdale sub-mortgaged the freehold to one Lyon, who, in September, 1875, contracted to sell the same to Moore under his power of sale, and on the 10th of September, 1875, executed a conveyance to J. Holme as trustee for Moore; and subsequently, by a deed dated the 9th of March, 1876, J. Holme conveyed the freehold to Moore, who was a trustee for Dimsdale.

A third loan was afterwards obtained on deposit of the genuine title-deeds as follows: In February, 1877, Moore applied to the defendants McStephens & Co., and obtained advances from them of various sums, amounting to about 5,000l., on the deposit of the genuine title-deeds, representing himself to be absolute owner; and made a statutory declaration to that effect, and executed a memorandum of deposit under seal dated the 1st of February, 1877. Shortly afterwards Dimsdale came to McStephens & Co. and stated that he was the real owner of the property, and that Moore was only a trustee for him, but

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agreed to confirm the advances to Moore, and obtained a further advance to himself of over 16,000*l.*, executing a memorandum of deposit under seal dated the 27th of April, 1877, charging the property with both sums and interest. A statutory declaration as to Dimsdale's equitable title was made by Dimsdale and Moore.

The frauds contrived by Dimsdale, Tait and Moore were soon afterwards discovered; and they were arrested in October, 1877, convicted for forgery, and were now undergoing penal servitude. None of them were called as witnesses in this action. The evidence of the parties in the case is sufficiently stated in the judgment.

The defendants McStephens & Co. had taken possession of the property on Dimsdale's arrest, but gave up possession to the receiver in this action, which was brought by Keate against Phillips and McStephens, claiming a declaration of the priority of his mortgage and recovery of the land. The defendants made counter-claims respectively claiming priority for their respective mortgages.

Mr. Horton Smith and Mr. E. T. Holland, for the plaintiff.—In purporting to grant an under-lease by way of mortgage Tait was acting as the instrument of Dimsdale, who received the money; and Dimsdale was bound to make good the representation by Tait that Tait had a term of years vested in him. That representation was one which gave the plaintiff an equitable charge upon the land in Dimsdale's hands or in those of his assignees, and as first equitable incumbrancer, the plaintiff is, therefore, entitled to priority—

Manningford v. Toleman, 1 Coll. C.C. 670; 14 Law J. Rep. Chanc. 160;

Roberts v. Croft, 2 De Gex & J. 1; 24 Beav. 223; 27 Law J. Rep. Chanc. 220;

Cory v. Eyre, 1 De Gex, J. & S. 149;

Newton v. Newton, 37 Law J. Rep. Chanc. 705; Law Rep. 6 Eq. 135; on appeal, 38 Law J. Rep. Chanc. 145; Law Rep. 4 Chanc. 143;

Thorpe v. Holdsworth, 38 Law J. Rep. Chanc. 194; Law Rep. 7 Eq. 139;

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Dixon v. Muckleston, 42 Law J. Rep. Chanc. 210; Law Rep. 8 Chanc. 155;

Waldy v. Gray, 44 Law J. Rep. Chanc. 394; Law Rep. 20 Eq. 238;

Hammersley v. De Biel, 12 Cl. & F. 45;

The Citizens' Bank of Louisiana v. The First National Bank of New Orleans, 43 Law J. Rep. Chanc. 263; Law Rep. 6 E. & I. App. 352;

Noel v. Bewley, 3 Sim. 103;

Heath v. Orealock, 44 Law J. Rep. Chanc. 157; Law Rep. 10 Chanc. 22;

Ortigosa v. Brown, 47 Law J. Rep. Chanc. 168;

Willoughby v. Willoughby, 1 Term Rep. 763;

Smith v. Baker, 1 You. & C.C.C. 223;

Ingram v. Thorp, 7 Hare, 67;

Cave v. Cave, 49 Law J. Rep. Chanc. 505; Law Rep. 15 Ch. D. 639;

Lewis v. Madocks, 17 Ves. 48.

[BACON, V.C.—Assuming that Dimsdale was bound to make good Tait's representation, that would create a personal obligation binding upon Dimsdale; but is there any authority that such a representation would create an equitable charge upon the land in whosoever hands it should come?]

We submit that the authorities cited go to that length. That being so, the legal estate is still outstanding in Moore, and therefore, as first equitable incumbrancer, the plaintiff is entitled to priority. But even assuming that the defendant Phillips has the legal estate through Moore by the doctrine of estoppel, still Moore was a bare trustee, and he could only grant even the legal estate subject to our equitable charge—

Stackhouse v. Jersey, 1 Jo. & H. 721; 30 Law J. Rep. Chanc. 421;

Mazfield v. Burton, 43 Law J. Rep. Chanc. 46; Law Rep. 17 Eq. 15;

Carter v. Carter, 3 Kay & J. 617; 27 Law J. Rep. Chanc. 74;

Prosser v. Rice, 28 Beav. 68.

The same arguments would apply against the defendants McStephens & Co.

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if they had the legal estate, but they have not, for a memorandum of deposit under seal does not give the legal estate. They are, therefore, only equitable incumbrancers later in date to the plaintiff, and the rule *qui prior est tempore potior est jure* must apply.

Mr. Hemming and *Mr. Everitt*, for the defendant Phillips.—The under-lease by Moore which was assigned to the defendant Phillips created a term by estoppel, and on the 9th of March, 1876, when Moore acquired the legal estate, that lease by estoppel became a lease by interest—

Webb v. Austin, 7 Man. & G. 701; 13 Law J. Rep. C.P. 203;

Trevivan v. Lawrence, 6 Mod. Rep. 256, 258;

Sturgeon v. Wingfield, 15 Mee. & W. 224; 15 Law J. Rep. Exch. 212.

The defendant Phillips, therefore, as legal mortgagee without notice, is entitled to priority over the prior equitable charge (if any) of the plaintiff, and the later equitable mortgage to the defendants McStephens—

Brace v. The Duchess of Marlborough, 1 P. Wms. 491.

The cases in which it has been held that a subsequently acquired legal estate will not protect the persons who acquire it, have no application to this case. In

Maxfield v. Burton (ubi supra)

Jessel, M.R., only says that a subsequent purchaser who obtains the legal estate will not have priority, if there was a contract to convey the legal estate to the prior equitable incumbrancer. There was no such contract here.

Carter v. Carter (ubi supra)

was virtually overruled by

Pilcher v. Rawlins, 41 Law J. Rep. Chanc. 485; Law Rep. 7 Chanc. 259.

As against the plaintiff, we further contend—first, that there is no evidence that Tait and Dimsdale are to be regarded as one person, so that Dimsdale was bound to make good the representation by Tait; and second, that, if there were, the representation would create a personal equity only against Dimsdale, and not an equitable charge upon the land.

Mr. Marten and *Mr. T. A. Roberts*, for the defendants McStephens & Co.—The defendants McStephens claim under the two memoranda of deposit, which were both executed as deeds, and hold the genuine title-deeds. They have therefore a good title against all the world as purchasers for value without notice. The plaintiff cannot oust them, for the case made by the plaintiff at the best only establishes a personal equity against Dimsdale, and not an equitable charge upon the land—

Stanhope v. Earl Verney, 2 Eden, 81;

Garrard v. Frankel, 30 Beav. 445; 31

Law J. Rep. Chanc. 604.

The case of

Noel v. Bowley (ubi supra)

was disapproved in

Smith v. Osborne, 6 H.L. Cas. 375.

They also commented on the other cases cited for the plaintiff, and cited in addition—

Rice v. Rice, 2 Drew. 82; 23 Law J. Rep. Chanc. 289;

Ogilvie v. Jeaffreson, 2 Giff. 353; 29 Law J. Rep. Chanc. 905;

Knox v. Gye, 42 Law J. Rep. Chanc. 234; Law Rep. 5 E. & L. App. 656;

Shaw v. Foster, 42 Law J. Rep. Chanc. 49; Law Rep. 5 E. & L. App. 321;

Orabtree v. Poole, 40 Law J. Rep. Chanc. 468; Law Rep. 12 Eq. 13;

Pease v. Jackson, 37 Law J. Rep. Chanc. 725; Law Rep. 3 Chanc. 576;

Eyre v. Burmester, 4 De Gex, J. & S. 435; 33 Law J. Rep. Chanc. 652;

Layard v. Maud, 36 Law J. Rep. Chanc. 669; Law Rep. 4 Eq. 397;

Spencer v. Clarke, 47 Law J. Rep. Chanc. 692; Law Rep. 9 Ch. D. 137;

Dodds v. Hills, 2 Hem. & M. 424;

Heath v. Pugh, 50 Law J. Rep. C.P. 473; Law Rep. 6 Q.B. D. 145.

The defendant Phillips cannot oust them, for the case made by Phillips rests on the supposed legal term from Moore by estoppel. But there can be no es-

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toppel even at law here, for estoppel must be mutual—

Wilson v. Woolfryes, 6 M. & S. 341;
Pike v. Eyre, 9 B. & C. 909; 8 Law
 J. Rep. (o.s.) K.B. 69;
Cardwell v. Lucas, 2 Mee. & W. 111;
 6 Law J. Rep. Exch. 52;
Webb v. Austin (ubi supra);
Sturgeon v. Wingfield (ubi supra);
Platt on Leases, vol. i. pp. 55, 56.

See, too,

Viner's Abridgment, "N," pl. 26;
 "Q," pl. 19;

Coke on Littleton, 47a, 352d,
Littleton, 1st sect. "On Terms of
 Years," s. 58.

Further, possession was never obtained,
 and the under-lessee had only an *interesse
 termini*—

Coke on Littleton, 46b;
Littleton, s. 58;
Smith v. Day, 2 Mee. & W. 684; 6
 Law J. Rep. Exch. 219;
Love v. Ross, 5 Exch. Rep. 556; 19
 Law J. Rep. Exch. 318;
Edwards v. Wickwar, 35 Law J. Rep.
 Chanc. 309; Law Rep. 1 Eq. 403.

Further, it has always been held that if
 you rely on estoppel you must so plead
 that the Court must not go into the facts.
 If the facts are allowed to be gone into
 there is an end of the estoppel—

Trevivan v. Lawrence (ubi supra).

They also cited on the subject of
 estoppel—

Treport's Case, 6 Co. Rep. 14b;
Noke's Case, 4 ibid. 80b;
*The General Finance Company v.
 The Liberator Building Society*,
 Law Rep. 10 Ch. D. 15.

With regard to enquiry as to title,
 neither the plaintiff nor the defendant
 Phillips made any enquiry as to their
 supposed lessor's title, though the leases
 were recent and the Vendor and Pur-
 chaser Act, 1874 (37 & 38 Vict. c. 78),
 which by section 2 debars a lessee from
 enquiring into the title to the freehold,
 had not then come into operation. This
 was such negligence on their part as to
 postpone their securities (if any)—

Allen v. Clark, 11 W.R. 304;

Keech v. Hall, 1 Dougl. 21.

The claim of the plaintiff and the

counter-claim of Phillips ought, there-
 fore, to be dismissed, and judgment given
 upon the counter-claim of the defendants
 McStephens.

Mr. Horton Smith, in reply.—The re-
 presentation by Dimsdale created a charge
 on the land, and not a mere personal
 equity, as is shewn by the case of

Roundell v. Breary, 2 Vern. 482,
 which was recognised as an authority in
Mornington v. Keane, 2 De Gex & J.
 292, 301.

See, too,

Watson v. Sadleir, 1 Molloy, 585;
Metcalf v. The Archbishop of York,
 1 Myl. & Cr. 547; 6 Law J. Rep.
 Chanc. 65.

The plaintiff has not been shewn to be
 guilty of negligence.

[He was stopped on this point.]

Moore was merely trustee for Dimsdale,
 and therefore there can be no application
 of the common law doctrine of estoppel
 as against equitable claims created by
 Dimsdale.

[He was stopped on this point.]

The defendants McStephens are only
 equitable incumbancers notwithstanding
 that the memoranda were under seal—

Wood v. Ledbitter, 13 Mee. & W.
 838; 14 Law J. Rep. Exch. 161;
 and the legal estate, being outstanding in
 Moore, they could only take what the
 plaintiff had not taken—

Phillips v. Phillips, 4 De Gex, F. &
 J. 208; 31 Law J. Rep. Chanc.
 321;

Baillie v. McKewan, 35 Beav. 177;
*The Shropshire Union Railway Com-
 pany v. The Queen*, 45 Law J. Rep.
 Q.B. 30; Law Rep. 7 E. & I. App.
 496.

Mr. Marten commented on the cases
 cited in reply, and referred to

Sugden's Vendors and Purchasers
 (14th ed. 1862), p. 796,

where

Phillips v. Phillips (ubi supra)
 is discussed.

BACON, V.C.—This is a most singular
 case. No cases are more difficult than
 those in which the Court has to decide
 between innocent parties, who have

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suffered through some fraud, whose right is to prevail. The rule *qui prior est tempore potior est jure* is a very convenient rule when it can be applied, but then, when a case is accompanied by circumstances so complicated as the one before me, it is impossible solely to rely on that well-established rule of law.

Now the plaintiff—to take his case first—insists shortly on this. A man named Tait pretended to want money on mortgage, and the plaintiff agreed to lend it to him upon the mortgage of a leasehold under an under-lease which served the purpose of a mortgage, and upon that occasion Mr. Dimsdale is said to have been the solicitor in the matter. The transaction took place, no doubt, at Dimsdale's chambers. The solicitor's clerk, who was concerned in the transaction, has proved that the business was conducted in a reasonable way. He admits that there was no enquiry into the lessor's title, which he says is not usual, and which we all know is not usual, notwithstanding the decisions which give to a purchaser, or an intended lessee, the right to enquire into the lessor's title, if that should not have been guarded by the contract which they have entered into, and it is not helped by the subsequent Act of Parliament which received the Royal assent after the transactions were complete. The solicitor's clerk proves that the business was regularly transacted, that there was a valuation of the property, that the mortgage money was advanced and paid to and received by Dimsdale, whom he took to be the mortgagor's solicitor. That is the whole that I have of evidence, or anything that I can rely upon in this case, as to the first transaction.

Then the contention of the plaintiff is this: It is not alleged that Dimsdale made any representation in the proper sense of that word; but the contention is, that from what he did, seeing the mortgage completed, and receiving the mortgage money, it must be inferred that he represented that the lease from Leighton to Tait, and then the under-lease from Tait to the plaintiff, was a valid, genuine, legitimate transaction. Those are the slenderest representations, as far as the evidence goes, that can be conceived. If I were

to infer from the nature of the case, I do not hesitate to say that it would amount to a suggestion, if not a representation, that Dimsdale was the actor and author of all this; and it being admitted that Tait and Leighton had no interest whatever in the property, it is clear upon the evidence that Dimsdale had an interest. What was Dimsdale's interest at that time? He had an equity of redemption in this property which he had mortgaged to one Lyon. That was his sole interest. The plaintiff's argument is, that by virtue of and by force of these representations, as they are called, made by Dimsdale, he did effectually charge the property in which he had this equity of redemption, and, as a consequence, when he acquired, as he at a subsequent date did acquire, the absolute beneficial interest on paying off Lyon's mortgage, that then the right of the plaintiff against him was to have the representation carried out to its full extent, and to the extent of making a charge upon the property supposed to be comprised in the fictitious lease.

I have listened to very numerous cases—I have attended to all of them—but I never heard, and I do not believe that there can be found, any case in which that principle has been carried to the extent to which the plaintiff seeks to carry it, and to which he must carry it in order to obtain any relief. Admitting, as I have no reason to doubt, that Dimsdale was a malefactor, and that he had committed a gross fraud, and made use of Tait as an instrument, and that he had imposed upon the plaintiff, what of that? How does that touch the estate? It would be misconduct for which he could be punished, and a wrong which could be redressed against him personally; but I am at a loss to see how it touches the estate. This brings it close to that doctrine of estoppel which Mr. Hemming argued at such great length, and, I need not say, with great ability. The common law doctrine of estoppel was, as I have said, a device which the common law Courts resorted to at a very early period to strengthen and lengthen their arm; and not venturing to exercise an equitable jurisdiction over the subject before them, they did convert their own special plead-

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ing tactics into an instrument by which they could obtain an end which the Court of Chancery, without any foreign assistance, did at all times put into force in order to do justice. But the doctrine of estoppel is purely legal. There is no case in which a trustee, having made a fraudulent representation, by which he was bound, or even a fraudulent conveyance, when he got his legal estate confirmed, but still remaining a trustee, was so estopped as to deprive the persons beneficially entitled to the estate which was theirs, and of which he was the trustee and trustee only. The doctrine of estoppel, therefore, in my opinion, has no place whatever in the case before me. Mr. Hemming well knows that I do not disregard anything he says to me, but I cannot apply the law which he laid down with so much clearness, and which is unquestionably the common law doctrine, nor can I, applying it to the merits of the case, say that Moore's subsequent acquisition of the legal estate, which he did acquire, at once confirms the validity of the original transaction. But where is the case to be found which says that a man who has committed a misdemeanour and contracted an equitable liability is not at liberty afterwards with a *bona fide* purchaser to deal with the thing which, in his hands, might be charged, but which, when once out of his hands, it is impossible that a Court of equity can ever reach so as to make the subject itself—the substance—liable for the nefarious transactions into which this man entered? I put that at the beginning, when Mr. Horton Smith opened the case to me. I felt the difficulty then, and it has not been in any degree removed, either by the arguments I have heard, or the authorities which have been quoted, or any observations which can be made upon it. It cannot be said that because a man commits a misdemeanour with relation to a certain estate, that the estate is thereby for ever bound. No case has been quoted that goes anything like that length. The equitable right and the equitable estate are distinguished in some of the cases which have been mentioned. *Stanhope v. Earl Verney*—an old case, but a case decided by one of the

most eminent Judges that this jurisdiction has possessed (1)—clearly makes a distinction between an equitable right, a personal obligation and a right which attaches itself to the land or to the substance of the thing which is the subject of the contract or transaction. I have heard no such case mentioned. There are a quantity of observations, some of them little better than commonplace, all of them highly interesting, all of them curious and entitled to great attention, but I have never heard that because a man commits a personal wrong, that he therefore deprives himself of all the right of dealing with property which is his, in favour of a subsequent purchaser.

Now that is the whole case before me. It has lasted hours and days, but that is the whole case, assuming that there was a representation made, of which the evidence is of the slightest kind possible—not a representation in fact, but a representation to be inferred from facts which are proved—that that is a representation which so deprives the owner of the equity of redemption, which is all that Dimsdale had, as that he cannot afterwards deal with that for value to a person who pays him or lends him money on the security of it.

What I have said about the plaintiff's claim applies with equal force, and perhaps with greater force, to that of Mr. Hemming's client, because that Moore, who evidently was an accomplice (who was brought up here, and intended to be examined, but counsel, in their discretion, did not think fit to examine him), was the instrument and agent of Dimsdale is plainly proved. It was proved by the deeds themselves, and it is proved, among other things, by that statutory declaration in which Dimsdale and Moore join in saying that Moore is only trustee, and that Dimsdale is the person beneficially entitled.

The plaintiff's case, in my opinion, fails in his attempt to fix the charge upon the mortgaged estate. That he has been robbed, signally cheated and injured nobody can for a moment dispute. But

(1) Decided in 1761 by the Earl of Northington, L.C.

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that he has a right to extend his charge to the estate in which Dimsdale was then the owner of the equity of redemption I can find no authority for saying, nor any principle on which it can be maintained.

That brings me to the third charge, against which I have not heard one word of exception. A man who is a money lender or banker, or whatever he is, is applied to to lend money, and he does so; it is not necessary to observe at an exorbitant rate of interest, because it may not be so unreasonable in the City of London as it seems to us here. He lends it first to Mr. Moore for a period, and at a later period Dimsdale appears. Dimsdale then avows himself to be the beneficial owner of the property, and adopts and confirms all that Moore had done, and contracts further obligations for himself. Upon Moore first procuring the loan he represented himself as the owner of the estate and produced the title-deeds, which deduced a very clear title to him, with the exception only of one deed. Mr. McStephens' solicitor very naturally said, "This is all very well as far as it goes, but how comes it to you?" Thereupon Mr. Waterhouse (Moore's solicitor) goes back to his chambers, or somewhere else, and returns with the deed executed by Holme, and transferring the legal estate to Moore. That made the chain of documentary evidence complete, and upon that the transaction was carried through. Mr. McStephens lent him money, and had and retains possession of the title-deeds. He had them on the terms of the memoranda which have been put in evidence, and besides them the statutory declaration which I have already referred to. Then if it be a true principle of the Court of equity that you cannot take from a purchaser, for valuable consideration without notice, anything which he has acquired, how can I say that the mortgage made to Mr. McStephens is not a mortgage first in point of rank in this estate.

The case is one of extreme difficulty. It has, as I say, occupied a very long time. The rights of the parties are quite clear in point of morals, and if Dimsdale was able to make good, I daresay the means might be found of his making

good, the wrong which he has done to each of these parties. That is not the case before me. The question I have to decide is, whether, by what took place in the year 1874, when Dimsdale stood by and saw the plaintiff lend his money, and afterwards in the same year, 1874, when Moore, the accomplice of Dimsdale, his agent, went through the sham mortgage in favour of Mr. Phillips, Mr. Hemming's client, there was a dealing which attached itself so as to make a burden on the estate, which neither Moore nor Dimsdale could ever deal with, and which, being dealt with to a purchaser for valuable consideration without notice, is to treated as a nullity.

In my opinion the plaintiff's claim fails. The claim of Mr. Phillips also fails—I mean to the extent of affixing any burden on the land. The claim of Messrs. McStephens I have heard no valid objection to, and therefore, in my opinion, they are first in the incumbrances upon this estate.

It is not necessary, I suppose, to carry it further, because there is not altogether enough to satisfy his debt.

There will be an order made on McStephens' counter-claim declaring them entitled to a charge on the estate for principal, interest and costs. I make no order as to the costs of this action, for I see no ground for imputing to the plaintiff negligence in the transaction. If I did that might influence my judgment on the point of costs. There will be liberty to apply.

Solicitors—Crowder, Anstie & Visard, for plaintiff;
W. H. Tattam, for Phillips; T. Durant, agent for
Payne & Galloway, Manchester, for McStephens.

[IN THE COURT OF APPEAL.]

JAMES, L.J.
COTTON, L.J. }
LUSH, L.J. } GATHERCOLE v. SMITH.
1881.
March 1.

Incumbents' Resignation Act, 1871 (34 & 35 Vict. c. 44), s. 10—Pension of Retired Clerk.

In an action brought by a retired clerk against his successor in the incumbency for payment by him out of the revenues of the vicarage of the arrears of the pension allowed under the provisions of the Incumbents' Resignation Act, 1871, the incumbent claimed to set off against such arrears a judgment debt previously due to him from the retired clerk:—Held (affirming the decision of JESSEL, M.R.), that no such right of set-off could be maintained.

This was an appeal from a judgment of JESSEL, M.R.

The plaintiff was the late incumbent of the vicarage of Chatteris, who had retired under the provisions of the Incumbents' Resignation Act, 1871, from the incumbency, as from the 6th of March, 1877, subject to the payment by half-yearly payments from the same date, out of the revenues of the benefice, of a yearly pension of 450*l*.

The defendant was his successor in the incumbency.

The pension having fallen into arrear, the plaintiff, in March, 1879, brought this action, claiming payment by the defendant of the arrears, out of the revenues of the vicarage. The defendant did not admit the claim, and delivered a counter-claim, in which he alleged that the plaintiff had, by a deed dated the 8th of August, 1845, mortgaged in fee the advowson of the parish church of Chatteris to one Hawkins to secure the repayment of 24,500*l*. advanced by Hawkins to the plaintiff, and interest, and that the plaintiff on the same day executed a warrant of attorney to confess judgment for that sum in favour of Hawkins; that Hawkins signed judgment in the Court of Queen's Bench on the 23rd of August, 1845, for the mortgage debt, interest and costs. This judgment debt was

now vested in the defendant and was still owing to him from the plaintiff, and the defendant now claimed to set off the amount of this judgment debt against the arrears of the pension claimed by the plaintiff.

It had been decided in the suit of

Hawkins v. Gathercole, 6 De Gex, M. & G. 1; 24 Law J. Rep. Chanc. 332,

that the judgment debt did not create a charge upon the benefice.

The defendant, on the 18th of September, 1877, had brought an action in the Common Pleas Division against the plaintiff upon this judgment debt, which was tried before Lord Coleridge alone, when he ordered a reference to ascertain the amount still due on the judgment.

The Master of the Rolls, on the 15th of June, 1880, gave judgment in favour of the plaintiff, and dismissed the defendant's claim with costs, holding that the object of this Act was to provide for retired incumbents an inalienable provision, and that it being an inalienable provision it was not possible to set off an antecedent obligation as against an accruing payment (1).

The defendant appealed.

Mr. Ince, Mr. Bompas and Mr. Smart, for the appellant, contended that although neither the pension itself nor any future accruing payments in respect thereof were assignable, yet that there was nothing to prevent the payments which had actually accrued due from being assigned, and referred to the judgment of Buller, J., in

Flarty v. Odium, 3 Term Rep. 681, 683,

and commented on

Lidderdale v. The Duke of Montrose, 4 Term Rep. 248;

Wells v. Foster, 8 Mee. & W. 149; 10 Law J. Rep. Exch. 216;

Stone v. Lidderdale, 2 Anst. 531.

(1) 34 & 35 Vict. c. 44. s. 10: "The pension so allowed shall be a charge upon the revenues of the benefice and shall be recoverable as a debt at law or in equity from the incumbent of the said benefice by the retired clerk, his executors, administrators or assigns, but such pension shall not be transferable at law or in equity."

Gathercole v. Smith, App.

The word "assigns" in the section must not be passed over, but must have some meaning attributed to it, and the whole section could be satisfied by the construction which it was desired to put upon it.

Mr. Chitty and Mr. W. W. Cooper, for the respondent, were not called upon.

JAMES, L.J.—I am of opinion that there is no ground for dissenting from the view which the Master of the Rolls has taken of the Act of Parliament. I think he is right in his construction of it. The words used in the section are very strong words. It does not say "shall not be assigned," but "shall not be transferable." "Transfer" is one of the widest terms that can be used. It appears to me to have been used not only to prevent the incumbent from assigning himself, but to prevent any transfer by operation of law *in invitum*—not only to prevent a voluntary dealing by an incumbent with an annuity, but also to prevent its involuntarily vesting in a trustee in bankruptcy, or being seized or attached under a garnishee order by an execution creditor, or otherwise transferred. If it is not transferable in that way, it cannot make any difference in substance that the person who seeks to say that he has got the right to it now is the person who has to pay the money. That is a mere accident. It does not interfere with the substance of this matter, and it must be treated as if somebody else had got this judgment, and he was seeking to enforce a garnishee order against the present incumbent to restrain payment to the retired incumbent. That would be entirely inconsistent with the object of the Act, which was to provide for the maintenance of a clergyman. He is allowed to withdraw from his incumbency with the consent of the bishop, and subject to such control as to the bishop or patron may seem right, by reason of his infirmity, of his age, or otherwise. One can see why that provision is introduced. Provision is made so that an aged clergyman resigning, and in many instances receiving a very small stipend (as is the case in nine-tenths of the cases in this country), may receive

the entire allowance during the remainder of his short or infirm life, and not be driven to spend the rest of his days in a workhouse, which would not be a very creditable result of such a section of the Act of Parliament. If we were to allow that which is now desired to be done, it would be to violate the very words of the Act, and to say that the provision made or intended to be made for the maintenance of this gentleman was transferred by operation of law and by the operation of a prior judgment to the prior judgment creditor. We cannot sanction such a transfer.

COTTON, L.J.—I also am of opinion that the decision of the Master of the Rolls is right. There is some difficulty in consequence of the wording of the 10th section, because it does say that this pension "shall be recoverable by the retired clerk, his executors, administrators or assigns." Then follow words which are clear and unambiguous. If the word "assigns" is necessarily inconsistent with the clear words that follow, I think that we ought to disregard it, although, of course, the general rule is that you must, if possible, give effect to every word. There may be a meaning to be given to the word "assigns," but it must be such as not to be inconsistent with the words which follow—"but such pension shall not be transferable at law or in equity." In my opinion the effect of that is this—while it is a pension, while it remains a charge upon a benefice, or suable for as a debt from the incumbent, it is that which the late incumbent cannot by any act of his own transfer, and so it cannot be transferred by operation of law to another by reason of that other having got a judgment or other process of law by which, if it were the absolute property of the debtor without any parliamentary fetter, the creditor could make himself master of the fund and say, "I am entitled to receive it."

That being so, I think it is clear that this defendant is not entitled by his counter-claim to defend himself by saying, "I have a claim against you, by means of which I am entitled to have a judgment to defeat that to which, under

Gathercole v. Smith, App.

the Act, you have a right, without any power on your part to transfer the right to receive it to any other person."

In my opinion, therefore, the decision of the Master of the Rolls is right.

LUSH, L.J.—I am of the same opinion. The Act allows an incumbent for the first time, if he be incapacitated by permanent mental or bodily infirmity from the due performance of his duties, if he has held the incumbency for a certain number of years, to retire from it with the consent of the bishop or patron, and, if the patron refuses his consent, with the consent of the archbishop, and to have a certain allowance out of the revenues of his living. The object of the Act, therefore, was that an incumbent should not be compelled to continue in a living when he was incapacitated from performing its duties, but should be able to retire and have a maintenance out of the revenues when the new parson is put in office. Then comes section 10, which says—[Reads it]. Now that clearly suggests to my mind the intention of the Legislature that neither should he be capable of assigning it himself to any other person nor be deprived of it by the act or operation of law—that is, that he should not do it directly or indirectly, by consenting to a judgment which would override it and become a permanent charge on it, so as to deprive him of the opportunity of receiving it, as it accrues half-yearly. The word "transferable" is of the widest possible import, and includes every means by which the property may be passed from one person to another.

The word "assigns" has occasioned some difficulty. I confess I do not see much difficulty in it myself, associated as it is with the words "executors or administrators;" and as at present advised, I do not see why the incumbent should not, after the payments had become due, assign them over to his butcher or baker, or anyone else, to recover the money for him. That, however, is not the question for us now to determine. The words "shall not be transferable at law or in equity" do say that he shall not be at liberty to incumber it either directly by an assignment, or indirectly by suffering a judg-

ment. Now here the person who proposes to set up this counter-claim cannot claim as assignee of the arrears. He claims under a judgment prior to the accrual of the arrears, and, if his contention is right, by virtue of a judgment which he contends amounts to an incumbrance or charge upon the pension which would have exhausted it during the whole of the incumbent's life. That would be to say that it has been transferred indirectly by the operation of law, and that would be entirely contrary to the object of the Act; and I therefore agree that the judgment of the Master of the Rolls is quite right.

Solicitors—Parkers, for appellant; Venn & Woodcock, for respondent.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.

JESSEL, M.R.

BAGGALLAY, L.J.

LUSH, L.J.

1881.

June 23.

In re JONES;
ex parte JONES.

Infants—Adjudication in Bankruptcy—Trade Debts—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 6 and 125. sub-s. 12.

An infant who had carried on business, and become indebted for goods supplied in the course of such trading, filed a petition for liquidation, but no resolutions were passed, and the liquidation proceedings fell through. Subsequently alleged trade creditors filed a petition for adjudication in bankruptcy against him, and the County Court Judge adjudicated him a bankrupt. The infant had not represented himself to be an adult:—Held (reversing the judgment of the Chief Judge, who had affirmed the County Court Judge), that the infant did not by merely trading constitute himself a debtor; that by taking the step, which only an adult trader could take, of presenting a liquidation petition, he did not alter his status or give the Court jurisdiction under section 125, sub-s. 12, of the

In re Jones; ex parte Jones (App.), Bankr.
Bankruptcy Act to adjudicate him bankrupt.

In re Lynch; ex parte Lynch (45 Law J. Rep. Bankr. 48; Law Rep. 2 Ch. D. 227), overruled.

To create an equitable liability in an infant to pay, on the ground of fraud, it is necessary to prove express representations by him that he was of age and that they were reasonably believed in and relied on by the person to whom they were made.

William Jones carried on business in Birmingham as a coal, coke, breeze, timber and scrap-iron dealer under the style of W. & S. Jones.

Being in difficulties in February, 1881, he filed a petition for liquidation, and a first meeting of the creditors was held, but no resolutions were passed and the liquidation proceedings fell through. At the date of the present application W. Jones was an infant under twenty years.

Thereupon the mayor, aldermen and burgesses of the borough of Birmingham, who alleged themselves to be creditors for coke and breeze supplied to the infant in the course of his trade, on the 22nd of March filed a petition in the County Court of Staffordshire, holden at Oldbury, for an adjudication in bankruptcy against him, and an order was made on the 8th of April adjudging him a bankrupt.

W. Jones appealed to the Chief Judge, who, by an order dated the 4th of May, affirmed the order of the County Court Judge.

The bankrupt appealed.

It was admitted that the infant had not represented himself to be an adult, but he looked older than he really was.

Mr. E. O. Willis, for the appellant.—The appellant is still an infant. The goods supplied for which the alleged debt is due were not necessities, and no action could be maintained at law; and there has been here no holding out as an adult, therefore none of the cases which have been decided in equity upon the ground of fraudulent express misrepresentations can apply. Nor can the fact that he filed a liquidation petition amount to an estoppel.

The Chief Judge has acted on the authority of

In re Lynch (ubi supra),

but in that case, if it can be maintained, the alleged debtor was of age at the date of the presentation of the petition of bankruptcy. Besides, in

Miller v. Blankley, 38 Law Times, N.S. 527,

that case was not followed by *Grove, J.*, and *Lindley, J.*

He also referred to

Ex parte Kibble; in re Onslow, 44 Law J. Rep. Bankr. 63; Law Rep. 10 Chanc. 373.

[*LUSH, L.J.*, referred to

The Queen v. Wilson, 49 Law J. Rep. M.C. 13; Law Rep. 5 Q.B. D. 28.]

Mr. De Gex and *Mr. Finlay Knight*, for the respondent.—This is a debt due either at law or in equity. There has been such a representation here by the infant, by trading and obtaining goods, as to constitute if not a debt at law a liability in equity, which even under the old bankruptcy laws was provable, and is still more so now when a liability is provable—

Ex parte The Unity Joint-Stock Mutual Banking Association; in re King, 3 De Gex & J. 63; 27 Law J. Rep. Bankr. 33.

In the case of

Ex parte Watson, 16 Ves. 265,

upon a petition by a bankrupt for an order to supersede his commission, on the ground of infancy, when it issued, Lord Eldon refused to make an order, the petitioner having made and contracted debts as an adult. See also

Kirton v. Elliott, 2 Bulst. 69; 1 Brown. 120; *sub nom. Kettle v. Eliot*, 1 Roll. Enfants, 731.

That case has been reviewed in

Blake v. Concannon, 4 Ir. Rep. C.L. 323.

[*JESSEL, M.R.*—The case is better reported in

Oro. Jac. 320,

under the name of *Ketsey's Case*, from which it appears that the infant had continued his occupation after attaining twenty-one, and the action was brought after his attaining majority. A lease to an infant is only voidable, not void.]

Then the appellant has estopped himself by filing a petition for liquidation. He cannot claim the protection of the Court, and at the same time deny its juris-

In re Jones; ex parte Jones (App.), Bankr.

diction. Besides, having once instituted these proceedings, the Court can then, under the 126th section of the Bankruptcy Act, adjudicate him a bankrupt without any further proceedings being taken—

Ex parte Charlton; in re Charlton,
46 Law J. Rep. Bankr. 110; Law
Rep. 6 Ch. D. 45.

They also referred to

Nelson v. Stocker, 4 De Gex & J.
458; 27 Law J. Rep. Chanc. 760;
Ohubb v. Griffiths, 35 Beav. 127.

JESSEL, M.R.—This is an appeal from a decision of the Chief Judge affirming a decision of the County Court Judge—the latter decision arising thus: The County Court Judge thought himself bound, and was bound, by the case of *Ex parte Lynch*, and the present case is rather an amplification of that case than a new decision.

The facts are few and simple. The appellant is a young man, still under the age of twenty-one years, who apparently some time ago married a widow who had carried on business in Birmingham; and he, after the marriage, continued the business. In the course of his trading he bought a quantity of breeze from the respondent, for which he has not paid. He presented a petition to the County Court for liquidation of his affairs by arrangement, and obtained an injunction restraining an action by an alleged creditor for a sum of money alleged to be due to him. The liquidation proceedings, however, fell through, and no resolutions were passed. Thereupon the corporation of Birmingham presented a petition for adjudication in bankruptcy against the infant on the ground that he was indebted to them on trade debts, and had committed an act of bankruptcy. The adjudication was made, and this is an appeal against that adjudication.

On the first point, is the infant liable at all to these creditors? If he is not a debtor he is not a person who can present a petition, nor can he be made a bankrupt. How is it made out that he is a debtor? It is not suggested that breeze was a necessary. Therefore there is no common law liability, because he could not contract a debt except for necessities.

The fact that he had the breeze is not material in the view of our law on the subject. If people choose to supply goods to an infant they take the chance of payment. Such is the law; and I do not think there is any absurdity or hardship in that, or that it ought to be altered. But it is suggested that there is an exception to that law on equitable doctrines, when the infant has committed a fraud, as when he has stated that he is of age with a view to obtain possession of the goods, and in those cases the Court has taken into consideration the appearance of the infant, because that is a material part of the evidence in the case. If the infant were a boy of ten years old, the creditor could not have relied on his representation, but when the infant is a grown man and appears to be of full age, and makes a statement that he is of full age, the creditors may well be deceived, and as the infant can commit a crime, he can commit frauds in equity, and under such circumstances becomes liable. But it is required that there should be an express representation, and such as to deceive the person to whom it is made. In such cases it has been decided that if after attaining age the person who has made the representation becomes bankrupt, the person defrauded can prove in the bankruptcy for the equitable liability resulting from the fraud. It is difficult to see how those decisions become established, because at the time when they were given the only things that were provable were debts and not liabilities; but it is clear now that they would be, because liabilities are under the present Act provable.

But there is no decision which says that this liability is a legal debt. I use the word "legal" advisedly, because an inaccurate phrase has crept into the books, namely, an equitable debt—that is, one which is not really a debt at all, but a liability to pay a sum of money—a liability arising from equitable considerations. But, whatever you call it, it is not a debt, and wherever a debt is by law required on which to found proceedings, there an equitable liability will not be enough. I have said so much because I do not want to be supposed to throw any doubt upon those cases.

In re Jones ; ex parte Jones (App.), Bankr.

But there is nothing of that kind here, and that is the first answer to the whole case. It being admitted that the infant made no express representation here, the respondents are driven to argue on this—that if a person being an infant, but whose appearance is such that you would not necessarily know him to be an infant, simply carries on trade, without any express representation that he is an adult, but buys and sells goods, that of itself amounts to a fraudulent representation.

Now the first observation is this—you must not invent frauds. There is nothing illegal in an infant's carrying on trade, nor anything improper. Thousands of infants do carry on business. A man dealing with an infant trusts to his honour to repay him, or to the infant finding it to his advantage to continue to carry on the trade, and a man's carrying on trade by itself is no express representation at all. That this is so is clear from the judgment of Lord Justice Knight-Bruce in the case of *The Unity Joint-Stock Mutual Banking Association*, where that Judge founds his decision on express representations, although he does also refer to the appearance of the infant and the way of carrying on the trade under these circumstances. But there is no pretence for saying in the present case that the infant is a debtor, or that any action could be maintained.

But it is suggested that the mere fact of having obtained the goods is enough ; but that would be wholly to destroy the protection afforded by the law. There is no ground for the suggestion that the infant is liable in any way. Further, there is no evidence that he owes any debts at all. Mr. De Gex suggests that he may owe debts for necessities, but you have no right to call a man a debtor without some evidence. Therefore, not being a debtor, he cannot be adjudicated a bankrupt.

But it is said that, under the 12th subsection of the 125th section, the Court has power to adjudicate a liquidating debtor a bankrupt, when the proceedings cannot be otherwise properly carried on ; but in the first place the Court must have a debtor before it—it cannot adjudicate bankrupt a man who is not a debtor

and has no debts—and in the next place the Court can only be put in motion by a creditor or a person with a right to intervene ; a mere stranger cannot come in and ask the Court to adjudicate a man bankrupt under this section. Therefore the liquidation proceedings do not give jurisdiction. You must shew the right to intervene, and if the respondents here have no right they cannot set the Court in motion.

It is not right to part with the case without saying that I respectfully but entirely dissent from the decision in the case of *Ex parte Lynch*, which must now be considered as overruled. I cannot agree with the propositions laid down there by the Chief Judge. In the first place, I am not aware that it is a well-settled rule of law that "if an infant has been held out and dealt with as a trader he can be made a bankrupt in respect of a trade debt." In my opinion the rule is settled the other way. In the second place, I do not agree in thinking that the Infants Relief Act has not made any difference with regard to this. The words of the Act are perfectly general for every purpose with the exception mentioned in the 1st section, and cannot be restricted so as not to apply to trade debts. Whatever may have been the motive of the Legislature in passing the statute, the words are of universal application. Then the last reason given by the Vice-Chancellor, namely, that by filing a liquidation petition the bankrupt adopted a proceeding which an infant could not lawfully take, and has clearly held himself out as an adult trader. That appears an inadequate and insufficient reason. The infant, by filing a liquidation petition, does not attain twenty-one years. (We are dealing with a man who is at the present time under twenty-one.) He cannot, by filing such a petition, obtain the advantages or entail upon himself the liabilities of such a proceeding. He does not make himself an adult trader, and by adopting that which is only possible in the case of an adult trader, he does not make himself an adult trader. He cannot alter his status by so doing. All the reasons failing, the decision fails. On these grounds the appeal must be allowed, and the order for adjudication reversed.

In re Jones; ex parte Jones (App.), Bankr.

BAGGALLAY, L.J.—On the 8th of April, 1881, an adjudication in bankruptcy was made against the present appellant on a petition presented on the 2nd of May. The petition described the alleged bankrupt as a trader, and the petitioning creditors were the corporation of Birmingham, who alleged that he was indebted to them for coal and breeze supplied by them to him. If there was nothing more in the case than the statement in petition, and that statement was met by the allegation of the infant that he was an infant, it could not for a moment be argued that the adjudication could stand. But reliance has been placed on the cases of *The Unity Joint-Stock Mutual Banking Association* and *Ex parte Lynch*. As regards the latter case, I cannot assent to the language of the Chief Judge. If his words, "This infant has traded, and in my opinion that was a clear holding out to the world that he was of full age and capable of contracting debts," are to bear their ordinary meaning I must respectfully dissent. How far a direct misrepresentation as to his being of full age may affect the question is another consideration, and I do not express any opinion that his act of misconduct can free him from liability of bankruptcy.

But no such case is made here. All that is alleged here is that he did not declare to the persons with whom he was dealing that he was an infant.

But in the case of *The Unity Joint-Stock Mutual Banking Association* there was an express misrepresentation, and that was not a case of an order for adjudication, but of a proof under an adjudication. It is stated in the judgment that the bankrupt represented himself as being twenty-two years of age at the time of the making of the loan; therefore, to my mind, the case is no authority whatever for supporting an adjudication if based on strictly bankruptcy proceedings.

But it is said that the presentation by the infant of a petition for liquidation makes a difference. It appears that this infant presented a petition for liquidation on the 14th of February, alleging that he was trading under the firm and style of W. & S. Jones, and by his statement of

affairs alleging debts and assets. A first meeting was held, but no resolutions were passed by reason of their not being approved by a proper majority, and the liquidation proceedings fell through.

Then the case of *Ex parte Charlton* was referred to for the proposition that where there is a difficulty in proving the debt of the petitioning creditor or the commission of an act of bankruptcy, you are relieved from the necessity of proving them if the debtor has previously filed a liquidation petition.

In *Ex parte Charlton* there had been liquidation resolutions passed and confirmed, and the debtors had failed to perform their engagements, and on a petition presented by a man who was really a creditor in the ordinary form, the debtor being of full age, it was decided that that was a proceeding under the 12th sub-section of the 125th section, and that it was not necessary that the act of bankruptcy should have happened within the six months. It did not decide that it was not necessary to have a petitioning creditor's debt.

The Chief Judge has acted on his own decision in *Ex parte Lynch*. I entirely concur with what the Master of the Rolls has said with regard to that case. I cannot assent to much of what the Chief Judge said or to his conclusion. We come back to this, that there is no debt proved to be owing to the person on whose application the adjudication in bankruptcy has been made. This appeal must be allowed.

LUSH, L.J.—The objection to the adjudication here is that there is no good petitioning creditor's debt. The alleged bankrupt is an infant. The article supplied, for which the alleged debt was contracted, is not a necessary for which an action is possible, but the debt is for the supply of goods to an infant for trading purposes—an alleged trading debt. Now the Legislature has said, although a person under twenty-one does no wrong by trading, he is not liable to pay trade debts. The protection of infancy is an answer to the claim of any person who has supplied him with goods for the purpose of trading. Now the debt of the petitioning creditor must, as

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defined by the 6th section of the Bankruptcy Act, be "a liquidated sum due at law or in equity." At the time when the Act passed a liability in equity was not a debt. A decree against a defaulting trustee for breach of trust constituted a liability which was not enforceable at law. It was a liability enforceable, it is true, but only in the Court which created the liability. There was, therefore, a distinction between a liability at law and in equity. That distinction has been abolished by the Judicature Acts; but I am speaking of the state of the law when the Act passed. Here there was clearly no debt due at law—no action could be brought at law on that debt.

If the infant had by express representations committed a fraud, that would have constituted a liability in equity which the Court (of equity) could enforce; and there being no difference now between the divisions, would be enforced by a Court of law.

Mr. De Gex says that the infant by carrying on trade had made that misrepresentation. I dissent to that statement. The representation must to constitute this liability have been an express misrepresentation. There is nothing here at all like that. He only carried on trade, and he did nothing illegal in carrying on trade, though he would have acted improperly if he had been asked whether he was of age and had said he was. That state of things does not occur here. It is a simple case of liability or no liability at law. There is no pretence of any liability in equity as distinguished from a liability at law.

Mr. De Gex made use of a further argument, that the infant here has estopped himself from setting up his infancy, because he began proceedings by filing a petition for liquidation, and in that petition stated (as he was bound to do) that he was unable to pay his just debts, and that he therefore admitted the present debt and he could not dispute the adjudication.

There, again, I differ from the Chief Judge. The 125th section is still dealing with debtors and creditors. The 12th sub-section provides as follows—[Reads]. The Court in this case did not proceed

under that clause. Then the liquidation proceedings were dropped, and we are now considering an independent petition for adjudication in bankruptcy founded on the act of bankruptcy committed by filing the liquidation petition. How the liquidation petition altered the infant's status I cannot see, and in my opinion he could have taken the objection of infancy at any stage. The Court would not have altered his status, because this clause, as well as the 6th section, has regard to legal debts—debts, that is to say, enforceable either at law or in equity. Therefore the liquidation petition makes no difference in his status.

An infant cannot by any false pleading, or by a mis-take in pleading, prejudice his position as an infant. There is no ground on which we can say that this adjudication can stand. This conclusion involves the reversal of *Ex parte Lynch*. It is impossible that that decision can stand when we consider the law on the subject. But more than that, not only has this point been in fact decided in *Ex parte Kibble*, but also in *The Queen v. Wilson*. In the latter case a prisoner was tried on an indictment under the Debtors Act charging him with having feloniously quitted England taking with him money to the amount of 20*l.* and upwards, which ought by law to have been divided amongst his creditors, with intent to defraud. He was within four months of his so quitting England adjudicated bankrupt, and the debts proved against his estate in his bankruptcy were trade debts only. It was proved on the trial that the prisoner was at the time of the adjudication of bankruptcy a minor. The jury convicted the prisoner, but the point of law was reserved whether under the circumstances he ought to have been so convicted. The question was heard before five Judges, who unanimously quashed the conviction, on the ground that being an infant he had no creditors. On that ground also I am of opinion that this adjudication cannot stand.

Solicitors—Swann & Co., agents for Jackson & Sharpe, West Bromwich, for appellant; Sharpe, Parkers & Co., agents for the Town Clerk of Birmingham, for respondent.

JESSEL, M.R. } In re PIGOTT and THE
1881. } GREAT WESTERN RAILWAY
May 2. } COMPANY.

Railway Company—Purchase under Lands Clauses Consolidation Act, 1845—Sections 75 and 85—Interest.

A railway company purchasing land under its statutory powers must pay interest on the purchase-money from the time when a good title is shown to the land.

By a settlement, made in 1843, certain hereditaments were granted to the use of John H. W. P. S. Pigott and his assigns, for his life, with remainder to Thomas Platt and John Baker, to preserve contingent remainders, with divers remainders over, and by the same settlement it was declared that it should be lawful for the trustees during the lifetime of John H. W. P. S. Pigott, and with his consent in writing, to exercise the powers of sale therein contained. Edward F. S. Pigott and S. E. Baker were subsequently appointed trustees of the settlement in the place of Platt and John Baker, but no estate in the lands was ever vested in the trustees.

The estate-for-life of John H. W. P. S. Pigott in the lands was some years ago vested in R. L. Jones on certain trusts.

Under the Bristol and Exeter Railway Act, 1875, the Bristol and Exeter Railway Company (whose rights afterwards became vested by amalgamation in the Great Western Railway Company) gave, in 1876, to Edward F. S. Pigott and S. E. Baker, as trustees of the settlement, notice to treat for the sale to the company of some of the lands subject to the settlement. On the same day the company gave a separate notice to treat to John H. W. P. S. Pigott and R. L. Jones, who, pursuant to the Lands Clauses Consolidation Act, sent in their claim to the company, stating therein that they were tenants-for-life of the property in question. The trustees did not send in any claim to the company, and the amount to be paid by the company was ascertained by an arbitration made between John H. W. P. S. Pigott and R. L. Jones and the company

alone, the trustees taking no part in the matter. The amount awarded by the arbitrator was 2,000*l*.

In September, 1879, a draft conveyance, expressed to be made by the trustees under their power of sale with the concurrence of John H. W. P. S. Pigott and R. L. Jones, was sent by the company to the vendors but was returned not approved of. Some correspondence ensued between the parties—the vendors, who remained in possession, claiming interest on the purchase-money as from the date of the award, on giving credit for the rents and profits from the same date; the company, on the other hand, offering to pay the purchase-money on being let into possession of the property, but denying that any interest was payable. The company also claimed to be entitled to a conveyance from the trustees, whereas John H. W. P. S. Pigott asserted that he had never given his consent to a sale in this form, and submitted that the completion ought not to be carried out otherwise than in pursuance of the claim sent in by him and Jones—namely, as a sale by a tenant-for-life under the Lands Clauses Consolidation Act, 1845, and so that the purchase and compensation-money might be paid into the bank pursuant to the Act.

In order to obtain the decision of the Court a vendor and purchaser summons was taken out and adjourned into Court, and the above facts embodied in an agreed statement by all parties.

Mr. Davey and Mr. Medd, for the company.—The company is not bound to pay interest. In the case of

Bidder v. The North Staffordshire Railway Company, Law Rep. 4 Q.B. D. 412,

Bramwell, L.J., said, "The arbitrator . . . only finds what is the proper amount of compensation, which does not become due until the claimant has done his part—that is to say, has executed a conveyance." If the purchase-money is not due there can be no interest due in respect of non-payment of it. Moreover, the ordinary rules as to interest on purchase-money do not apply to a statutory purchase. The 75th section of the Lands

In re Pigott.

Clauses Consolidation Act, in providing for payment of the purchase-money, is entirely silent on the subject of interest, which, therefore, must be taken to be excluded by it. Where interest is intended to be given to the vendor it is expressly provided for, as in the 85th section of the same Act.

Again, we are entitled to a conveyance from the trustees, and are not bound to take possession of the property until the vendors are willing to give us such a conveyance. Consequently interest is not payable under any circumstances.

They referred to

Jones v. Mudd, 4 Russ. 118;

Dart's Vendor and Purchaser (5th ed.) p. 630.

Mr. Bagshawe and Mr. B. Eyre, for the vendors.—Interest runs as from the date of the award. From the moment of the notice to treat there is a binding contract enforceable in equity, and the company, unlike an ordinary purchaser, can never be prevented by difficulties in the title from safely taking possession of the property. At any rate, interest runs from the time when a good title was shewn.

The company have all along treated this as a sale by the tenant-for-life under the Lands Clauses Consolidation Act, and cannot now set up a demand for a conveyance by the trustees.

They cited

The Regent's Canal Company v. Ware,
23 Beav. 575; 26 Law J. Rep.
Chanc. 566;

Catling v. The Great Northern Railway Company, 18 W.R. 121;

Rhys v. The Dare Valley Railway Company, Law Rep. 19 Eq. 93;

In re The Eccleshill Local Board, 49
Law J. Rep. Chanc. 214; Law
Rep. 13 Ch. D. 365.

Mr. Davey, in reply.

THE MASTER OF THE ROLLS.—There are two questions in this case, and I will deal with the second question first. The second question is, whether the Great Western Railway Company were entitled to have a conveyance under a power of sale executed by trustees. They gave notice to treat both to the trustees and to the tenant-for-life, but the proceedings

went on on behalf of the tenant-for-life. There was a reference to arbitration, to which the trustees were not parties, and an award finding the amount of the purchase-money under the Lands Clauses Consolidation Act; and then, of course, the sale became a sale merely by the tenant-for-life under the powers of that Act, and consequently, as he could make a conveyance as tenant-for-life, the trustees were not bound to convey. On that point it is clear the railway company were wrong.

The first point is one of far more general importance, and it raises a question of interest. Now I must, first of all, consider the course of decision. The course of decision has been that after notice to treat has been given and the price has not been paid, there is a contract enforceable in a Court of equity, and you can have an action for specific performance. Not only can the vendor have an action for specific performance, but it has been decided that a railway company can. There are cases in the books where companies, more than once, have instituted actions for specific performance, or, rather, filed bills and got decrees, and the case of *The Regent's Canal Company v. Ware*, cited in the course of the argument, is an instance in point. That being so, I take it, unless you find some statutory enactment in the way, all the ordinary rules in an action for specific performance apply. Consequently, where the vendor has shewn a good title, there, as stated on page 630 of the last edition of *Mr. Dart's book*, the purchaser pays interest from the time at which he might prudently have taken possession, supposing it to have been offered him—that is, at the time when a good title is shewn. Now that answers, as it appears to me, every objection on the part of the vendors. It is said they cannot cultivate their land properly, or let it properly, with this contract hanging to them. That would be the case with any contract of sale into which a vendor chooses to enter. Of course, if he once enters into a contract for sale, all those inconveniences follow. Then it is said a vendor to a company is rather worse off, because he has a contract, so to say, forced on him. Still, if

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it is a contract, it must be a contract of which he can get specific performance; and although it was originally, so to say, made against his will, it has now become a contract enforceable in the ordinary way, and, therefore, all the consequences of that contract will follow; and I suppose the Legislature took good care of him, as regards compensation and as regards costs and otherwise, to make amends for any compulsory sale of the land being forced upon him. It appears to me, therefore, that, subject to the question as to the statute, the ordinary rule as to vendors and purchasers supplies every possible remedy that is required. It is suggested that in the ordinary case a man can, if he likes, say, "I will not sell, unless you fix a day for completion." That is only a variation of the same argument, that in the ordinary case he is at liberty not to enter into a contract. If the Legislature thought fit to say every contract should be deemed to have a time of completion after so many months' notice, it would have said so. It has not said so, and it appears to me it has left it to the ordinary laws.

The only other point I have to examine is this: Is there, as contended for on the part of the railway company, a statutory enactment that the company is not to be in the position of an ordinary purchaser? This would be very remarkable, because, though the vendor may be willing (the purchaser always is willing), the notice to treat is the actual exercise of an option on the part of the purchaser. The company gives the notice to treat because it wants the land; the purchaser is therefore willing, and it would be an extraordinary thing if the Legislature had said on behalf of such a purchaser as that that he should be under a less obligation as regards the payment of interest than the ordinary purchaser. I see no reason for assuming that the Legislature would have so enacted. That does not, of course, decide the question whether there is such an enactment or not, which must depend on the words of the statute. Now, it is not contended that there is any such enactment in words; but I am asked to infer it from certain other provisions which are to be found in the Act of Par-

liament. When you are asked to infer a thing, I think the argument of reasonableness has and ought to have very great weight. What has sometimes been called the argument of common justice ought to have great weight, and you are not to infer an alteration of the general law if that alteration be against common justice. It would require very strong words. I say so, because that must be taken into consideration in reading those enactments. Now, the enactment which is relied on is simply this: there are certain provisions as to ascertaining the purchase-money, and under those provisions the company is liable, as a general rule, to pay the costs of ascertaining the amount of purchase-money. There are some slight exceptions, but as a rule the company is liable to pay the costs.

Then, after the purchase-money is ascertained, the 75th section says, "Upon deposit in the bank, in manner hereinbefore provided, of the purchase-money or compensation agreed or awarded to be paid in respect of any lands purchased or taken by the promoters of the undertaking under the provisions of this or the special Act, or any Act incorporated therewith, the owner of such lands, including in such term all parties by this Act enabled to sell or convey lands, shall, when required so to do by the promoters of the undertaking, duly convey such lands to the promoters of the undertaking, or as they shall direct; and in default thereof, or if he fail to adduce a good title to such lands to their satisfaction, it shall be lawful for the promoters of the undertaking, if they think fit, to execute a deed-poll," and vest the lands in themselves, and thereupon all the estate and interest in such lands shall vest in the company as against all parties therein named.

Now, no doubt, in the ordinary course, where interest is payable, the vendor is not bound to convey till his purchase-money and interest thereon is paid to him; but the mere fact of his conveying without the payment of the interest would not deprive him of the interest, and in some cases, as we know, he has got interest even after the conveyance. Therefore it is not conclusive that, because on

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payment the man is bound to convey, he therefore loses the interest when he is entitled to it. There is another section which has been relied upon, which appears to me to rather confirm that view. Under the 85th section, if the railway company want to take possession before the purchase-money has been agreed upon, they may do so upon depositing the value and giving a bond, and the bond is to be for the purchase-money or compensation, together with interest thereon at the rate of five per cent. per annum from the time of entering on the lands. Mr. Davey said you find there a provision as to interest. So you do; but it is a simple provision for interest—that is, it is only secured by a bond, and it does not enact you shall pay interest, but give a bond for the payment (which, of course, would only be a liability under the bond), and interest at the rate of five per cent., the ordinary rule of equity only giving four per cent. So there was a reason for the enactment. But it appears to me that, notwithstanding that under the 75th section the vendor must convey without receiving his interest, he is still entitled to enforce it under his bond. Therefore, that shews at once that the 75th section does not exclude interest, merely because he is bound to convey; and that being so, I think it is plain that as this does not exclude him in that one case, it must not be held to exclude him in every other case. The mere fact, therefore, of a conveyance being required on the payment of the purchase-money, without saying payment of interest (if any), does not, to my mind, preclude the application of the general law as to the liability to pay interest in a proper case, and to receive the rents; and it does appear to me that to decide otherwise would be to commit something like a great injustice, because after these notices have been received the owner of the land can no longer deal with it in the same way as if there were no notice—he cannot either improve it, or let it, or deal with it at all satisfactorily, and he can only rely on his compelling the railway company to complete. Now, it has always been said that if you can compel a thing to be done by action, it never can depend on the mere bring-

ing of the action. The action does not create rights, it only enforces rights previously existing, and if, therefore, you can have an action for specific performance under the ordinary rules as to specific performance, you must be entitled to the benefit of those rules which govern specific performance independently of bringing an action for the purpose; otherwise wilful delay on the part of the company, the voluntary purchaser, in taking possession for a very great number of years, would inflict a serious injury on the owner, without his being able to compensate himself, because he could not get his full amount of rents, not being able to let the land in the ordinary way. It seems to me that the statutory enactment does not exclude the application of the ordinary law, and therefore I decide that the vendor is entitled to interest in accordance with that law.

There have been some cases cited, but they do not appear to me to have any direct bearing on the subject. The cases rather assume that this is the law than decide it; but there is certainly one case—*The Regent's Canal Company v. Ware*—where the company was plaintiff, and the title having been accepted before the amount was ascertained, interest was given by the award. The cases, as I said before, seem rather to assume that interest is payable. There is another, before Vice-Chancellor Bacon, where he adverted to the fact of the verdict of the jury being given, and he held interest to arise from that moment. I am quite unable to understand the principle on which that case proceeded. I am not embarrassed about it, because I have no verdict of a jury to deal with in this case; but I am free to confess that, if I had the case to deal with, I should not have been able to decide it otherwise than I have decided the one before me.

Solicitors—R. R. Nelson, for the company; Merediths, Roberts & Mills, agents for Bakers, Phillott & Co., Weston-super-Mare, for the vendors.

KAY, J.
1881.
June 29, 30. } PAWSEY v. ARMSTRONG.
July 4.

Partnership—Sharing Profit and Loss—Denial of Partnership—Dissolution—Right to Goodwill—Claim by former Servant to be Partner—Sale of Business—Mode of Sale.

An agreement to share the profit and loss of a business entitles each party as against the other to the general rights of a partner, including an interest in the goodwill; and the agreement would have this legal effect notwithstanding a stipulation that the parties should not be partners.

Where a former servant claims to be a partner, his case must be made out by strong evidence.

Where the premises at which a partnership business was carried on belonged to one partner exclusively, the Court in directing a sale of the business in an action between the partners for dissolution, ordered the sale to be conducted by an independent firm of solicitors with liberty to either partner to bid.

The plaintiff sought by this action a declaration that he was a partner with the defendant, George Armstrong, and a dissolution of the partnership and auxiliary relief.

The plaintiff, who had been a clerk with the defendant's former firm of Nicholay, Graham & Armstrong, after the dissolution of that firm remained with the defendant (who had taken over the business) upon an agreement come to in June, 1869, that profits and losses should be shared in the proportion of four-fifths to the defendant and one-fifth to the plaintiff; the defendant stipulating that the mills at which the business was carried on should remain his sole property. The plaintiff paid in 210*l.* in 1869, and 1,500*l.* in 1871. In June, 1873, the interests of the parties were varied, the plaintiff taking one-fourth of the profit and of the loss, instead of one-fifth. In 1878 the defendant required all bills of exchange to be drawn or indorsed by the firm to be brought to himself for signature; and this was thenceforth done. The

defendant throughout drew all cheques on account of the business.

In 1871 a lease of an adjacent wharf and property was taken in the name of the defendant for the purposes of the business, and works and buildings were erected thereon. The plaintiff alleged that these premises belonged to the firm, and also sought to establish a charge on the mills belonging to the defendant in respect of outlay upon them of partnership moneys.

The defendant having required the plaintiff to cease using the signature of the firm, and advertised in a newspaper that he would not be liable for contracts entered into by the plaintiff in the firm's name, this action was brought.

The defendant denied that the plaintiff had ever been his partner, and alleged that the moneys brought in by the plaintiff were merely deposited at interest. He also alleged that it was stipulated, when the arrangement for sharing profit and loss was made, that this should not be construed as admitting the plaintiff into partnership.

Evidence was gone into at the trial, the result of which, so far as material, appears in the judgment.

Mr. Rigby and Mr. Northmore Lawrence, for the plaintiff.

Mr. Napier Higgins and Mr. Hornell, for the defendant.—The plaintiff cannot have a right to wind up the concern unless he is an ordinary partner. Sharing profits does not make him so—

Ex parte Tennant; in re Howard, Law Rep. 6 Ch. D. 303.

Nor should an agreement to share losses also be conclusive; for that is *prima facie* implied in the right to share profits—

Lindley on Partnership, 3rd ed. p. 20; 4th ed. p. 19,

citing

Greenham v. Gray, 4 Ir. Com. Law Rep. 501,

and two other cases. The true test of an ordinary partnership is the relation of agent on the part of each partner to the firm—

Pooley v. Driver, 46 Law J. Rep. Chanc. 466; Law Rep. 5 Ch. D. 458;

Pawsey v. Armstrong.

Lindley, p. 2, approving of Mr. Dixon's definition of partnership. That relation is excluded here by the agreement of the parties, evidenced by their course of dealing. The plaintiff never had power to bind the firm. The question of partnership depends not on any arbitrary presumptions of law, but on the real contract of the parties—

Mollwo, March & Co. v. The Court of Wards, Law Rep. 4 P.C. 419.

If the plaintiff was a partner he is entitled to no part of the capital, and should only have an enquiry granted as in

Burdon v. Barkus, 4 De Gex, F. & J. 229; 31 Law J. Rep. Chanc. 521.

KAY, J.—The plaintiff, Mr. Arthur Pawsey, has brought this action stating that in 1861 he entered the service of Nicholay, Graham & Armstrong as a salaried clerk, and so continued till the dissolution of that firm in December, 1868, when the business was taken over by the defendant; that the defendant offered to take the plaintiff into partnership, which he accepted, and they became partners, originally in the proportion of four-fifths and one-fifth, and later of three-fourths and one-fourth. A considerable quantity of evidence was produced on both sides, which I do not intend to examine closely. It is the common case that Mr. Pawsey's share was a share in the profit and loss of the concern. I have asked for any authority to shew that when persons agree to divide profit and loss in certain shares they can be anything else than partners. Mr. Pawsey's case is that he was a partner; the defendant's case is that he was not, but was to share profit and loss. I am of opinion that the agreement to share profit and loss is conclusive between the persons agreeing on the question of partnership; and that it is not open for one of them to say there is no partnership, any more than it would be open, after a valid ceremony of marriage had been gone through, for the husband or the wife to say that was not a marriage, because he or she after the ceremony had uttered the words, "We are not married;" or, to use another illustration, any more than

a man, in whose name 1,000*l.* had been invested for the purpose of his taking the dividends and paying them over to another, could stipulate that he should not be a trustee. If certain legal relations are established, it is idle for people to affect to stipulate that the legal consequences of those relations shall not follow. If, therefore, I considered that any such stipulation had been proved in this case, I should not attend to it; but I have here evidence on one side that there was no such stipulation, and on the other side one witness only affirms that there was. I confess that I have been reluctant to adopt the conclusion which I have come to, because it is very necessary when a former servant of a business claims to have become a partner with his master, that the burden of proof should be laid strongly on the claimant. If authority were wanted for that proposition, it is entirely justified by the case of *Naylor v. Farrer* (1) before the Court of Appeal. That was a case of remuneration out of profits; and although an agreement to share profits *prima facie* raises the relation of partnership, the Court there canvassed the evidence closely, and concluded that there was no partnership. That case wanted the element of sharing losses, which is present here, and which, as I have reluctantly admitted, makes the persons partners.

What then are the conclusions on the whole case? First, it is clear that at the date of the partnership the whole of the capital sunk in the business, every item of plant, mills, buildings, &c., belonged to Mr. Armstrong. As to the mills and buildings, it is agreed that it was stipulated these should belong to him, and the plaintiff makes no claim to them, except with regard to outlay upon them. Mr. Armstrong's own evidence as to the mills belonging wholly to him rather confirms the plaintiff's story. If they were not to be partners in other respects what is the meaning of Mr. Armstrong saying the buildings remained his? Why should he say that, if the agreement went only to the mode of remuneration of his clerk?

Pawsey v. Armstrong.

It is very plain that the property employed in the business when the arrangement for partnership was made must be treated as capital of Mr. Armstrong. It is said that the plaintiff brought in some small sum. Then the books shew that profits were divided according to the arrangement, the plaintiff taking at first one-fifth, and then one-fourth; this part of the profits being carried to his share precisely as if he was a partner. In the course of the partnership a thing happened which has occasioned some trouble. In 1871 a lease of adjoining property was taken in the name of the defendant Armstrong alone. That ground was afterwards built on, and improvements were also made on the other property of Armstrong. Looking at all the evidence, I must treat the leasehold as an accretion to Armstrong's original property—as belonging to him, and not to the firm. Then an enquiry will have to be directed with regard to the expenditure made by the partnership upon all Armstrong's property; and in order to make this enquiry plain, I explain distinctly, if this money was expended out of what would otherwise have been divided as profits, *prima facie* the effect would be to diminish the profits divisible, and, if so, part of the expenditure may have been made out of Pawsey's money. Still it does not follow that he is entitled to get that back; it may be that the partnership has had the full benefit of it, and that it was exhausted; it may have been expended with Pawsey's consent, having his eyes open to the fact that he had no interest in the land. On the other hand, it may be that he looked to the partnership continuing longer than it has, and that the improvement is not yet exhausted, so that it may be fair that something in respect of that outlay should be repaid to Pawsey.

That concludes all, except one important question. The partnership is now dissolved, at any rate on the issuing of the writ. What is Pawsey's right if he was a partner, even in the limited way in which I must hold he was so? I am told, it is true, that he was restricted in other ways, so that for a time he did not sign cheques—afterwards did not sign

contracts; that in other ways he was not allowed in carrying on the business to have the same privileges that Armstrong had. But I do not follow the argument that he was by reason of these things not a partner; because one partner can always by a threat of dissolution force another to agree to restrictions on his powers, without putting a stop to the partnership. Now it is said that the Court is bound to hold that Pawsey had no interest in the goodwill. But why? How does it follow from the fact that he submitted to particular restrictions that he must be restricted in one of his principal rights as to which there was no stipulation? He is entitled, in my opinion, if he insists upon it, to a sale of the business as a going concern. But that must be with the understanding that the premises belong absolutely to Armstrong, and that nothing will pass by the sale but the assets, and such goodwill (if any) as there may be when it is understood that Mr. Armstrong's mills and property are not to be sold, and that he will be at liberty to carry on the business at those mills in his own name. If such a sale is made, the most probable purchaser will be Armstrong himself, and therefore I shall direct—as the Master of the Rolls did in *Rowlands v. Evans* (2)—that the sale be conducted by an independent firm of solicitors, to be named (if not agreed on between the parties) by the Judge at chambers, and either party will have liberty to bid. The order will declare that the plaintiff and defendant are partners in the business, as from the 30th of June, 1869, to the 31st of December, 1872, in the proportion of one-fifth and four-fifths, and from the 31st of December, 1872, till the date of the writ in the proportion of one-fourth and three-fourths; that the mills and the additional lands and premises comprised in the lease of 1871 are the exclusive property of the defendant; that the assets and property of the concern on the 30th of June, 1869, are to be treated as part of the capital of the defendant in the partnership business. There will be the usual partnership account, and an enquiry whether,

Pawsey v. Armstrong.

having regard to the terms of the partnership and the purposes for which the expenditure on the mills and premises was made, any and what sum ought to be allowed to the partnership in respect of the sums so expended; and the direction for sale. With regard to costs, each party has claimed more than was his right, and there will be no order as to costs up to the hearing.

Solicitors—Hollams, Son & Coward, for plaintiff;
G. E. Philbrick, for defendant.

KAY, J. }
1881. }
May 17. }

FOWLER v. FOWLER.

*Solicitor's Lien—Subpœna duces tecum—
Inspection—Practice.*

A solicitor being called as a witness by the plaintiff, under a subpœna duces tecum, to produce her marriage settlement, to which she was a party, for her inspection,—Held, that he could not refuse to do so by reason of his lien for the unpaid costs of preparing it.

Action with witnesses.

This was an action brought by Emma Fowler against her husband, Samuel Fowler, his two sons by a former marriage and the two trustees of her marriage settlement (mainly) to obtain a declaration that certain furniture, linen and other miscellaneous articles, alleged to be of the value of 100*l.* and upwards, were comprised in her marriage settlement.

The settlement, dated the 6th of October, 1873, and made between the defendant Samuel Fowler, of the first part, the plaintiff Emma Fowler (then Emma Ritchie, widow), of the second part, and the two defendants Henry Church and James Broad, of the third part, was executed by all parties in the presence of Mr. Frederick W. Oliver, solicitor.

Valuers were called as witnesses on behalf of the plaintiff, to prove that the furniture, linen and other miscellaneous articles were worth more than 100*l.* Other

valuers were afterwards called as witnesses on behalf of the two stepsons, to prove that these articles were not worth so much as 100*l.*; the question in dispute between the parties (on this point) being whether these articles did or did not come within the wife's after-acquired property clause in the settlement.

Mr. Frederick W. Oliver had been served with a *subpœna duces tecum* to attend as a witness on behalf of the plaintiff, and to produce the marriage settlement.

The plaintiff, having called her witnesses as to value, called Mr. Oliver. He stated, in the witness-box, that he had been employed by Mrs. Fowler to prepare the settlement in the year 1873; but objected to produce it, as he had not been paid his costs of preparing it.

Mr. Higgins and Mr. Mulligan, for the plaintiff.—The plaintiff is a party to the settlement. The witness is bound to produce it under the *subpœna duces tecum* for her inspection, and cannot set up his solicitor's lien against her—

Lockett v. Cary, 10 Jur. N.S. 144;
Hope v. Liddell, 7 De Gex, M. & G. 831.

[KAY, J., referred to

In re Gregson, 26 Beav. 87.]

In re Cameron's Coalbrook Railway Company, 25 Beav. 1.

Mr. Oliver (in person).—I claim a lien on the settlement against Mr. and Mrs. Fowler and the trustees. I submit that I am not bound to produce it until the costs are paid.

KAY, J.—I think that Mr. Oliver is bound to produce the settlement, for the purpose of being inspected by the plaintiff.

The settlement was then produced, and the action proceeded.

Mr. J. Pearson and Mr. Tremlett, and Mr. Chester, for the defendants.

Solicitors—F. C. James, for plaintiff; C. P. Deane, for the first three defendants; E. W. & R. C. Mote, agents for E. Hillman, Lewes, for the trustees,

[IN THE COURT OF APPEAL.]

JAMES, L.J.
BAGGALLAY, L.J. }
LUSH, L.J. } BECKETT v. ATTWOOD.
1881.
May 10.

Practice—Dismissal of Action—Appeal by one of two Plaintiffs.

Any one of two or more plaintiffs may appeal from the judgment dismissing the action, although his co-plaintiffs refuse to join in the appeal.

This was an appeal by one of two trustees, the plaintiffs in the action, against the decision of Malins, V.C.

The action was by two of the three trustees of a settlement, claiming execution of the trusts thereof, and certain enquiries as to the persons who were beneficially entitled to the settled property.

At the trial the Vice-Chancellor dismissed the action with costs, on the grounds that the proceedings were unnecessary and had been initiated against the wishes of the beneficiaries.

One of the plaintiffs appealed, but his co-plaintiff, Attwood, refused to join in the appeal, and was consequently made a respondent.

Mr. Glasse and Mr. Stock, for the appellant.

Mr. Higgins and Mr. E. O. Batten, for Attwood, objected that one plaintiff could not appeal alone from a judgment dismissing the action, and referred to

Drake v. Symes, 3 De Gex, F. & J. 491; 30 Law J. Rep. Chanc. 358.

Mr. Locock Webb and Mr. W. P. Beale, for another respondent, supported the objection, and cited

Jopp v. Wood, 2 De Gex, J. & S. 323; 34 Law J. Rep. Chanc. 625.

Mr. Glasse and Mr. Stock, in support of the appeal, cited

Colman v. Hartwell, 5 Cl. & F. 484; *Seton* (4th ed.), 1605;

Hanson v. Keating, 4 Ha. 1; 14 Law J. Rep. Chanc. 13.

Mr. Hemming, Mr. McSwinnery and Mr. Carson, for other parties.

JAMES, L.J., said—The objection must be overruled. If one plaintiff is dissatisfied with the judgment of the Court, he ought not to be prejudiced in his right to appeal simply because his co-plaintiff does not wish to risk the consequences of further litigation. The appeal must proceed.

BAGGALLAY, L.J., and LUSH, L.J., concurred.

Solicitors—Dixon, Ward & Co., for appellant; E. H. Barlee; J. F. Smith; Bircham & Co., and F. Lamb, for respondents.

BANKRUPTCY.
BACON, C.J. } *Ex parte SULGER; in re CHINN.*
1881.
May 16.

Bankruptcy—Secured Creditor—Elegit—Seizure of Goods only—Bankruptcy Act, 1869, ss. 12, 16 (sub-s. 5), 87, 95 (sub-ss. 2, 3).

A seizure, under a writ of elegit, of goods only, does not bring the execution within the protection of section 95, sub-section 2, of the Bankruptcy Act, 1869; and therefore, where goods only (not land) of an execution debtor had been seized by the sheriff under a writ of elegit, after the date, though without notice, of the act of bankruptcy, and before the order of adjudication,—Held, that the execution was not protected by section 95; that the execution creditor was consequently not a secured creditor; and that the goods belonged to the trustee in bankruptcy by virtue of the doctrine of relation back.

On the 10th of March, 1881, the appellants, Messrs. Sulger & Co., placed in the hands of the sheriff a writ of elegit to enforce a judgment against Charles Chinn, a trader, for 65l. 10s. 2d., and on the 11th of March the sheriff seized Chinn's goods (he having no land). On the 15th of March a petition for adjudication was filed against Chinn, founded upon an act of bankruptcy committed by

Ex parte Sulger ; in re Chinn, Bankr.

him on the 9th of March, and on the 21st of March he was adjudicated a bankrupt, and a trustee was appointed.

Upon the application of the trustee, the Judge of the Coventry County Court restrained Messrs. Sulger & Co. and the sheriff (there having been yet no inquisition or appraisal of the goods) from proceeding with the execution, being of opinion that the protective clauses of the Bankruptcy Act did not apply; and that, therefore, Messrs. Sulger & Co. were not secured creditors, and the goods were consequently the goods of the trustee by the doctrine of relation back.

It was admitted that at the date of issuing the writ of *elegit* the judgment creditors had no notice of the act of bankruptcy.

Messrs. Sulger & Co. appealed.

Mr. Warmington, for the appellants.—The writ of *elegit* being issued against the lands as well as the goods of the debtor, is as efficacious where (as here) the goods only have in fact been seized, as where there has been a seizure of the lands, and therefore section 95, sub-section 2, though only in terms protecting an execution against land, must be taken to protect a writ of *elegit*, however executed.

Ex parte Abbott ; in re Gourlay, Ante, p. 80; Law Rep. 15 Ch. D. 447, decided that section 87 has no application to the seizure of goods under an *elegit*, and that the creditor is a secured creditor from the date of the seizure.

Ex parte Pillers ; in re Ourtoys, 29 W.R. 575, was also referred to.

Mr. E. Vaughan Williams, for the trustee.—Apart from section 95 and the protection afforded by it, these goods are the goods of the trustee by relation back. What protection does that section give? Sub-section 2 only refers to an execution against "land," and here no land, but only goods were seized. Sub-section 3 speaks of an execution executed by "seizure and sale," and is, therefore, inapplicable.

Ex parte Abbott ; in re Gourlay (ubi supra),

is no authority in the appellant's favour, because there the seizure was prior in date to the act of bankruptcy.

Mr. Warmington, in reply.—The only question is whether the doctrine of relation back applies to the present case, the writ of *elegit* being, in effect, a statutory assignment of the land and goods of the bankrupt (except oxen and beasts of the plough) to the execution creditor.

BACON, C.J.—The case is, no doubt, a very nice and difficult one. The real point is that referred to by *Mr. Warmington* in his reply, namely, whether the sheriff, being armed with the authority of the law to take these goods, the doctrine of relation back applies. The act of bankruptcy in this case having been before the date of the seizure, that doctrine must apply unless the execution is protected by section 95. In my opinion none of the sub-sections of section 95 touch this case. From the nature of a writ of *elegit* sub-section 3 cannot, there being no sale; nor can sub-section 2, because here the land was not taken in execution; sub-section 1, of course, does not apply. The cases of *Ex parte Pillers ; in re Ourtoys*, and *Ex parte Abbott ; in re Gourlay*, though valuable as guides, are neither of them directly in point.

Accordingly I feel bound to hold that these goods are the goods of the trustee, and therefore the appeal must be dismissed with costs.

Solicitors—R. H. Harris, for appellants; Sharpe, Parkers & Co., agents for Hughes & Maser, Coventry, for trustee.

HALL, V.C. }
1881. } *In re* PRINGLE. WALKER v.
June 18. } STEUART.

Will—Construction—Residuary or Specific Gift—"All the rest of my money, however invested."

A testatrix, after making a pecuniary and two specific bequests, gave "all the rest of her money, however invested," to her nephew, "under deduction of 50*l.* to be paid to each of her executors after named." She then proceeded to make certain bequests of jewellery and other specific articles, and concluded by appointing executors:—Held, that the gift to the nephew was a residuary gift.

The testatrix, Cecilia Pringle, by her will, dated the 19th of September, 1866, made dispositions as follows:—

"I give to my sister, Mrs. Thomas Walker, residing at present in Hamilton, Upper Canada, six hundred pounds sterling, or should she die before me, her daughters are to have two hundred pounds each of the same, and the remainder is to be equally divided amongst her sons. . . . My clothes to be equally divided between Mrs. Walker's children. I give and devise to my niece, Madeline C. Maunsell, my share of the house and furniture in 13, Canterbury Road, and my shares in the East and West India Docks, and the brooch her mother gave me, all to her and her heirs forever, and exclusive of the control of her present or any future husband. I give all the rest of my money, however invested, to my nephew, Robert John Foley, presently residing in New Zealand, under deduction of 50*l.* to be paid to each of my executors after named."

Then followed specific bequests to various persons of the following articles—namely, pink topaz brooch, turquoise and gold ornaments, Irish diamond brooch, plated bread-basket, portraits, oil painting, clock, salver; "all the rest of my plate to be equally divided between all my nephews and nieces;" house linen, watch and chain, bracelet, Indian ring and Indian earrings. And the will then concluded: "And I hereby appoint Robert

Steuart and David Pringle, my nephews, the executors of this my last will."

The testatrix executed, in July, 1870, a codicil to her will in the following terms:—

"I have to add to the above will that all I leave to my nephew, Robert John Foley, is in life rent to himself, and in trust and reversion to his children, to be divided equally amongst them."

The testatrix died on the 21st of June, 1880.

At the time of making her will the testatrix, in addition to the property and effects specifically mentioned therein, was possessed of the following property: 612*l.* 10*s.* 6*d.* consolidated stock of the Glasgow, Garnkirk and Coatbridge Railway Company, which was converted previously to her decease into 1,218*l.* 2*s.* 2*d.* Caledonian Railway four per cent. guaranteed annuity stock, and a moiety of the residue of the estate of Isabella Atkinson unascertained at the date of the testatrix's will, but which subsequently amounted to 1,489*l.* 1*s.*

Subsequently to the date of her will the testatrix acquired sums of 1,000*l.* and 140*l.* Madras railway stock.

The balance at the testatrix's banker's standing to her credit amounted to 24*l.* at the date of her will, and on the day of her death to 67*l.* 0*s.* 4*d.*

The question having arisen whether the whole, or, if not, what portion of the residuary estate of the testatrix was comprised in the above-mentioned bequest of "all her moneys, however invested," to her nephew, R. J. Foley, this action was instituted by the two daughters and only children of Mrs. Thomas Walker, in the will named, as plaintiffs, against the executors of the will, R. T. Foley and his children, and the other next-of-kin of the testatrix, as defendants, claiming to have the true construction of the will and the rights of the parties interested thereunder declared, and the personal estate of the testatrix administered by and under the direction of the Court.

Mr. Northmore Lawrence, for the plaintiffs, submitted the question to the Court.

Mr. Eddis, for the defendant R. T.

In re Pringle.

Foley and his children.—I submit two alternative propositions: first, that this gift of "the rest of my moneys, however invested," is a good residuary gift; secondly, that if it be not, it comprises all the shares and stock of which the testatrix was possessed at the time of her death.

Dowson v. Gaskoin, 2 Keen, 14; 6

Law J. Rep. Chanc. 295,

is direct authority for the second proposition. Moreover, we have here the important circumstance that the testatrix directs general legacies to be paid out of "the rest of her moneys," and this goes far to shew that the gift was intended by her to be residuary.

He referred also to

Williams v. Williams, 47 Law J. Rep.

Chanc. 857; Law Rep. 8 Ch. D. 789.

Mr. Caldecott, for the next-of-kin.—First, this is not a bequest of "money" *simpliciter*, which, no doubt, may comprise the general residue, but of "money invested," which has never been held to be a residuary gift. The nearest case to the present is

Stooks v. Stooks, 35 Beav. 396,

which is conclusive to shew that the gift is specific. And

Lowe v. Thomas, Kay, 369; 5 De Gex, M. & G. 315; 23 Law J. Rep.

Chanc. 453, 616,

shews that the position in which the gift of "money" occurs is important. Here the gift is followed by specific bequests, a circumstance which indicates that it was not intended to be residuary. Secondly,

Ogle v. Knipe, 38 Law J. Rep. Chanc.

692; Law Rep. 8 Eq. 434,

is an authority that, under a gift of "securities for money," bank stock and canal shares do not pass; and it is submitted that "money invested" is an equivalent phrase to "securities for money."

Mr. Eddis, in reply.

HALL, V.C.—This is a will entirely of its own description, and as to which, if it be considered with reference to authorities and the rules laid down in the different cases which have been referred to, it is difficult to say that any construction to be put upon it will harmonise

entirely with the views which have been there expressed. I confess that I have had considerable difficulty in coming to a conclusion. In this case there are specific gifts coming after the gift I have to construe, and that is a circumstance which, in one of the authorities which have been cited, has been referred to as shewing that the preceding gift could not have been meant to be residuary. As regards that, there is a difference in the judgments in *Lowe v. Thomas*, before the Court of Appeal, and *Stooks v. Stooks*, before the Master of the Rolls. In *Stooks v. Stooks* the Master of the Rolls held the gift residuary, notwithstanding that there was a subsequent gift, but he held that the particular subject-matter of the subsequent gift would not pass under that which would have otherwise been a complete residuary gift. It appears to me upon the whole that, although that is a most important circumstance to be regarded in ascertaining whether or not the gift is residuary, yet it is not necessarily conclusive in this case. The particular things which are given in this particular case are a brooch to one person, an ornament to another, and so forth, some small things, and the plate, which was probably not of any great value, and the linen. If there be anything in this will which will enable me to say that that is not a sufficient circumstance to prevent this gift from being residuary, if it would be so but for that circumstance, I should be disposed to hold, for the purpose of avoiding an intestacy, that this was intended to be a residuary gift. Now I think there is a circumstance which enables me to treat the case as distinguishable from the other cases which have been referred to, and it is that to which Mr. Eddis called attention in his opening, namely, that this gift of "the rest of my money, however invested," is "under deduction of 50*l.* to each of my executors after named." From that it appears that the testatrix was there in association with this disposition making a disposition of a portion of what I may call her general estate. The 50*l.* is a legacy which, as I threw out in the course of the discussion, is at least demonstrative. If this gift of money were a specific gift, the legacy of

In re Pringle.

50*l.* would be demonstrative, so that it would come out of the money, and also, if necessary, out of the general estate. But the question being whether this is a specific gift or not, if I find given in association with that gift a legacy which is either a general legacy or, if demonstrative, is at all events a legacy which, if necessary, would be satisfied out of the general estate, that rather tends to shew, to my mind, that the testatrix was dealing there not merely with specific property, but also with that which affected and operated upon, or might operate upon, the general estate. It seems to me, therefore, that that being so, there is here present a circumstance which enables me to say what I think is the good sense of this will, namely, that the testatrix was here making a general disposition of her residue by the description of what she calls "the rest of my moneys, however invested," after having previously given a general legacy of 600*l.*, some clothes, a specific thing, her share in a house and furniture, her shares in the East and West India Docks, and a brooch. The gift is a gift of her "moneys, however invested;" and to say the least of it, the words "money, however invested," are not necessarily to receive the same construction as the words "securities for money"—a construction by means of which it has been endeavoured to exclude from the gift anything in the shape of shares and stock. In the popular sense "money, however invested," would include any fund which the person had invested in railway stock, and I do not know why I should cut it down so as to exclude such stock. It may not be what is ordinarily or technically called securities for money, and therefore may not pass under a gift of securities for money; but it is money invested—that is, which the testatrix had invested—and it is the rest of her money, however invested, as distinguished from investments comprised in the preceding particular dispositions, one of which was a disposition of the shares in the East and West India Docks. On the whole of this will, taking into consideration, as I do, the position and means of the testatrix at the time when she made it, I consider and hold that this

testatrix has not died intestate; in other words, that this particular gift of all the rest of her moneys, however invested, is a residuary gift of personal estate, and that the next-of-kin do not take.

Solicitor—W. M. Webster, for all the parties.

[IN THE COURT OF APPEAL]

BANKRUPTCY.

JAMES, L.J.

BAGGALLAY, L.J.

LUSH, L.J.

1880.

April 28.

May 5.

In re CURTOYS; *ex parte*
PILLERS.

Bankruptcy—Attachment of Debt by Garnishee Order—Service of Order—Prior Act of Bankruptcy—Protected Transactions—Bankruptcy Act, 1869 (31 & 32 Vict. c. 71), ss. 94 (sub-s. 3) and 95 (sub-s. 3).

An attachment of a debt due to a bankrupt under a garnishee order is not a "dealing with the bankrupt" within the protection of section 94, sub-section 3.

Whether it is an "attachment against the goods" of a bankrupt within the protection of section 95, sub-section 3, quære.

But semble, as an attachment against the goods of a bankrupt must, in order to be protected by that section, be perfected by seizure and sale, an attachment of the debt, if it be within the section, must be completed by the actual payment of the attached debt before the order of adjudication.

Curtoys was on the 25th of September, 1880, adjudicated a bankrupt upon a petition filed on the 3rd of September by A. W. Pillers, the act of bankruptcy being that Curtoys had, on the 14th of August, departed from his place of business with intent to defeat or delay his creditors; and on the 23rd of October Pillers was appointed trustee.

Prior to the bankruptcy petition—

In re Cartoys; ex parte Pillers (App.), Bankr.

namely, on the 30th of August—a judgment was recovered against Cartoys by Tagart for the sum of 167*l.* 11*s.* 8*d.* and costs; and Tagart on the 1st of September obtained a garnishee order *nisi* against King, attaching all debts due to Cartoys in his hands. The order was served on King on the 2nd of September, and was made absolute on the 15th of September, Tagart having no notice of the act of bankruptcy.

On the 16th of December Pillers applied to the County Court of Bath for an order declaring that the garnishee order was void as against him, on the ground that, prior to such order, the bankrupt had committed an act of bankruptcy to which the trustee's title related back.

The County Court Judge dismissed the application, holding, first, that by the service of the garnishee order *nisi* before petition and adjudication, the judgment creditor obtained a valid security which was independent of any prior act of bankruptcy by the judgment debtor; secondly, if this was not so, the security was valid by reason of the want of notice on the part of the judgment creditor, at the time of the service of the order, of the prior act of bankruptcy; and, further, that the order was a dealing within the meaning of sub-section 3, section 94, and was therefore protected.

The trustee appealed to the Chief Judge, who, on the 28th of February, 1881, dismissed the appeal, on a slightly different ground from that on which the County Court Judge decided. The Chief Judge held that the debt due from King to the bankrupt was part of the bankrupt's "goods;" that the garnishee order was an attachment, though the property was incapable in its nature of being dealt with by sale; that there might be executions and attachments which could not be effected by sale—the present being one; and that the judgment creditor having obtained the order before notice of the act of bankruptcy, had obtained a security for his debt, and that the attachment was a valid transaction as against the trustee under sub-section 3 of section 95 of the Bankruptcy Act.

From this decision the trustee appealed.

Mr. Winslow and Mr. Finlay Knight, for the appellant.—This is the first case in which the question of an act of bankruptcy prior to the service of the garnishee order has occurred. Where the service of the order has preceded the act of bankruptcy, there it has been held that there was a good security in favour of the garnishor.

But the act of bankruptcy has here preceded the service of the order. To be protected against the trustee this attachment must be a transaction within the 94th or 95th section of the Act.

The issuing of a garnishee order cannot be a "contract or dealing" with the bankrupt within sub-section 3, section 94, and an attachment against goods in the 3rd sub-section of section 95 must be perfected not only by seizure, but by seizure and sale before the order for adjudication. A debt is by its nature incapable of being sold, and it would seem from this that "goods" in the sub-section are not meant to include "debts," but mean goods and chattels in the ordinary sense of the word.

[JAMES, L.J., referred to

Ex parte Abbott; in re Gourlay, Law Rep. 15 Ch. D. 447 (*sub nom. In re Gourlay; ex parte Ormandy* (cor. Bacon, C.J.), 49 Law J. Rep. Bankr. 23).]

That was the case of a seizure under a writ of *elegit*, in which it was held that the execution creditor had a security, and was not deprived of it by section 87; but there the seizure preceded the act of bankruptcy.

It must be borne in mind that by the relation back of the trustee's title the debt from King did not belong to Cartoys, but was the property of the trustee—

Ex parte Duignan; in re Bissell, 40 Law J. Rep. Bankr. 68; Law Rep. 6 Chanc. 605.

The word "goods" must apply to goods properly so called, not debts. The words in the 3rd sub-section of section 95—"execution or attachment against the goods of any bankrupt"—are very similar to those in 6 Geo. 4. c. 16. s. 81 and 12 & 13 Vict. c. 106. s. 133; and when the words were first used, goods could be attached under the custom of London,

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and so be sold in default of payment of the debt, and that kind of attachment is sufficient to satisfy the word. Attachment under a garnishee order was an unknown process at the time of the two earlier Acts.

The words are "seizure and sale." The Chief Judge has read them as "seizure or sale." The respondent is in this dilemma: Either this debt is no part of the bankrupt's goods (and then the case does not fall within the 95th section at all), or, if it is, there must be such a dealing with the debt as is equivalent to a sale of goods.

They referred to

Holmes v. Tutton, 5 E. & B. 65; 24 Law J. Rep. Q.B. 346;

Stevens v. Phelps, 44 Law J. Rep. Chanc. 689; Law Rep. 10 Chanc. 417;

Ex parte Greenway; in re Adams, 42 Law J. Rep. Bankr. 110; Law Rep. 16 Eq. 619;

Huisch v. Coates, 18 Com. B. Rep. 757;

and

Wadling v. Oliphant, Law Rep. 1 Q.B. D. 145.

Mr. Roxburgh and Mr. O. J. Ruscombe Poole, for the judgment creditor.—It is not in every case, in order to obtain protection under the 95th section, that sale is necessary. Under the 2nd sub-section, in the case of land, an attachment is perfected by seizure only: the principle is that the creditor should have done all that he can to complete his title. Here the debt is not capable of being dealt with by sale like mere goods, but the service of a garnishee order *nisi* completes the title of the garnishee—

Emanuel v. Bridger, 43 Law J. Rep. Q.B. 96; Law Rep. 9 Q.B. 286.

In

Ex parte Joselyne; in re Watt, 47 Law J. Rep. Bankr. 91; Law Rep. 8 Ch. D. 327,

James, L.J., says (p. 92), "The moment the order of attachment was served upon the garnishee, the property in the debtor was absolutely transferred from the judgment debtor to the judgment creditor, and the garnishee could then only pay the debt to the judgment creditor. The property in the debt was transferred, and there was

a complete security the moment the garnishee order was served."

[JAMES, L.J.—All that was based on the notion that the judgment debtor had not committed an act of bankruptcy.]

But if service of the order passes the property in the debt, I am in the same position as if I had sold the goods and received the proceeds.

Seizure and sale of a trader's goods under an execution are made an act of bankruptcy, and, but for the 87th section, would be available for any person to file a petition within the statutory time; but section 87 was introduced to protect the goods in certain cases. The Act has not said that attachment of a debt shall be an act of bankruptcy.

The material date is when I have acquired the property, not when I have received the money from the sale of it. By the service of the order the property is gone entirely from the debtor. The words must be qualified, that the execution shall be completed by sale when the property admits of sale.

In the case of "actual delivery" of land under the 27 & 28 Vict. c. 112. s. 1, as an equitable interest in land cannot be actually delivered, it has been held that the words of the statute are satisfied if there be such a delivery as the subject-matter is capable of—

Hatton v. Haywood, 43 Law J. Rep. Chanc. 372; Law Rep. 9 Chanc. 229;

Anglo-Italian Bank v. Davies, 47 Law J. Rep. Chanc. 833; Law Rep. 9 Ch. D. 275;

Ex parte Evans; in re Watkins, 48 Law J. Rep. Bankr. 97; 49 *ibid.* 7; Law Rep. 11 Ch. D. 691; 13 *ibid.* 252;

In re The Stanhope Silkstone Collieries Company, 48 Law J. Rep. Chanc. 409; Law Rep. 11 Ch. D. 160.

JAMES, L.J.—I think it is impossible to assent to the conclusion of the Chief Judge, and in fact I am unable to agree with the decision of the County Court Judge.

It appears to me that an attachment issued *in invitum* cannot be held to be a "dealing with" the man who is suffering

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it against his will within the meaning of sub-section 3 of section 94 of the Bankruptcy Act.

An attachment to be protected must be brought within the exact words of section 95, sub-section 3, or within their reasonable meaning. That section says that the attachment against the goods of a bankrupt to be protected must have been perfected by seizure and sale before the date of the order of adjudication. This particular attachment is not capable of realisation by seizure and sale, because the debt attached under the garnishee order is not capable of being sold. Therefore it is not within the actual words. It is said, however, that the sense of the words does apply, and that we must give some meaning to the word "attachment." Without expressing a final opinion on the point, my strong impression is that goods in the strict sense of the word—that is, goods and chattels which are capable of being seized and sold—are alone within the clause. I was at first impressed with this suggestion, that there was nothing of that nature which could be attached for the purpose of paying a debt. But the same words occur in the Act 6 Geo. 4. c. 16. I am of opinion that the Legislature had then in view the equitable process of execution in a Court of equity, under which goods could be sequestrated and sold for payment of a sum of money which had been ordered by a direction of the Court to be paid. The defendant was first attached for his contempt, and then a sequestration issued against his goods. This was in the first instance only an attachment to compel payment. But after a certain time, if the process did not succeed in producing obedience and payment of the money, the creditor applied for the goods which had been thus attached to be sold for payment of his claim out of the proceeds. Therefore, when the words were first used in a Bankruptcy Act, there was something in the nature of an attachment of goods to which they could apply, and there was sufficient to satisfy every word of the clause.

But if the words in the present Act are to be taken to apply to an attachment of a debt under a garnishee order, we

must give to the words "executed by seizure and sale" a meaning applicable to that, and then it would appear that the only equivalent to a sale of goods would be the realising the attachment by obtaining actual payment of the attached debt to the garnishor. So long as the thing remains *in fieri* and the security is unrealised, we cannot put an attachment under a garnishee order in any higher position than seizure of goods by the sheriff under an execution without any sale. This is enough to dispose of this case.

BAGGALLAY, L.J.—I am of the same opinion. On the 25th of September, 1880, the Court of Bankruptcy adjudicated Curtoys a bankrupt on an act of bankruptcy committed on the 14th of August, 1880. On the 1st of September a garnishee order was obtained by a judgment creditor and served on him, and made absolute on the 15th of September.

When the case came before the County Court Judge he held that the transaction was a dealing with the bankrupt within the protection of the section 94, sub-section 3. On appeal the Chief Judge did not accept that view, but held that the transaction was protected under the 3rd sub-section of section 95.

Now the first question is, Did this debt form part of the "goods of the bankrupt"? If so, in order to be protected, the attachment must have been executed by seizure and sale.

If the debt was not part of the bankrupt's goods, the case does not come within the section at all. It is not necessary to say which is the right view, because in neither case is there any protection. I agree with Lord Justice James that the debt was not part of the goods of the bankrupt. Similar words, "execution or attachment," are to be found in the protecting clauses of the Bankruptcy Acts at least as early as the Act of 6 Geo. 4 c. 16, though no such thing as an attachment of a debt by a garnishee order was then in existence. Attachments of goods in the Lord Mayor's Court were then well known, and also attachments to compel the payment of money ordered to be paid by a decree of the Court of Chancery,

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which were not sufficient to support a commission of bankruptcy unless the orders had been followed up by an order for the sale of the goods attached.

LUSH, L.J.—I entirely agree with my colleagues, that it is not necessary for us to decide on the present occasion whether the 3rd sub-section of section 95 does or does not apply to an attachment of a debt under a garnishee order. But I am anxious not to have it supposed that I agree with them in their view of the construction of the sub-section. I think that we are bound to give full effect to every word of the clause, and although at the time when the words were first used in the Bankruptcy statutes there was no such thing known as an attachment of a debt under a garnishee order, yet when the Act of 1869 was passed the Common Law Procedure Act of 1854 had introduced that process of attachment; and I cannot help thinking that, whatever may have been the meaning of an "attachment against goods" in the former Bankruptcy Acts, yet in the present Act it must be taken as embracing an attachment under a garnishee order, which was a process well known at the time when the Act was passed. The 3rd sub-section following the 2nd, which deals with executions or attachments against land of the bankrupt, speaks of executions or attachments against his goods (not his goods and chattels). There is no qualification of the word "goods." I think the two clauses were intended to deal with all the property of the bankrupt which passes to his trustee. A debt due to a bankrupt may well be included in the word "goods," and I think we ought to take the word as including debts as well as goods properly so called. But, assuming it to be so, I still think that the attachment here is not within that saving clause. The fallacy of the respondent's argument consists in treating the debt attached under the order as a debt of the bankrupt's at the time when the order was served. By virtue of the 11th and 15th sections of the Act all the property of every kind which the bankrupt had at the time of the commission of the act of bankruptcy

is vested in the trustee and is divisible among his creditors. This debt, therefore, was no longer due to the bankrupt, but was then due to the trustee. Then this 95th section was passed to protect a creditor who, after the commission of an act of bankruptcy of which he had no notice—a secret act of bankruptcy—had pursued his remedy against his debtor; but it only protects him on certain conditions. Goods which can be seized under a *fi. fa.*, goods in the ordinary popular sense of the word, must not only have been seized but sold before the adjudication. The intention was that so long as the execution remained only a security for the debt it was not to be protected. Something more must have been done; there must be seizure and sale—an actual conversion of the security into money; and then the money belongs to the creditor.

We must, I think, find some equivalent for that in the case of an attachment under a garnishee order. What is the equivalent? The security must have been realised before there can be any protection. Now can the garnishor realise the debt which has been attached? A debt is not sold, but as the words clearly express the intention of the Legislature that the property shall be realised to obtain protection, he must realise the debt either by obtaining payment of it voluntarily from the garnishee or by means of an execution against his goods. Until that has been done I think there is no protection. It is true that the words "execution by seizure and sale" do not apply to an attachment like this, but they demonstrate clearly enough, in my opinion, the intention of the Legislature to enable us to apply the principle to attachment of debts; and if for want of apt words in the section we were to say it does not apply to a garnishee order, we should be incurring the censure which is implied in the maxim *Qui hæret in litera, hæret in cortice*. I am of opinion that the only equivalent for an actual sale of goods which will satisfy the words of the Act, in the case of an attachment of a debt under a garnishee order, would be an actual receipt by the garnishor of the money represented by the debt attached

In re Curtlys; ex parte Pillers (App.), Bankr. under the order. Till that has been done the attachment is only a security, and it is not protected by section 95.

JAMES, L.J.—I wish to add that if the case should ever arise of an actual receipt of the money by the garnishor, the question is left entirely unprejudiced by our present decision.

LUSH, L.J.—I agree that that is so.

Mr. Roxburgh asked leave to appeal to the House of Lords, which was refused.

Solicitors—B. H. Van Tromp, agent for Benson & Carpenter, Bristol, for appellant; Whitakers & Woolbert, agents for Simmons, Clark & Collins, Bath, for respondent.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.

JAMES, L.J.

BAGGALLAY, L.J.

LUSH, L.J.

1881.

May 5.

In re COLLIE;
ex parte FINDLAY.

Bankruptcy — Proof against Joint and Separate Estates—Payment in Full—Right to Interest after Adjudication.

A creditor, whose proof had been admitted against both the joint and separate estates of bankrupt partners, elected to receive and did receive dividends from the separate estates, whereby his debt was paid in full. He then claimed to receive further dividends from the separate estates until he had received interest on his debt from the date of the adjudication until it was paid:—Held, that he was not entitled to the interest he claimed until the joint creditors had received 20s. in the pound.

This was an appeal from the decision of *Mr. Registrar Hazlitt*, acting as Chief Judge.

On the 19th of August, 1875, A. Collie and W. Collie, trading in co-partnership as "A. Collie & Co.," were adjudicated bankrupts.

On the 26th of July, 1876, Messrs. Findlay & Co., creditors of the bankrupts, were admitted to prove against the joint estate of the bankrupts for the sum of 5,000*l.*, and also against the separate estate of each of the bankrupts for the like sum, on account of a fraud committed on them by the bankrupts, but were required by the Court to elect, before the receipt of any dividend from either joint or separate estates, whether to receive dividends from the joint estate or to receive dividends from the separate estates.

Findlay & Co. elected to receive dividends from the separate estates, and were paid dividends amounting to 10s. in the pound from each separate estate. They then claimed to be paid interest at the rate of four per cent. on their proofs against the separate estates from the date of the adjudication until final payment to them of the 5,000*l.* The trustee of the separate estates contended that Findlay & Co. were not entitled to the interest they claimed until the joint creditors had received 20s. in the pound, and the Registrar affirmed his decision.

Findlay & Co. appealed.

Mr. Stirling, for the appellants, referred to

In re The Joint-Stock Discount Company, 38 Law J. Rep. Chanc. 565; 39 *ibid.* 122; Law Rep. 5 Chanc. 86;

In re The Humber Works and Shipbuilding Company, 39 Law J. Rep. Chanc. 185; Law Rep. 5 Chanc. 88;

Mr. Winslow and *Mr. J. E. Linklater*, for the trustee, were not called upon.

JAMES, L.J., said—I am of opinion that there is really no authority for this application, and all principle is against it. The cases referred to are not in point. In the one case there were two distinct windings-up, and in the other the creditor applied his security in payment of interest; but in the bankruptcy of a firm there is only one administration of joint and separate estates, although for convenience of administration the creditors are divided into two classes. The

In re Collie; ex parte Findlay (App.), Bankr.

rule is clear that, in the absence of any security, a creditor cannot get interest on his debt accrued subsequently to the adjudication until the joint and separate creditors have been paid 20s. in the pound on the principal of their debts.

BAGGALLAY, L.J., and LUSH, L.J., concurred.

Solicitors—Murray, Hutchins & Stirling, for applicants; Travers, Smith & Braithwaite, for trustee.

KAY, J. }
1881. }
June 23, 24. } HART v. HART.

Specific Performance—Separation Deed—Enforcement by Action in one branch of the Court of Agreement providing for Stay of Proceedings in another branch—Part Performance—Incomplete Contract—Provision for Reference in case of Difference—“Usual covenants”—“Dum casta” clause—Mutuality—Agreement for Custody of Children by Mother—Judicature Act, 1873, s. 24 (sub-s. 5)—36 Vict. c. 12, s. 2.

Specific performance was granted in the Chancery Division of an agreement come to by way of compromise at the trial of a petition for divorce, and which provided for the execution of a deed of separation and the dismissal of the petition; no proceedings having in fact been taken under the petition between the date of the compromise and the trial of the action for specific performance.

Where an agreement has been in part performed, the Court struggles to overcome a difficulty in the way of its specific enforcement arising from vagueness in the terms.

The terms of an agreement being sufficiently defined to present a concluded contract in all essentials, it may be enforced by the Court, although comprising a provision for reference to named persons in case of difference in working out the terms.

Gourlay v. The Duke of Somerset (19 Ves. 429) and Tillet v. The Charing Cross Bridge Company (26 Beav. 419;

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28 Law J. Rep. Chanc. 863) distinguished and explained.

An agreement between husband and wife, providing (inter alia) for the execution of a deed of separation, with usual covenants, and for an allowance to the wife, and that in case of difference in working out the terms of the agreement the matter should be referred to A and B, was decreed to be specifically performed. The judgment directed the deed to be settled by the Judge in case the parties differed. Held also, that “usual covenants” did not include a “dum casta” clause, or provision that misconduct on the wife’s part should cause a forfeiture of the allowance. Held, further, that the term as to “usual covenants” imported that a trustee should be found by the wife, and therefore that the agreement was not in that respect unenforceable at her suit for vagueness or want of mutuality.

Observations on the effect of the statute 36 Vict. c. 12 with regard to provisions for the custody of children in a deed of separation.

Trial of action.

The plaintiff, Mrs. Hart, asked for specific performance of an agreement come to between herself and her husband upon the trial, in February, 1880, of a petition for divorce brought by the husband. The agreement was as follows: “Petition and answer dismissed. Deed of separation with usual covenants. Costs of preparing deed to be borne by Mr. Hart. Mr. Hart to covenant to pay Mrs. Hart for herself and child or children 150l. a year quarterly. Mrs. Hart to maintain the child or children. Mr. Hart to pay wife’s costs. In case of difference in working out these terms, matter to be referred to Mr. Willis and Dr. Deane.”

Mr. Willis and Dr. Deane were respectively the leading counsel for the husband and wife on the petition for divorce. It was stated that at the trial of the petition evidence had been given of adultery on the part of the wife, but her evidence in rebuttal had not been heard before the compromise. The petition had not been dismissed, but nothing had been done under it since the date of the agreement.

The present action was resisted on

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various grounds, which are stated fully in the judgment.

The defendant contended that the expression "usual covenants" should, under the circumstances, include a restriction of the allowance to the period of the wife remaining chaste, and pleaded that he had so understood the agreement, and he tendered the evidence of the counsel on the divorce petition to shew that this was usual in arrangements made in proceedings in the Divorce Court. The plaintiff tendered the evidence of two conveyancers to prove that this was not a usual provision according to the practice of conveyancers. The Judge refused at the present trial to admit evidence of misconduct on the part of the plaintiff since the date of the agreement.

Mr. Rigby and Mr. Chapman Barber, for the plaintiff.

Mr. Napier Higgins and Mr. S. Stephens, for the defendant.

In addition to the cases mentioned in the judgment, there were referred to, on the point of "usual covenants,"

Hampshire v. Wickens, 47 Law J. Rep. Chanc. 243; Law Rep. 7 Ch. D. 555;

as to the agreement admitting of specific enforcement,

Gibbs v. Harding, 39 Law J. Rep. Chanc. 374; Law Rep. 5 Chanc. 386;

and as to the reference clause in the agreement,

Baumann v. James, Law Rep. 3 Chanc. 508.

KAY, J.—There seems to be no kind of doubt that the Court has jurisdiction to order specific performance of an agreement of this kind. In the case of *Wilson v. Wilson* (1) that seems to have been decided in the House of Lords, and in *Besant v. Wood* (2) the present Master of the Rolls entirely confirms that view, and I take it to be quite clear that if the agreement was otherwise unobjectionable, the Court can specifically perform it.

I will consider the first objection raised

(1) 23 Law J. Rep. Chanc. 697; 5 H.L. Cas. 40.

(2) Law Rep. 12 Ch. D. 605.

by way of defence to this action, that the Court has no power to interfere with the action of the Divorce Court. If I were asked to grant an injunction restraining a pending action, I should be prevented by the express terms of the Judicature Act of 1873, s. 24 (sub-s. 5), which provides: "No cause or proceeding at any time pending in the High Court of Justice or before the Court of Appeal shall be restrained by prohibition or injunction." It is observable that it refers to a pending action, and I see that the Master of the Rolls in *Besant v. Wood* (2) (at p. 630 of the Report in 12 Ch. D.) says this: "As regards the injunction, it must be remembered you cannot restrain a pending motion" (I suppose the word "action" was really intended), "but you can restrain a person from instituting proceedings;" and in that case he did grant an injunction to prevent the institution of proceedings by the wife for the purpose of compelling the husband to cohabit with her. Well now, am I asked in this case to do anything which in the least degree contravenes the provision of that section of the Judicature Act? In the first place, I think it doubtful after this agreement, which contains the term "petition and answer dismissed," whether there is any pending action in the Divorce Court at all. It may be that the actual dismissal has not taken place, but still, can it be considered for the purposes of the Judicature Act that it is a pending action? In the second place, whether it is a pending action or not, I am not asked to grant an injunction to restrain it; therefore I certainly am not transgressing the letter of the Judicature Act if I grant a decree for specific performance of this agreement. I do not think I should be in the least degree interfering with the spirit of it, because here is an agreement containing very many other terms which it is important, or may be very important, to the parties to have carried out; and the argument is, that because it contains this one term, that an action which at the time the agreement was come to be pending in the Divorce Court is to be dismissed, the Court is absolutely by that prevented from directing specific per-

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formance of the whole agreement or any part of it. Just observe what a curious position that would put the Court in. It is said that the Divorce Court would not entertain jurisdiction as to this question of specific performance, not because it had not jurisdiction, but because the question of specific performance was not one which it uniformly and ordinarily dealt with; and therefore that being one branch of the Supreme Court, it is preferred that the question should be dealt with by another branch of the Supreme Court. Must I not treat this action coming before me as if it had come for this purpose before the Divorce Court itself? and would that branch of the Supreme Court—the Divorce Court—have had any difficulty whatever on this portion of the agreement, namely, that the action should be dismissed? and would it have said, having otherwise jurisdiction to decree specific performance, by reason of this clause we must refuse to decree it? It is obvious, if it had been in that Court nothing would have been easier than for the Court to say, The parties have agreed that the action shall be dismissed, and accordingly this Court has ample authority to carry out that part of the agreement. I am not going to direct anything to be done by way of dismissal of the action; I am not going to grant any injunction against the further prosecution of that action. I leave all that to the Divorce Court, which has jurisdiction; but I cannot see that, unless I am asked to grant an injunction, or unless it were essential to the order which I am asked to make that an injunction should be granted, that term that the action is to be dismissed being included in this agreement prevents this branch of the Supreme Court from directing specific performance of the whole agreement. Therefore I overrule that objection.

Then it was argued that there is in this agreement a provision for the custody of the child or children by the wife, and I was referred to the well-known cases of *Hope v. Hope* (3) and *Vansittart v. Vansittart* (4) for the purpose of shewing

that that is a provision for the husband to divest himself of his natural guardianship and custody of the children, and that that is so much against the policy of the law, that it makes the whole agreement either void or such an agreement as the Court in its discretion will not grant specific performance of. That was the case doubtless when *Hope v. Hope* (3) and *Vansittart v. Vansittart* (4) were decided; but they were both decided before the Act of 36 Vict. c. 12, which contains a section which I must consider was enacted on account of those decisions. [His Lordship read the 2nd clause of that Act.]

Surely the plain meaning of that enactment is unmistakable. The deed is not to be invalid, nor is the particular clause in the deed giving up the custody of the children by the father to be invalid; but it is to be read as if there were inserted in it that all this convention as to the custody of the children is subject to the power of the Court, as guardian of the infant children, to enforce or refuse to enforce that, according as the Court may think the interests of the infant children require the enforcement or non-enforcement of that clause. Then if in a deed of separation a covenant by the father to give the custody of the infant children to the mother is not of itself invalid, how can an agreement for a deed which is to contain such a covenant be invalid either? I failed to comprehend the argument on that point. It seems to me this Act has removed what otherwise might possibly have been a difficult point in carrying out this agreement by an order for specific performance. But I am rather inclined to think that in the deed to be framed under this agreement there probably would not be any provisions as to the custody of the children at all. That was said by one of the conveyancing counsel—that he in such a deed, even looking to that provision, would not make any stipulation as to the custody of the children at all. If I understand his view it was this: “I should make the husband covenant for payment of the provision to the wife for herself or children, either for the maintenance of herself or children, or in order that she

(3) 22 Beav. 351; 26 Law J. Rep. Chanc. 417.

(4) 2 De Gex & J. 249; 27 Law J. Rep. Chanc. 289.

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might maintain herself and children, or something of that kind; and I should not say a word about the custody of the children." So that I do not think it at all follows that the deed need contain, or would ordinarily contain, any provision of that kind, though I confess my own view in reading this agreement is, that it was the intention of the parties that the child or children should live with and be maintained by the mother. It seems to me that is the meaning which must necessarily be attributed to these words, because you cannot conceive that it was intended the mother should maintain the child or children if the child or children were not living with her, but with the father, from whom the provision of 150*l.* a year for the wife was to proceed. I therefore think the statute to which I have referred removes any difficulty arising from that part of the agreement, even if it be an agreement that the custody of the children is to be with the wife, and accordingly I cannot hold that objection is one which is at all in the way of making an order for specific performance.

Then I was very much pressed indeed to admit evidence upon the pleading, as I now understand the pleading, that the wife has been guilty of misconduct since the separation, such that the provision to be inserted in the deed as to the annuity would now, according to the intention and meaning of this agreement, have come to an end; and therefore that I am not to decree specific performance. Again, I say, having paid the utmost attention to the argument, I am not able to comprehend it. How can it follow, if it were the case, that because one provision of a deed of this kind by the terms of its limitation has come to an end, that therefore there is not to be a deed at all? Supposing that particular provision had come to an end, there are various other provisions contained in the separation deed which would not have come to an end. There is the covenant by the trustee with the husband that the wife shall not molest or interfere with him; there is his covenant that he will not molest or interfere with the wife, but will allow her to live separately. There is a covenant by the trustee to indemnify the

husband against the wife's debts. I need not go further. Those are provisions which would be entirely operative even supposing that the annuity for the wife had come to an end by the terms of the limitation of that annuity. Therefore I am not able to follow the argument that I should not decree a deed to be executed or this agreement to be carried out, because one term—one essential term, if you like—has by the very form and stipulations of the agreement come naturally to an end, if it has come to an end. Therefore, so far as that can be urged as a reason why the Court should not make an order for specific performance, I must hold that it fails as such a reason, and it was on that ground, because it seems to me that the reason is entirely irrelevant to the question whether the Court can grant specific performance or not that I did not allow evidence to be gone into in order to prove that the wife had been guilty of this misconduct. By anything I have said, of course, I do not assume that she has the least in the world; I am only dealing with the argument that proceeded on the assumption that she might have done so.

Now there remain three other objections, which were pressed thus by Mr. Higgins, if I rightly understood his argument. He said that the agreement was too vague; he said that there was no mutuality in it, because no trustee had been provided; and then he relied very much indeed on that clause at the end of it, that "in case of difficulty in working out these terms the matter is to be referred to Mr. Willis and Dr. Deane." I do not understand that it can be fairly said that this agreement is too vague in any other respect except about the arbitration, and the fact that the trustee is not named; but I cannot omit to observe that the action for specific performance is brought by the wife, whose duty it is to provide a proper trustee to enter into the usual covenants which a trustee in a separation deed does enter into with the husband—that the trustee, in fact, in all cases is found by the wife, of course subject to his being a proper person; and all that is a matter of detail to be arranged in carrying out this deed. But I do not

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see, having got the words "usual covenants," that there is any such vagueness on that point as ought to induce me to refuse to interfere on that ground.

It seems to me that when two parties—the husband and wife—agree to compromise a pending litigation upon the terms that a deed of separation shall be executed containing the usual covenants, those very words imply, if they do not express it, that there will be a trustee on behalf of the wife, who will enter into such covenants as in such a deed a trustee usually enters into on behalf of the wife with the husband. Therefore I think there is no such vagueness on that point as should induce me to refuse to give relief.

Then comes that part of the argument which has impressed me more than any other part—that is, with reference to the two gentlemen named in this agreement, who are to settle any difference that may arise. I must observe before I deal with that question that this is an agreement one essential part of which has to some extent been performed. It was an agreement at the hearing of an active litigation between husband and wife; and it is perfectly well settled that husband and wife being at arm's length in a divorce suit are perfectly competent to enter into a binding agreement; and whatever may be said about the consideration, I for my part regard the main consideration of such an agreement as being the compromise of a litigation, the putting an end to a litigation which husband and wife, whatever their grievances may be, may each of them think it a proper thing to put an end to, by making considerable sacrifices on one side and on the other. I cannot conceive, in point of law or common sense, of higher consideration than that.

Now, as to that, there has been a performance of that agreement from the 14th day of February, 1880, down to this moment, because from that time to this no further proceedings have been taken in the divorce action. And I feel considerably impressed by the consideration which actuated the Court in *Milnes v. Gery* (5), and was expressed in very emphatic language by Lord Justice

Turner in *Wilson v. The West Hartlepool Railway Company* (6). When an agreement for valuable consideration between two parties has been partially performed, the Court ought to do its utmost to carry out that agreement by a decree for specific performance. I think, if I do not misquote the words, Lord Justice Turner's words went as far as this, that the Court ought to endeavour to find out what the agreement was and enforce it. That is—as I understand the rule of equity—although there may be considerable vagueness in the terms, and although it may be such an agreement as the Court would hesitate to decree specific performance of, if there had not been part performance, yet when there has been part performance the Court is bound to struggle against the difficulty arising from the vagueness. Without putting the rule higher than that, I have to consider whether there is in this last objection of the arbitrators being named in the agreement to settle any difference that may arise, such a formidable difficulty as the Court after all must give way to and cannot get over.

I mentioned in the opening of the case the case of *Tillett v. The Otharing Cross Bridge Company*, which I have always thought was one of the strongest decisions on that point to be found in the books. No stronger decision has been cited to me, and in such opportunity as I have had, I have looked back to the cases, and I cannot find a stronger decision. In that case there was one term, being considered by the Court an essential term of the memorandum, as to which there was no concluded contract. The agreement was, not that Messrs. Tillett should build "usual houses," and in case of difference A B be consulted, but that such houses should be built as the company and Messrs. Tillett should mutually agree upon. So that there was no agreement as to what kind of houses were to be built, and as to that therefore there was no contract, but the contemplation of a future contract; and that seems to me the material difference between that case and this case, because in this case it will

(6) 2 De Gex, J. & S. 475; 34 Law J. Rep. Chanc. 241.

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be observed that there was to be a deed of separation with usual covenants—not with such covenants as the two parties shall hereafter agree upon, but with usual covenants; and “usual” means usual according to the practice and customs of conveyancers in such cases. All that was to be left to Mr. Willis and Dr. Deane was this—not to complete any part of this agreement which was left incomplete, but, in case of difference in working out these terms, the matter was to be referred to Mr. Willis and Dr. Deane. Before I examine the case which I am going to refer to more closely, I wish to point this out distinctly, that it seems to me the Court is not at liberty to suppose there will be a difference. There may not be any difference at all in an agreement like this, there may be nothing to refer to Mr. Willis and Dr. Deane; and certainly it would be an absurd thing, a very inconvenient, and I think I may say a very wrong thing, that the Court should hold its hand after an agreement has been partly performed in its main stipulations, because it assumes that there may arise a difference which may have to be referred to two named arbitrators. Now I do not think that *Tillett v. The Charing Cross Bridge Company* is an authority for saying that the Court ought to refuse specific performance because of an objection of that kind. But the decision in *Tillett v. The Charing Cross Bridge Company* professed to proceed on cases very well known to all of us. First of all the case of *Gregory v. Mighell* (7): in that case there was a parol agreement for a lease of twenty-one years, on the payment of a fair rent, to be fixed by two indifferent persons—one to be chosen by the plaintiff, the other by the defendant, with liberty to the arbitrators in case of difference to choose one or more umpires. Specific performance was decreed, and it was decreed upon the ground which I have already indicated as being a very strong ground in this case—that there had been part performance by possession being taken. But there one of the essential things, namely, the amount of rent, without fixing which it was impossible to say

there was a concluded agreement at all, was to be fixed by arbitrators to be named by either party; yet the Court, in the case of part performance, did not think the difficulty an insurmountable one, and decreed specific performance.

In the case of *Milnes v. Gery* (5) the agreement was for sale according to the valuation of two persons—one to be chosen by each side, or an umpire appointed by the two in case of disagreement. They differed in their estimate, and were not able to agree upon a third person; and it was decided that the agreement could not be specifically performed. The ground is put thus by Sir William Grant in giving his judgment: “The only agreement into which the defendant entered was to purchase at a price to be ascertained in a specified mode. No price having ever been fixed in that mode the parties have not agreed upon any price. Where, then, is the complete and concluded contract which the Court is called upon to execute?” Surely you may put the reason of that decision briefly thus: The contract which the Court is called upon to execute is not a complete contract, but it is an agreement that a contract should be made; the contract must be complete.

Reference was also made to the case of *Darbey v. Whitaker* (8), which is essentially the same as *Milnes v. Gery* (5). Those were the decisions upon which the case of *Tillett v. The Charing Cross Bridge Company* proceeded. Therefore I have no doubt that the meaning of that decision was this, that under the particular terms of that contract there was not a complete and a concluded agreement, but it was essential, in order to complete and conclude the agreement, that a further agreement between the company and Messrs. Tillett, or failing them the arbitration of the named persons, should have taken place; and until that was done there was nothing which the Court could enforce, that being the essential term of the agreement. That is entirely consistent with the case of *Scott v. Avery* (9). There the obtaining of the decision

(8) 4 Drew. 134.

(9) 6 H.L. Cas. 811; 25 Law J. Rep. Exch. 308.

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of the arbitrator was declared to be a condition precedent to the maintaining of an action. According to the terms of the contract, as no action could be brought for such a sum as the insurer was entitled to until the same was settled, there was no cause of action whatever.

That case was followed by *Scott v. The Corporation of Liverpool* (10), where the surveyor was to determine the amount payable, and until he had made that determination there was no sum which could be sued for. All these cases seem to me to proceed on one and the same principle—a very simple and intelligible principle—that when the agreement on the face of it is incomplete until something else has been done, whether by further agreement between the parties or by the decision of an arbitrator, this Court is powerless, because there is no complete agreement to enforce. Applying that rule to this case I find here an agreement which is, on the face of it, quite complete: the arbitrators are not to complete this agreement; they are not to supplement any defect in it; that is not the purpose for which they are appointed. The thing they are appointed to do is merely that in case of difference in working out these terms the matter is to be referred to them. And now I refer to the case of *Gourlay v. The Duke of Somerset*, in which the agreement was for a lease which was to contain all such provisions—reading it shortly—as should be judged reasonable and proper by John Gale. That case is very like *Tillett v. The Charing Cross Bridge Company*, but it differs from this, because, as I have already pointed out, this is not an agreement that the deed is to contain such covenants as Mr. Willis and Dr. Deane agree upon. But even in that case, there having been a suit for specific performance, a decree had been made, and on the reference to settle the lease a question arose. The suit having been by the intended lessee against the lessor, on the reference to settle the lease which was to be made by the de-

fendant to the plaintiff, the defendant contended that the Court would determine what were the proper covenants to be put in, and take the matter out of the hands of John Gale, the referee. The Master of the Rolls decided that the plaintiff in the action who had obtained a decree for specific performance raising the objection, the objection did not lie in his mouth, because, in point of fact, he had waived it by obtaining the decree, and submitting to the jurisdiction of the Court; and the Judge certainly said this: "If the defendant insisted that the only lease he was bound to execute was one to be approved by Gale and not by the Court, there would be more colour to the objection"—that is, as I understand it, if at the hearing of the action the defendant had said, There is no complete agreement, because I have only agreed to execute a lease containing such covenants as Gale shall approve, and Gale has not approved a lease,—then it seems to me the Court would have been in great difficulty, and would probably have refused to decree specific performance; but the Court said the plaintiff, having obtained a decree for specific performance, the objection that Gale was to settle the lease did not lie in his mouth; he must be held to have waived that objection? Certainly the Court went on to say this: "Suppose the reference made to Gale, is his decision liable to exception? If it is, the decision with regard to the propriety of the lease will ultimately be that of the Court; if not, the Court may be carrying into execution a lease which it may think extremely unreasonable and improper. If the parties had gone to Gale, and got him to settle a lease, and one of them had objected to the covenants as improper, and a bill had been filed by the other, the Court would have inspected the lease, and, if it were found unreasonable, would not have decreed an execution of the agreement." I do not know whether I ought to read that as meaning "If the defendant had raised this objection to specific performance, after all the Court would have to consider the actual terms of the lease. It may in the long run come to be settled by the Court,

(10) 3 De Gex & J. 334; 28 Law J. Rep. Chanc. 230.

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and therefore we will disregard that portion of the convention of the parties which makes John Gale the person to settle the terms of the lease." I am not sure whether that is the meaning of the Master of the Rolls. Therefore I rather hesitate to accept the short statement of that decision which is contained in the recent edition of Mr. Justice Fry's book (11), where the decision is said to be this: "There was a contract to grant a lease containing such conditions as A B should think reasonable and proper, and his Honour referred it to the Master to settle the lease, and not to A B, considering the agency of A B not to be of the essence of the contract, and that the Court would not grant relief through the medium of a reference compulsory on the other party." I confess I rather hesitate to hold that to be the effect of that decision. But that case, as I have pointed out, does not govern this, even if I am to suppose that the Master of the Rolls meant that if the defendant had made this an objection to a decree for specific performance he might have been compelled to yield to the objection. It does not govern this case, because there the defendant's objection would be, "I only agreed to grant such lease as Gale should approve." In this case the deed is not to be such a deed as Dr. Deane and Mr. Willis approve, but to be a deed containing "usual covenants;" and the agreement is quite perfect and complete in itself without the clause of arbitration. The clause of arbitration is only added as a subsidiary clause in case a difference should arise, which, as I have already said, I cannot and ought not to contemplate as a thing which may inevitably happen; but whether it happens or not, I do not think that the case comes within *Tillett v. The Charing Cross Bridge Company*, or any other of the cases cited on this point; and I do not know of any authority for refusing to grant specific performance of an agreement like this, because of the addition of that clause that in case of difference the difference is to be decided by two named persons.

Least of all do I hold that the Court is bound to hold its hand on that ground in a case where, as here, there has been part performance of what I consider to be one of the most important stipulations in this agreement. Therefore, all these grounds, which I believe were the only grounds urged as a reason why the Court should not make a decree for specific performance, seem to me to fail, and I feel myself bound to make a decree in this case for specific performance of this contract.

Then there remains the question which has been submitted to me—as I must take it by agreement between the parties—that is, whether or not a particular provision that an annuity to be paid to the wife should last only so long as she leads a chaste life, is to be included in this deed. On that point, first of all, I look with my own eyes, without extraneous help, at this agreement, and I find in it a provision—"Mr. Hart to covenant to pay Mrs. Hart, for herself and child or children, 150*l.* a year, quarterly." I find in that no such limitation—I should rather say no such defeasance—and the natural place for such a defeasance to occur, if it were intended, would be in that clause, or connected with that clause. Then comes the question whether, as it is not expressed in any way, it is to be implied by reason of the words "usual covenants;" and I believe I am not misrepresenting the argument when I say it was put to me in this way: that the surrounding circumstances at the time the agreement was entered into are to be considered; and one very important circumstance is this, that the agreement was entered into in the course of the trial of an action in which certain evidence had been given to criminate the wife—to prove that she had been guilty of adultery. The evidence on the other side had not been put in, but at that stage of the proceedings this agreement was come to, and the Court, in determining what are "usual covenants," must look to that among other facts, and "usual" must mean usual under such circumstances. I admit that argument to a certain extent. I do not think that the word "usual" is in many cases to be

(11) Fry on *Specific Performance* (2nd. ed.) p. 155.

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read with reference to the surrounding circumstances, but I agree the Court has a right to know, and is bound to know, all the material facts which were known to the parties at the time when the agreement, deed, document, will, or whatsoever it may be, was entered into or made. That is legitimate in all cases, as I understand the law, for the purpose of construing a written instrument. I put myself in that place as far as I can, but I dissent entirely from the statement that I am bound to treat the circumstance that one side has given evidence of a particular fact, which evidence had not then been answered, as being a material circumstance in considering this agreement. For all I can tell, the evidence on the other side might have disproved it entirely: evidence is not proof; least of all can evidence given on one side in a contested litigation be proof of the fact to maintaining which the evidence is addressed. For aught I know the evidence on the other side might have displaced the evidence given on the one side completely and entirely. I do not know what effect that evidence which was given produced on the mind of the Judge who was trying the case, and who was in that respect a jury. I do not even know what the evidence was. I cannot know; and therefore in construing this deed I do not look upon the fact that such evidence had been given upon one side only as being a material circumstance to be regarded.

Then it is said the pleadings in the divorce suit ought to be looked to and the charges made in the pleadings should be regarded and the issue should be looked to. I will not say in some cases that may not be material, but is it material here? Suppose I look at the pleadings? I have not done so. So little has it been thought material that they have not even been put into my hands, nor have counsel thought it worth while to refer to them in the argument in this case. I suppose I should find an accusation made against the wife, met probably by a denial—I do not know, I assume that for a moment—and a counter-charge in the wife's counter-claim against

the husband: I know so much from the pleadings in this action. How can I alter the meaning of the words "usual covenants," because there were those charges and counter-charges? I find myself perfectly unable to treat that, supposing it to be relevant, as evidence which can affect the meaning of the words "usual covenants." Then the two gentlemen engaged as counsel in this action were put into the box and their evidence seems to me to come to this: of course it was sought to induce me to accept evidence of what the negotiation was, but holding as I do that a written agreement has been come to which is complete in its terms and as to which the pleading is simply that the defendant signed it perfectly knowing what the words were but putting a certain meaning of his own upon them,—all I have to consider is what is the meaning in this agreement of the words "usual covenants." Therefore I declined to receive evidence from these gentlemen of what the negotiation leading up to this agreement was. The evidence given by them was of this nature. Dr. Deane said he was leading counsel for the wife, the respondent in the action. Mr. Willis was counsel for the husband, in that action in the Divorce Court. Dr. Deane said, "We negotiated terms of arrangement. The chastity clause is a provision that the annuity to the wife should cease if she became unchaste. As to the chastity clause, I cannot answer as to its being usual, except that if I were counsel for the husband I should insist upon it." I must take that to mean only this: "If I were negotiating terms of this kind, acting on behalf of the husband, I should insist that there should be put into the agreement that the annuity to the wife should cease if she became unchaste." That is as clear to my mind as any evidence could possibly be, that Dr. Deane's opinion was that it was not a usual covenant but a thing which ought to be stipulated for. Mr. Willis, on the other hand, says that he believes it to be the invariable practice in the Divorce Court, where an allowance is ordered by way of alimony, I understand in favour of a guilty wife, to make it part of the

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order that it shall continue only as long as she continues chaste; and that when in course of litigation parties come to an arrangement, when it is alleged that the wife had been guilty of adultery, and a provision is to be made for her by deed "with all usual covenants," such words would be taken to mean and include the *dum casta* clause. The term "usual covenants" means, he says, usual under all the circumstances, and it is distinguishable from a case of agreement out of Court when the wife is not guilty.

That asks me to assume the very thing which was in issue in that case, whether the wife was guilty or not; and it seems to me quite impossible for me to assume that the wife was a guilty person for the purpose of having that provision introduced into the deed which would be introduced by the Court in granting alimony if the Court was satisfied that the wife was guilty, because what Mr. Willis says is, the Court puts that in its order where it is satisfied the wife is guilty. It does not follow the Court would put that in its order when the wife was accused of being guilty, and that was not proved. Therefore I do not think the evidence on the part of the husband as to this being a usual covenant is very satisfactory or convincing, and I should hesitate to decide that this was a usual covenant, looking to all the facts which I am at liberty to regard even upon the husband's evidence alone. We have, however, had two gentlemen known to all of us—gentlemen of great experience—put into the witness box on behalf of the wife, who have told me that in the words "usual covenants" certainly would not be included a clause of this kind. I have already observed that is not strictly a covenant at all. The only book in which such a provision occurs was a book handed up to me by counsel for the husband, in a late edition of which, in the covenants to make a provision of this kind for the wife, there is introduced by way of proviso this limitation. I take it that would be, according to conveyancers' practice, the proper mode of introducing it; or perhaps it would be more proper if it were introduced in the covenant to pay the annuity to the wife in this form. A covenant to

pay the annuity to the wife during their joint lives or so long as the wife remains chaste, that, as it seems to me, would be the more strict way of introducing the provision. That, however, is almost a verbal criticism, because, if usual, it would probably come into the covenant in some form, either by way of proviso or limitation to that extent of the covenant, and therefore in that sense it may be treated as part of a usual covenant. As I said, the evidence of these gentlemen, experienced conveyancers, coincides. They say that they should not think—they being persons who cannot have any bias in the matter one way or the other, having no connection with the case at all, and merely coming here to prove what is the practice of conveyancers—each of them says he should not think of introducing a provision of this kind unless he had been specially instructed so to do. Therefore I, having this point submitted to me to decide—although it might perhaps have been the duty of Mr. Willis and Dr. Deane to decide it, or try to decide it in the first instance if it had not been submitted to me—but being submitted to me, I must decide it in favour of the wife. I think in an agreement of this kind this limitation of the provision for the wife must be specially expressed if it is intended to be contracted for, and that the words "usual covenants" do not include it.

Now I believe that determines everything which has been submitted to me except one point. According to the view I have taken of this case, this question as to what would be "usual covenants," supposing it had been submitted to Dr. Deane and Mr. Willis, and they could not have agreed, probably would have had to come before the Court, as Sir William Grant said in *Gourlay v. The Duke of Somerset*, therefore I have the less hesitation in undertaking to decide that question to the best of my ability now. I think the decree I am bound to make is the usual decree for specific performance of this agreement, and I think I ought to add to that decree a direction that the deed is to be settled in chambers if the parties differ. I do so for this reason: if the parties intend to carry this case further, it is better that my

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view should be very clearly expressed on the matter; and my view is, that the provision for the settlement of differences, in case they arise, by Dr. Deane and Mr. Willis does not oust the jurisdiction of the Court to settle the deed itself—that the agreement is on the face of it complete. This is an incidental term introduced, which does not in fact oust the jurisdiction of the Court. I do not know why, if this comes within the provision of the Common Law Procedure Act, a decree might not be made in the terms of merely directing specific performance of the agreement and then leaving any difference to be settled by Dr. Deane and Mr. Willis with a reference to the Court in case they cannot agree, or with power for the Court to exercise those provisions of the Common Law Procedure Act which would enable it to make the arbitration effective. I do not, however, know any such decree; and I of course should not like to be the first Judge to make the decree in that form. I therefore think it better to make a decree in the form I have indicated; then, if the case should go further, the whole of the decree will be subject to revision, and the extent to which I have proceeded will be thoroughly understood from the terms of my judgment, and of the decree. There remains the question of costs.

Mr. Higgins.—I would suggest that your Lordship cannot deal with the costs until it shall appear whether the plaintiff performs her part of the agreement and provides a trustee. If it should turn out that she fails in this respect the result will be that no benefit will arise from this action either to herself or anybody else.

KAY, J.—That will not make the defence any better. I must give the wife her costs of this action up to and including the hearing. There must also be liberty to apply, so that the question of subsequent costs can then be dealt with. The costs of the divorce suit will be included in the order for specific performance of the agreement. There will be a declaration to the effect that the usual covenants do not include the *dum casta* clause, and there must be an order for payment of

the arrears of the annuity, taking credit for the amount of alimony which may have been paid pending the litigation, the amount to be stated in the order.

Solicitors—Merediths & Co., agents for C. J. Chesshyre, Cheltenham, for plaintiff; Darley & Cumberland, for defendant.

HALL, V.C. }
1881. } COLLYER v. ISAACS.
June 14. }

Bill of Sale—After-acquired Chattels—Bankruptcy—Discharge—Effect of Discharge on Bill of Sale.

Where a bill of sale of the chattels upon premises contains an assignment of chattels which may subsequently be brought upon the premises, and the grantor of the bill of sale becomes bankrupt and obtains his order of discharge, such assignment will be effectual as to chattels brought upon the premises by the grantor after obtaining his order of discharge.

Lyde v. Mynn (1 Myl. & K. 683; 4 Sim. 505) followed. *Thompson v. Cohen* (41 Law J. Rep. Q.B. 221; Law Rep. 7 Q.B. 527) and *Cole v. Kernot* (41 Law J. Rep. Q.B. 221; Law Rep. 7 Q.B. 534 n) distinguished.

On the 25th of April, 1879, a bill of sale was executed by the plaintiff, who carried on business as an engineer and tool maker, for the purpose of securing to the defendant the repayment of the sum of 300*l.*, with interest at ten per cent., owing to him by the plaintiff.

By this instrument the plaintiff assigned to the defendant "all the goods, chattels, effects and things, enumerated in a schedule to the deed, belonging to the plaintiff, then in, upon or affixed to the messuage and premises Nos. 21 and 22, Charles Street, Oakley Street, Lambeth" (the place of business of the plaintiff), "and all other goods, chattels and effects which might be therein, or which might at any time thereafter be brought thereon in addition thereto or in substitution thereof,

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or any of them." It was provided that the 300*l.* and interest should be repaid to the defendant in six equal instalments, extending over a period of eighteen months, and if default should be made in the payment of such instalments or any of them, or in case the said goods and chattels should be distrained for rent, rates or taxes, or the plaintiff should become bankrupt, or any proceeding at law should be commenced against the plaintiff by writ of summons or otherwise, or the said goods, chattels and effects should not be insured by the plaintiff, or the same or any part thereof should be removed from off the said premises contrary to the covenants and provisions thereafter contained, then the defendant, his executors, administrators or assigns might at any time afterwards "enter into and upon the said messuage and premises, or any other messuage or tenement or place where the same goods, chattels and effects should then be, and take possession of and thenceforth hold and enjoy the said goods, chattels and effects, and might remove or not remove the same at his or their discretion, and also might, with or without the concurrence of the plaintiff, his executors or administrators, at any time after such default, absolutely sell the said goods, chattels and effects and every part thereof by public auction or private contract." The goods enumerated in the said schedule consisted of certain plant, tools and machinery used by the plaintiff in his business of an engineer and tool maker.

On the 16th of February, 1880, the plaintiff presented his petition for liquidation, and on the 1st of April, 1880, a certificate of discharge was granted to him. The defendant took no steps in the liquidation to prove his debt, but rested on his security. After receiving his discharge the plaintiff discontinued his business of an engineer and started an entirely new business, namely, that of a billiard slate manufacturer, and acquired new plant and stock to carry it on. The plaintiff continued to carry on his new business until the 18th of May, 1881, when the defendant entered on the premises and seized not only the specific chattels enumerated in the schedule to the bill of sale, but also the stock, plant

and effects of the billiard slate business, and advertised the whole for sale by auction.

The plaintiff now moved for an injunction to restrain the defendant, his servants and agents, from continuing in possession of the slate rubbing benches and prepared and other slate slabs for billiard tables, and other effects in and upon the plaintiff's premises, and from advertising the same or any other effects whatsoever for sale by public auction on the said premises, and from selling by public auction upon the said premises the said effects or any of them, or any other effects whatsoever.

Mr. W. Pearson and *Mr. E. Outler*, for the plaintiff.—By the order of discharge the debt due to the defendant was extinguished, and the chattels acquired subsequently to its extinguishment cannot be made available as security.

Cole v. Kernot (ubi supra), reported together with

Thompson v. Cohen (ubi supra), is a direct authority in our favour. In

Thompson v. Cohen (ubi supra) there was only a licence to seize after-acquired property, but in

Cole v. Kernot (ubi supra) there was, as there is here, an actual assignment of the after-acquired property. For the present purpose there is no difference between a bankruptcy and a liquidation—see

Carr v. Acreman, 11 Exch. Rep. 566; 25 Law J. Rep. Exch. 90.

The object of the order of discharge is to enable the debtor to make a new start in life, and that object would be defeated if a security of this kind were held applicable to property acquired subsequently to the discharge.

Mr. E. W. Byrne, for the defendant.—No doubt the order of discharge would prevent the defendant from suing for the debt, but it does not take away or affect what he has as security—see

Lyde v. Mynn (ubi supra), which, I submit, governs the present case. The cases cited were previous to the Judicature Act, and the effect of that Act is, that whatever was theretofore a good equitable assignment is now a good

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legal assignment. Moreover, the judgments in

Cole v. Kernot (ubi supra)

and

Thompson v. Cohen (ubi supra)

only establish that a mere licence to seize after-acquired chattels as security for a debt is co-extensive with the debt, and therefore cannot be exercised after the debt is barred by bankruptcy; and they merely proceeded upon the ground that the securities in those particular cases were not sufficiently specific in their terms to attach to after-acquired property. The recent cases of

Lazarus v. Andrade, 49 Law J. Rep. C.P. 847; Law Rep. 5 C.P. D. 318;

and

Leatham v. Amor, 47 Law J. Rep. Q.B. 581,

are express authorities that where, as here, the assignment is absolute, and not a mere agreement to assign, and the goods are sufficiently specific to make the assignment operative in equity, the after-acquired property may be seized under the security.

No section in the Bankruptcy Act, 1869, can be referred to which invalidates a floating security of this kind; indeed, in many cases, it would be impossible for a man to start afresh in business if he could not give such a security.

He referred also to

Holroyd v. Marshall, 10 H.L. Cas. 191; 38 Law J. Rep. Chanc. 193;

and

The Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 4.

Mr. W. Pearson, in reply.—The cases of *Lazarus v. Andrade (ubi supra)*

and

Leatham v. Amor (ubi supra)

have no application, because in each of those cases there had been no bankruptcy; the debt still subsisted, and the only question was whether the after-acquired chattels were comprised in the security. So in

Lyde v. Mynn (ubi supra);

the claim upon the covenant there in question was one which at that time was not provable in, and consequently was not affected by, the bankruptcy which had taken place.

HALL, V.C.—Upon the first question, as to the injunction asked for to restrain a sale upon the premises, it seems to me that this security is not framed in such a way as to authorise any sale being effected upon the property which was in the possession of the debtor at the time when this assignment was made. It contains an authority for the mortgagee to take possession of, and thereafter to hold and enjoy, the goods, chattels and effects, and to "remove or not remove the same at his discretion;" but it contains no authority to sell the chattels upon the premises, or hold an auction upon the premises, so as, to that extent and for that purpose, to divest the debtor of the possession of the premises for the purpose of giving effect to the security. That being so, it appears to me that the plaintiff is right in respect of that portion of his case.

As regards the other point in the case, the question for decision appears to me to be one of considerable difficulty. The frame of the deed is a transfer of all chattels which were then on the premises, or which might be thereon, or which might at any time thereafter be brought thereon.

That language is unlimited in point of time, so long as the relations between the two parties to the instrument subsist. In terms the security extends to the property which is at the time thereon, or which at any time thereafter may be thereon.

The debtor takes proceedings for the purpose of liquidating his affairs in bankruptcy. Whatever he had at the time, subject to the rights of secured creditors, passed to the trustee in bankruptcy; and as to the property which he had at that time there is no question that the secured creditor has his security. What is in contest is as to the property which the debtor, after becoming a liquidating debtor, acquired since the time when he got his discharge, and the question is, whether that property is included in the security or not for the benefit of the secured creditor. In terms the security extends to and includes it: it is there on the premises, and has, within the meaning of the instrument, been brought

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on the premises in addition to or substitution for chattels thereon at the time of the assignment. It being covered by the terms of the deed, the debtor says that, notwithstanding that, the debt itself has gone, and that the debt having gone, the creditor must thenceforth and from that time be secured, not upon what he (the debtor) has brought upon the land, so as to fall within the terms of the security, but upon what was there at the time when he got his discharge. Now upon that point the authorities which have been referred to do not apparently dispose of the question. The contention that the discharge from the debt, treating it as a debt, has the effect of limiting the security so that it should not comprise what, according to its terms, it does comprise—particularly seeing that there is an option to the debtor as to bringing the property on the premises or not, so as to fall within the security—and that the property brought on the premises should be distinguished from what was already there by reason of the extinction of the security so far as the debt is concerned, involves a process of reasoning which I confess I cannot quite follow. I have not been referred to anything in the Bankruptcy Act which gives it such an operation, nor upon general reasoning do I consider that it has been shewn that the security ought to be dealt with in that way. Authorities have been referred to, and particularly the case of *Cole v. Kernot* (reported in the note to *Thompson v. Cohen*). In that case, no doubt, there was an assignment of "all and singular the household furniture, stock-in-trade, goods, &c., which were then, or which might during the continuance of that security, by substitution or otherwise, be in and about or belonging to the messuages and premises then occupied by the plaintiff." Mr. Justice Willes in that case directed the jury that the defendant had no right under his bill of sale to seize any property acquired by the plaintiff since his order of discharge, and expressed it as his impression that the effect of the plaintiff's discharge in bankruptcy was to get rid of the collateral security for the debt which was

absolutely barred by the order of discharge in bankruptcy.

Now that general proposition is, of course, manifestly a great deal too wide. The security itself was in the terms which I have mentioned, and in the argument the counsel who supported the rule contended "that the authority to seize being given for a good consideration was irrevocable; the bankrupt was discharged from the debt, but the debt was not extinguished, and if the debt still existed, then there was a default within the terms of the deed, although the debtor was only morally bound and not legally; that the security remained, although the debt was barred by the bankruptcy."

The Court discharged the rule, and Mr. Justice Mellor, in his judgment in *Thompson v. Cohen*, after saying that he had nothing to add to the judgment of Mr. Justice Blackburn, continued: "But I have to say that we have considered the case of *Cole v. Kernot*, together with this case, and the Court are all satisfied that the two cases are identical in principle, and the rule, therefore, in that case must be discharged."

Then Mr. Justice Blackburn says, "The case is distinguishable from *Lyde v. Mynn*, which was much pressed, and properly pressed, upon us. In the present case the mortgagor, having executed the above deed, filed a petition for liquidation, which, as I have already said, had the same effect as if he had become a bankrupt, and by operation of the liquidation he was discharged from the debt altogether—the debt was, in fact, gone;" and in his judgment Mr. Justice Blackburn dealt with *Lyde v. Mynn*, and said that "It is sufficient to say that the precise point does not arise in the present case, as there is no covenant to transfer, or anything amounting to an equitable mortgage, like the case of *Holroyd v. Marshall*. Here is a simple licence to seize after-acquired goods for the purpose of selling them and discharging the debt, and the debt being gone, we think the collateral licence to seize goes with the principal debt. There must, therefore, be judgment for the plaintiff."

Now *Lyde v. Mynn* was a case which was decided by the Vice-Chancellor Shad-

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well, and afterwards by Lord Brougham, who thought that the covenant in that case was not discharged by the bankruptcy. If that was the law as applicable to that case, I do not understand why it is not the law as applicable to the case now before the Court, notwithstanding that Mr. Justice Blackburn thought fit to distinguish it. In spite of the authority of Mr. Justice Blackburn in favour of the proposition, I do not see my way to limit down the security to what was comprised in the assignment at the time of the discharge. The debtor has given this security in terms expressly extending to what he has brought upon the premises, and that being so, the security remains for whatever was comprised within it, except so far as it may have been varied. I do not see my way to limit the security down in the way which is contended for.

The debtor thought fit to give the security extending to property which he might bring upon the premises, and so, in like manner, he thought fit, being in possession of the property, to bring upon the premises this other property. I do not see what authority there is to cut it down.

It is manifest that all those cases which have been considered have been considered and dealt with in the way in which they have, by reason of the different views of Courts of equity and Courts of law as to the operation of instruments as effectually dealing with property non-existent—the Courts of law refusing to admit its existence for the purposes of transfer, while Courts of equity have dealt with these cases as being as effectual transfers of property not existing as they were of what was in existence. It appears to me, upon the whole case, that the plaintiff has not made out to my satisfaction that he is entitled to have the sale restrained as to chattels brought on to the premises by himself since he obtained his order of discharge.

Solicitors—Grueber & Co., for plaintiff; Hy. Levy, for defendant.

BANKRUPTCY.

BACON, C.J.

1881.

July 18.

In re LATHAM; ex parte GREGG.

Leasehold Interest of Bankrupt—Disclaimer by Trustee—Previous Severance of Tenant's Fixtures—Special Stipulation—Bankruptcy Act, 1869, s. 23.

A lease contained a proviso that the tenant, his executors, administrators or assigns, might remove tenant's fixtures at any time within twelve months from the expiration or other sooner determination of the term.

The tenant's trustee in liquidation having sold certain tenant's fixtures, and afterwards disclaimed the lease,—

Held, that, having regard to the proviso, the disclaimer had not the usual effect, by virtue of section 23 of the Bankruptcy Act, 1869, of surrendering to the lessor the tenant's fixtures not disannexed at the date of the trustee's appointment, and that the trustee was entitled to them.

Ex parte Brook (48 Law J. Rep. Bankr. 22; Law Rep. 10 Ch. D. 100) discussed.

A brickfield was leased to the debtor Latham, the lease containing a proviso that the lessee, his executors, administrators or assigns, might, during the continuance, or within twelve months from the expiration or other sooner determination of the term, remove any buildings or machinery which he might have erected on the premises for trade purposes.

On the 1st of March, 1881, resolutions for the liquidation of Latham's affairs were passed, and a trustee was appointed. On the 18th of March the lessor gave notice to the trustee to disclaim. On the 9th of April the trustee sold certain trade machinery which Latham had erected on the property leased to him, and on the 13th of April disclaimed the lease. The lessor having moved for an order upon the trustee to pay him the proceeds of sale of the machinery, the County Court Judge held that the trustee had a right to disannex the machinery, and was entitled to the proceeds. From that order the lessor now appealed.

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Mr. De Gex and Mr. Clare, for the appellant.—Section 23 enacts that the disclaimer shall have the effect of a surrender from the date of the order of adjudication, represented in this case by the appointment of the trustee. This proviso is then either a part of the lease—in which case, upon surrender, the machinery passed to the surrenderee from the date of the trustee's appointment; or it is a distinct contract—in which case, by section 23, it must be deemed to have been determined from the same date. It has been decided in

Ex parte Brook (ubi supra) that the effect of a disclaimer is to put the trustee in the position of having never had any interest; that case, therefore, and

Ex parte Stephens, 47 Law J. Rep. Bankr. 22; Law Rep. 7 Ch. D. 127,

govern the present one.

Mr. Winslow and Mr. Bardswell, for the trustee.—Neither in

Ex parte Stephens (ubi supra) nor in

Ex parte Brook (ubi supra) was there any special stipulation between lessor and lessee as regards fixtures, but in this case there is just such a special stipulation as *Thesiger, L.J.*, in the latter part of his judgment in

Ex parte Brook (ubi supra), referred to as making a case exceptional. We submit that the trustee is entitled to the proceeds of sale of the machinery.

They also cited

Stansfield v. The Mayor of Portsmouth, 4 Com. B. Rep. N.S. 120; 27 Law J. Rep. C.P. 124;

Sumner v. Bromilow, 34 Law J. Rep. Q.B. 130.

Mr. De Gex, in reply.

BACON, C.J.—The only question before me arises upon this proviso. The argument of the appellant is irresistible as far as it goes. It has been decided that a tenant's right to remove fixtures is what is called an excrescence—a wart, but still a common law wart; but it is part of the demise, it is part of the transaction between the parties, and inseparable from it, and when a surrender takes place that

wart goes along with it. How does that affect a case where the parties, cognisant of their rights (as I must assume they were in this case), and, besides that, keeping in contemplation the common law right as to the removal of fixtures, enter into the contract contained in the proviso which is here referred to? Is that to be treated as a dead letter? That is no excrescence, that is no fiction of the law, but it is a plain, substantial proviso, come to by contract between these two parties, that in certain events the lessee shall have a right to remove the fixtures. In the trustee in liquidation every earthly particle of interest and right that could have been asserted by the lessee is vested. He has a right to do everything that the lessee could do. He had a right, therefore, before he disclaimed—not before he had notice to disclaim—to avail himself of this proviso; and when he afterwards disclaims and surrenders to the lessor, by what operation of law, by what form of words, does he say at the same time, "I release and surrender to you the contract you have entered into, by which you say I am at liberty to remove these things on certain terms"?

Now the cases are perfectly consistent, and the common law cases within their ambit are perfectly consistent. *Stansfield v. The Mayor of Portsmouth* was a case plainly within the jurisdiction of the Courts of common law. They had to construe a stipulation in a written agreement, and they did construe it in favour of the right of the tenant to do that which the lessor had said he should be at liberty to do, namely, to remove such fixtures as were not connected with the shipbuilding trade.

But the case most relied upon is the case of *Ex parte Brook*, in which Lord Justice Thesiger delivered a very elaborate judgment; but it is quite clear that, although his attention was mainly fixed upon the common law doctrine, the excrescence, and the consequences of the excrescence, going along with the original member, he had in view that there might be a contract between the parties that would prevent the application of that law. He says so in terms which cannot

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be misunderstood. He says all that it was necessary to have decided in *Ex parte Stephens* was, "that any severance which has taken place after the date when the term is put an end to, for all purposes and by a person who, like a trustee, is in the position of never having had any interest in the term, must necessarily be wrongful." Is the trustee here a person who never had any interest? What has taken from him the right contained in the proviso? Then in a later passage, keeping in view the same thing, Lord Justice Thesiger says, speaking of the right of the tenant to sell his fixtures and to remove them in reasonable time, "Even in cases where the landlord exercises a right of forfeiture, and the tenant remains on the premises for such reasonable time as last referred to, the law would presume a right to remove tenant's fixtures after the expiration or determination of the tenancy. But, however that may be, we are clearly of opinion that the case of a surrender of a lease by a tenant while tenant's fixtures remain affixed to the freehold, does not, either upon principle or the authority of decided cases, give any right to the tenant subsequently to remove such fixtures. At the date of the surrender they form part of the freehold, and the law has no right to limit the effect of the surrender by excluding from it that which legally passes by it, and which has not been excluded from it by the bargain of the parties." Can those words apply in the face of this proviso—"excluding from it that which legally passes by it"? You are to read the surrender not only as a surrender of the demise, with all the consequences of that surrender, but also as a release of the beneficial proviso for the benefit here of the creditors of the bankrupt. Within the very terms of the qualification of the Lord Justice, perhaps not contemplating the case before me, but speaking generally, it applies only to the cases which have not been excluded from it by the bargain of the parties. Then at p. 111 the same idea is kept clearly and pointedly in view, where the learned Judge says, "The effect, therefore, of a disclaimer generally being such as we have laid down, and there being in the agreement

between the debtor and his landlord no special stipulations as regards fixtures which make this case in any way exceptional, the necessary conclusion must be that the respondent by disclaiming the property to which the fixtures were attached, after his sale of those fixtures, constituted himself by relation a wrongdoer in respect of that sale." I cannot leave that proviso out of the lease. Living or dead, active or surrendered, nothing has been surrendered except that which the landlord could properly claim, and by his own plain bargain and covenant the proviso amounts to this, that he had agreed that the lessee, his executors, administrators or assigns might at any time during a continuance of the term, or within twelve months from the expiration or sooner determination thereof, but not afterwards, remove any buildings or machinery which he or they might have erected on the premises for trade purposes. It is admitted on both sides that the buildings and machinery here in question were erected during the term and for trade purposes. In my opinion the judgment appealed from is perfectly right in giving effect to that proviso, which is wholly unaffected by the surrender, and is not a wart or excrescence, but a contract between the parties, which the trustee had a right to enforce, and having enforced it the subsequent surrender does not in the faintest degree affect the right which he has so acquired. I am of opinion, therefore, that the decision of the Court below is quite right, and the appeal must be dismissed with costs.

Solicitors—Gregory, Rowcliffes & Co., agents for Scott & Ellis, Wigan, for appellant; Chas. M. Barker, agent for Robert Stuart, Wigan, for the trustee.

FRY, J. } *In re* THE ALBION ASSURANCE
1881. } SOCIETY; *ex parte* BROWN.
Aug. 2. }

*Companies Act, 1862—Life Insurance—
Articles of Association—Construction—
Contributory—Policy-holders.*

Where the constitution of a life insurance society was such that participating policy-holders were liable as contributories after shareholders, it was held on the construction of the articles that a policy-holder who had assigned his policy before the winding-up was not liable as contributory.

It had been determined in the winding-up of the Albion Assurance Society (1) on the construction of the memorandum and articles of association of the society, and the form of proposal used and policies issued by the society, that participating policy-holders are liable as contributories; but that (2) they are only liable after shareholders. It was found that sufficient would not be received from the shareholders to defray the expense of the winding-up, and a call was made on the policy-holders. This was an application by Mr. Wilson Brown, who had been placed on the list of contributories as participating policy-holder, to be removed, on the ground that he ceased to be a policy-holder before the commencement of the winding-up.

In October, 1866, the policy in respect of which Mr. Brown was placed on the list of contributories was issued to him on his own life, insuring the sum of 400*l.*, and his name was placed on the register of insurance members. In May, 1867, he assigned the policy to Elias Vooght by way of mortgage, and notice was given to the society of the assignment. In March, 1873, Mr. Brown presented a petition for liquidation of his affairs by arrangement, on which an order was made and a trustee appointed. In February, 1874, the mortgagee, under a power of sale, assigned the policy to Messrs. Sedgwick & Woolcombe, who from that time paid the premiums on it. The society was ordered to be wound up, and Messrs.

Sedgwick & Woolcombe proved in the winding-up for 135*l.* 19*s.*, the estimated value of the policy.

Mr. Brown's name remained on the register of assurance members, and no other person's name was ever placed on the register in respect of the policy.

The society was registered as an unlimited company in November, 1863. The memorandum of association of the society stated the objects of the society in terms which embraced the ordinary business of a life insurance company, and that the liability of the members was unlimited, and fixed the capital of the company as 50,000*l.* divided into 10*l.* shares.

The articles of association provided that the company should consist of two classes of members, shareholders and participating policy-holders, and in certain events for turning the society into a mutual company and the extinguishment of the shares by purchase out of the accumulated profits of the business. The other relevant provisions of the articles are sufficiently referred to in the judgment.

Mr. Vernon-Smith (Mr. North with him) argued that the general scheme of the society's constitution was that a policy-holder who by assignment ceased to have any benefit in the policy ceased to be a member, and to be liable to contribute irrespectively of whether anyone else became a member in his place. There was no analogy between liability in respect of shares and in respect of policies; for, from the nature of the property, the share was intended to exist for the benefit and at the liability of some one so long as the company existed; while a policy must drop at some time. Moreover, the liability of the shareholders was regulated by the general law; but a policy-holder was only liable by virtue of a special contract, and the Court would not extend his liability beyond the words of his contract.

Mr. Glasse and *Mr. Boome*, for the liquidator, contended that Mr. Brown had agreed to become a member within the meaning of the 23rd section of the Companies Act, 1862, and so long as his policy subsisted he could not cease to be a

(1) *Winst. n's Case*, 48 Law J. Rep. Chanc. 607; Law Rep. 12 Ch. D. 239.

(2) Law Rep. 16 Ch. D. 83.

In re Albion Assurance Society; ex parte Brown.

member, and as such liable till some one else was substituted on the register of members—

The Imperial Mercantile Association; Ourtie's Case, 37 Law J. Rep. Chanc. 629; Law Rep. 6 Eq. 455.

Fry, J., said—The question I have now to determine is one upon the construction of the articles of association of the Albion Assurance Society, because the policyholder has made himself liable to the provisions of the articles of association.

That question is this: Does a policyholder who has assigned his interest in his policy, and thereby ceased to be entitled to hold the policy, cease to be liable as a member of the company?

In the first place, the interpretation clause says, "Assurance members means every person for the time being holding a subsisting policy of assurance with the company for the whole term of life on the terms of participating in the profits of the company, and duly registered as a member of the company." That means, in my judgment, that while he holds he is a member, and when he does not hold he is not a member. I turn then to the subsequent clauses which bear upon the question, and find that by the second article the company is made to consist of two classes of members, shareholders and as members for the time being only assurance members.

Then at clause 13 I find that the net profits were to be apportioned as to one-fourth among the shareholders, and as to the other three-fourths among the holders of such participating policies as should be subsisting: it follows that if the person who took out the policy continues a member, notwithstanding an assignment, the assignee would take the benefit while the assignor remained liable. Then I observe there is another series of clauses, beginning at article 16, which provide, in effect, that the holder is to take the bonuses and elect in what manner they are to be taken, all which shew that the holder is to have the benefit.

Then again, in clause 52, which provides for the mode of calling extraordinary general meetings, I find persons

entitled to call such meetings to be "members of the company, not less than nine in number, holding in the aggregate not less than 500 shares, or assurances in the company to the amount of 5,000*l.*, or not less than 250 shares, and also assurances to the amount of 2,500*l.*" It would be a very improbable construction to put on that article, that it should apply to persons who had assigned their policies.

In article 91 I find that the qualifications for the office of director were that he should hold in his own right fifty shares, or an assurance in the company for the whole term of life in the sum of 1,000*l.* Again, if a person who had assigned remained a member, he was incapable of serving the office of director.

In article 147 I find a provision for the forfeiture of policies. Now it appears to me plain that it is against ordinary common sense to hold that a person who had his policy forfeited remained a member incapable of deriving any benefit. And if forfeiture extinguishes the liability, it is difficult to see why assignment should not.

Lastly, in section 153 and the two following articles, I find provisions which enable a person by transfer or devolution to become a member of the society. I do not mean to suggest that by mere assignment the assignee became a member; but those provisions enable him to become one, and thereby to participate in the profits and assume the liability of membership.

Those articles seem to me all consistent with the interpretation clause, and all tend to shew that the scheme and object was, that the holder for the time being should be liable, and when he ceased to hold should also cease to be liable.

I find also that Lord Justice James, when another question in the winding-up came before him, expressed himself in a way which seems to me to be entirely consistent with what I have just said. He says, "The clause making them" (the participating policy-holders) "members, was only to give them control over the funds which would be applicable for their policies. These provisions do not seem to me to be sufficient to imply that the mutual liabilities were different

In re Allion Assurance Society; ex parte Brown.

from those in ordinary offices." Now it is plain that that applies to persons who have existing interests in policies, not to persons who were interested in policies which they have ceased to have any benefit in. I hold, therefore, that Mr. Brown having ceased by assignment, a notice of which was duly entered in the books of the company, to be interested in his policy, ceased also to be a member of the company.

It is then said that it is impossible to relieve Mr. Brown till some person is placed on the register of members in his stead. And the cases cited do not appear to me to be any authority in the present case; because, as I have pointed out, the question simply is, What was the contract between the company and the policyholder? If it were that he should be a member so long as he held his policy, by the mere effect of assigning he ceased to be a member.

In *Curtis's Case* the applicant had taken shares and was duly registered in the ordinary way, and could not be relieved from his liability till he had proved that he had transferred to another person who was liable, and he could only prove that in the presence of a transferee. I must make an order to remove Mr. Brown's name from the list of contributories.

Solicitors—W. Moon, agent for Robert Taylor
Campion, Exeter, for applicant; George Blagden, for respondent.

FRY, J.
1881.
June 17, 18. }

In re CHASTON.
CHASTON v. SEAGO.

*Will — Construction — "Others" —
"Paid" — Accretion — Uncertainty.*

A testator, in case of the death of any of his children without leaving issue, before payment of any part of reversionary legacies, directed such parts to be divided among the others and other of them, and in case of the death of a child leaving issue before such payment, he directed such parts to be divided among the children of such child:—

Held, first, that "payment" referred to the time when the shares given over became payable, and the gift over was not void for uncertainty; secondly, that "others" meant children other than those who had died without leaving issue; thirdly, that the gift over applied to accrued as well as original shares.

This was a Special Case to determine questions under the will of John Chaston, who died in 1827. He gave his real estate to his wife during widowhood, with remainder to his trustees on trust for sale. He directed his trustees to set apart a sum of 320*l.*, and bequeathed the residue of his personalty to them on trust to pay the income to his wife during widowhood, and after her second marriage to provide an annuity of 100*l.* for her. Subject to the annuity given to his wife on her death or marrying again, he directed his trustees to divide the proceeds of his real and personal estate into nine equal shares and to pay one of such shares to each of eight out of his nine children by name. He directed his trustees to add the 320*l.* to the ninth share, invest it and hold it in trust for his other child Robert for life. The will then proceeded as follows: "In case of the death of any one or more of my said sons and daughters before the said legacies and bequests hereinbefore by me given and bequeathed to them, or any part thereof, shall have been paid to him or them so dying, or of the death of my said son Robert before the said dividends, interest and income arising from the said trust moneys, stocks, funds and securities in which a life interest is hereinbefore given to him, shall become due and payable, without leaving issue lawfully begotten, then my said executors and trustees, and the survivors and survivor of them, and the executors or administrators of the survivor of them shall stand and be possessed of the said legacies and bequests of him, her or them so dying, or so much thereof as shall not have been paid to him, her or them, and of the said moneys hereinbefore directed by me to be put and continued out at interest for the benefit of my said son Robert: in trust for the others and other of them, to be equally divided between them my said

In re Chaston.

children (if more than one), share and share alike, and to be payable and paid to him, her or them respectively at the time or respective times hereinbefore appointed for the payment of his, her, and their original share and shares, and in case of the death of any one or more of them my said sons and daughters leaving issue, that they, my said executors and trustees, and the survivors and survivor of them and executors and administrators of such survivor, shall stand and be possessed of the legacy and bequest, or legacies and bequests, of the aforesaid trust money, stocks, funds and securities of him, her or them so dying, or so much thereof as shall not have been paid to him, her or them so dying, for his, her or their child or children respectively, to be equally divided between them, as well as to the original share or shares (or such part thereof as shall not have been received by them) of their fathers or mothers respectively as any additional share or shares in the event of the decease of any one or more of them my said children, without having received all or some part of his or her share or respective shares."

The testator's wife survived him. She died in 1832, without marrying again. All the nine children of the testator survived her. The testator's son Robert Chaston died in November, 1879, without issue. The plaintiff Daniel Chaston was the only one of the testator's children who survived Robert. Of the other seven, two—Alfred and Benjamin—left no issue. The other five—John Browne Chaston, Mary Browne Watling, George Chaston, Sarah Gowing and Ann Elizabeth Shearing—left children or remoter issue.

The questions submitted for the opinion of the Court were for the purpose of determining to whom, and in what proportions, Robert Chaston's share ought to be paid.

Mr. Glasse and *Mr. Beale*, for the plaintiff, contended that the word "others" must be cut down to mean those surviving at the time the gift over took effect, and that the plaintiff took the whole of Robert's share.

Mr. Farwell, for the defendant Seago (the representative of John, one of the

testator's children, who had died leaving issue), contended that the share of Robert was divisible into eighths, and went among all the other eight children of the testator, and the word "others" must be taken literally; secondly, that the gifts over of the shares, whether original or accrued, of the children, other than Robert, inasmuch as they were to take effect on death before the time of payment, not the time of being due or payable, referred to an indefinite time, and were void for uncertainty, and therefore the representatives of all the deceased children took—

Minors v. Battison, 46 Law J. Rep. Chanc. 2; Law Rep. 1 App. Cas. 428;

Johnson v. Crook, 48 Law J. Rep. Chanc. 777; Law Rep. 12 Ch. D. 639;

Collison v. Barber, 48 Law J. Rep. Chanc. 720; Law Rep. 12 Ch. D. 834;

Bubb v. Padwick, 49 Law J. Rep. Chanc. 178; Law Rep. 13 Ch. D. 578;

Cambridge v. Rous, 25 Beav. 409;

In re Willmot's Trusts, 38 Law J. Rep. Chanc. 275; Law Rep. 7 Eq. 532;

Martin v. Martin, 35 Law J. Rep. Chanc. 679; Law Rep. 2 Eq. 404;

Theobald on Wills, p. 367.

Mr. Langworthy, for the representative of Alfred and Benjamin Chaston, contended also that the share of Robert was divisible into eight parts, and that either the gifts of the other shares over did not apply to accrued shares or were void for uncertainty—

Haydon v. Rose, 39 Law J. Rep. Chanc. 688; Law Rep. 10 Eq. 224.

Mr. Cookson and *Mr. Bunting*, for children of deceased children of the testator, contended that the gifts over referred to times when the legacies or any parts of them became payable, and not to the time of actual payment. The Court would put such a construction on the words as would prevent the gifts over being void for uncertainty, and the word "others" meant either all the children, living, or dead leaving issue at the time the gift over took effect, or all the other chil-

In re Chaston.

dren ; on either construction, the share of Robert would be divisible into six parts, one of which would go to the plaintiff and one to the children of each child who had died leaving issue. They referred, in addition to the above authorities, to

Hutcheon v. Mannington, 1 Ves. jun. 366 ;

Elwin v. Elwin, 8 Ves. 547 ;

Gaskell v. Harman, 11 Ves. 489 ;

In re Arrowsmith's Trusts, 2 De Gex,

F. & J. 474 ; 29 Law J. Rep.

Chanc. 774 ; 30 *ibid.* 148.

Mr. Glasse, in reply, referred to

Roberts v. Youle, 49 Law J. Rep.

Chanc. 744.

FRY, J., stated the facts and read the clause in the will above set out, and said—The question is, to whom is the gift over ? It is to "the others and other of my said children." Other than whom ? *Prima facie* it would seem to mean other than the child who has died, or, to take the particular case, other than Robert, in which case it would go over to the eight. But the difficulty in the way of that construction is this, that the testator has contemplated that the class to whom it is to go over will be or may be a diminishing class, and may consist of one person only ; because it is to go to the others or other, and to be equally divided between them if more than one. It cannot, therefore, in my judgment, include the whole of the children other than the child on whose death the effect is to take place. I must introduce some words of contingency, or in some way make the class one which may diminish by death or by some other event. It is suggested on the part of the plaintiff that the words, therefore, should be read "survivors or survivor," and, of course, that would diminish the class, and would render sensible the expression "if more than one." It is suggested, on the other hand, that the class consists of all the children other than those who are entitled in the class of the children who may die ; that is to say, all the children other than the children who die or have died without leaving lawful issue ; and as that would be a diminishing class full effect would be given to the words "if more than

one." It is not very easy, perhaps, to choose between the two, but I think the latter is the better construction ; and therefore I think that the words "others and other" mean my children other than those upon whose death the gift over is to take effect. The result is, that, in my judgment, Alfred and Benjamin having died before Robert, and having been children in the class on whose death that gift over might take effect, will take nothing under the gift over on the death of Robert ; and consequently that on the death of Robert his share was divisible into six parts.

One of those shares of course will be taken by John, and John died leaving issue ; and thereupon arises the second question, which is a question to be determined on the second gift over. The question upon that is twofold : in the first place, does the gift over relate to the added shares or accrued shares ?—does the gift over relate only to the original ninth taken by John, or does it relate to the gift of the share of Robert's share, which is also taken by John ?

Now the words must be had recourse to to answer that enquiry. The words are these : "In case of the death of one or more of them my said sons and daughters, leaving issue lawfully begotten, that they, my said executors and trustees, and the survivors and survivor of them, and the executors and administrators of such survivor, shall stand and be possessed of the legacy and bequest or legacies and bequests of the aforesaid trust moneys, stock, funds and securities of him, her or them so dying, or so much thereof as shall not have been paid to him, her or them so dying, for his, her or their child or children." In the first place I find words of plurality—legacy or legacies, bequest or bequests. If the gift over is to apply only to the original share there is no meaning in the added words. If the added words are there I must give them some meaning ; and I see no meaning so natural as to apply them to the gifts of the accrued shares. Further than that there is this observation, that the clause would apply equally to Robert and all the others, because Robert died without leaving lawful issue, and

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another child might die without leaving lawful issue; and the testator, when he comes to deal with the disposition of the property under the second gift over, says that the shares are to be equal as well in relation "to the original share or shares (or such part thereof as shall not have been received by them) of their fathers or mothers respectively as any additional share or shares." Therefore I have in the subsequent part of the clause an express reference to the accrued or added shares. In my judgment, therefore, it is perfectly plain that that clause does operate upon the added as well as the original shares.

The second question which arises is this: Is the gift over void for uncertainty? The gift over is of the bequests, or so much thereof as shall not have been paid to him, her or them so dying. I find that explained by the subsequent clause, in these words: "Such part thereof as shall not have been received by them." The first question is this: What is the meaning of the words "received by them" or "paid to them" in this clause? Upon the words of this will itself I come to the conclusion that "paid" and "received" refer not to the time of actual payment or receipt, but to the time when the payment or receipt ought to be made; and I come to that conclusion very much for this reason, that in the previous clause I have found a reference to the shares or parts of the shares which have not been paid, and I find that they are to be payable and paid at the times respectively hereinbefore appointed for the payment of the original shares. I cannot help thinking that the reference to the time appointed and the reference to payment really relate to the same thing, and that the testator by payment meant the time appointed for payment. Further than that, it is to be observed that a point almost precisely similar received the adjudication of the Court in *In re Arrowsmith's Trusts* (which is only reported in 29 Law Journal); and there Vice-Chancellor Kindersley made this observation, that if the widow had been entitled to a life interest in the fund, beyond all doubt her death would have been the moment of payment. But there, that not applying either to the whole or part of the property, he held

the words "dying before receiving the share" was the termination of the period the law usually allows to executors for the payment of legacies—that is, twelve months from the testator's death. That case went to the Court of Appeal, and the Court of Appeal affirmed the decision of the Vice-Chancellor, Lord Justice Turner indicating a doubt on this question: supposing the executors had been in a condition to pay the legacies before the expiration of the year, he seemed to think that probably the person who died after the period when they might have been paid, and before the expiration of a year, would not lose the legacy. The Lord Justice Knight-Bruce agreed with Vice-Chancellor Kindersley. I had to consider the same point in that case of *Collison v. Barber*, or a very similar one, upon the words "division of the estate," and I came to the conclusion upon the authority of that case, and upon the language of Lord Selborne in the House of Lords, that the words "received" or "paid" ought to be read with reference to the period at which the receipt or payment ought to be made; that there would be less difficulty in ascertaining that period than in ascertaining the period of actual payment. In the present case there is no difficulty at all as to the time at which the payment ought to be made. The testator sets aside the whole of his residuary estate for the benefit of his widow during her life. If she dies unmarried, then the period of her death is clearly the period of payment. If she marries again, then the time of her marriage is clearly the period of payment of everything except the fund appropriated to meet her annuity; and then on her death, after having married again, her death is clearly the period of payment of the fund set aside to answer the annuity. If the widow died before the testator, so that the gifts for her benefit failed, then the twelve months, or, if the view of Lord Justice Turner is right, such earlier period as the legacies might have been paid at, would have been the period. The Lord Justice thought that offered no difficulty, but he said he would be inclined to direct an enquiry when the earlier payment might be made. Upon the decision

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of that case the view I ought to take appears to me to be plain.

But it is said that there are authorities which compel me to hold that the gift over is too uncertain. Now what are they? One is the case of *Hutcheon v. Mannington*, where the words were essentially different to what they are here. The words there referred to death before the legatee might have received the legacy. Whether the words in the will were "may receive the money" or "might have received the money," I do not quite know; and I observe that learned Judges in referring to the case have referred to it differently in that respect. I think the probability is that the words were "might have received the legacy," because the reporter has placed those words in marks of quotation, and because it is apparent that the enquiry which Lord Thurlow declined to direct was not, in his view, whether the money had been received—which would probably have been the true construction of the word "may," because "may" would include "shall"—but whether it might have been received. He says this: "Suppose he had given a real estate in the manner specified, it is clear that it will not depend upon the caprice of the trustee to sell—for that would be contrary to all common sense—nor upon his dilatoriness; in some way it may be sold immediately; but I should not enquire when a real estate might have been sold with all possible diligence, for it might be the very next day or that very evening, and therefore the Court always in such a case considers it is sold the moment the testator is dead." Therefore it is quite plain he considered the enquiry ought to have been what might have been, which is a very vague one. The other case which bears upon this precise question is the case of *Martin v. Martin*, before the Vice-Chancellor Wood, afterwards Lord Hatherley, and there the words were "shall have been actually received," and the Vice-Chancellor thought that the law in that case would interfere to prevent effect being given to those very words, the question of actual receipt being too uncertain. Lord Selborne undoubtedly adopted that view in the House

of Lords, and, in the passage referred to, said the actual receipt was a thing too indefinite to be enquired into. If the matter had been *res integra*, probably I should not have arrived at any such conclusion. But the case does not come before me upon the words "actual receipt." If it had, I might have felt myself in some difficulty. It comes before me on the words "which have been held" to mean period of receipt, and therefore the difficulty does not arise. Undoubtedly Vice-Chancellor Malins has expressed his dissent from *In re Arrowsmith*, and Vice-Chancellor Malins and Vice-Chancellor Hall have expressed their dissent from the case of *Johnson v. Crook*, in which the Master of the Rolls very elaborately investigated the whole of these cases. If it were necessary for me to express my opinion, I am bound to say I think *In re Arrowsmith* is a perfectly good decision, and I greatly prefer that construction of wills which shall give effect to the intention of the testator to that construction of wills which shall defeat it. I believe all the earlier cases proceed simply on this enquiry: Is the contingency expressed with definite certainty? If it be, we will give effect to it; if it be not, we will not give effect to it. Lord Thurlow in the case of *Hutcheon v. Mannington* came to the conclusion that the contingency was too indefinite. The enquiry when a thing might have been done, was one which could not be answered satisfactorily. But when the enquiry was of a definite description he did not hesitate any more than any other Judge to give effect to it, as is perfectly apparent from that case of *Faulkener v. Hollingsworth*, decided by Lord Thurlow himself, which was a gift over on the death of a legatee before the estate should have been sold and the purchase-money received by the trustee; and the Lord Chancellor made a declaration that the legatee had died before the contingency, and that the gift over took effect. That case is fully cited by Sir William Grant in *Elwin v. Elwin* (1). I think it needless to go over the earlier authorities, because, having considered them with

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some attention, it appears clear that that was the principle on which they all proceeded; and Lord O'Hagan, in the case of *Minors v. Battison*, in the House of Lords, expressed that as being the principle on which the cases go. He says, "The cases of *Hutcheon v. Mannington* and *Elwin v. Elwin* certainly sustain the conclusion at which I have arrived. In the former, the gift over was defeated because the purpose was, in the words of the Lord Chancellor, 'immeasurable,' because it was all too uncertain. The uncertainty and difficulty of ascertaining the intent which operated in that case exist also in the case before us. In the latter a different rule was reached because the intention was declared with a 'definite certainty' which does not here compel us to an injurious decision."

The sole question, therefore, is, Has the testator here expressed his intent with definite certainty? In my judgment he has done so, even if the literal construction had been put on the words. But for the other cases I should have thought it sufficiently distinct, but the cases I have referred to shew that in my judgment the rule of construction of the words in this will must have reference to the period of distribution. That is in no way uncertain, and therefore no difficulty exists. That being so, I hold the gift over in the event of John dying, as he did, before Robert is a death before he has received that money, and consequently the gift over takes effect. I have taken John because he represents a class.

Solicitors—Clark, Woodcock and Ryland, agents for Hartcup & Sons, Bungay, Suffolk, for plaintiff and defendant; Seago, Whites, Renard & Co., for Louisa Jane Chaston; Walker & Battiscombe, for Arthur Watling.

Fry, J. }
1881. }
July 1, 8. }
Aug. 3. }

In re COLTMAN.
COLTMAN v. COLTMAN.

The Friendly Societies Act, 1875, s. 16 (sub-s. e)—Loan on Personal Security—Loan prohibited by Statute.

The trustees of a friendly society advanced 300l., on the security of a promissory note, to a person not a member:—Held, that such a loan, being expressly prohibited by section 16 (sub-section e) of the Friendly Societies Act, 1875, no claim could be enforced against the borrower in respect thereof.

Adjourned summons.

In February, 1881, the usual decree was made in the above action to administer the estate of one Edwin Coltman, who died intestate on the 31st of December, 1879.

A claim had been made against the estate by Joseph Robinson and two others, the trustees of a friendly society, called the Victoria Friendly Society, for a sum of 325l. 4s. 4d., alleged to be due upon a joint and several promissory note, dated the 4th of September, 1877, for 300l. and interest at four per cent., signed by one Joseph Marshall (to whom the money was advanced), and by the intestate and another as sureties only.

The promissory note was as follows:—

"Burbage, Sept. 4, 1877.

"£300.

"On demand we jointly and severally promise to pay Joseph Robinson, Charles Hands and Mark Ghent, framework knitters, of Burbage, in the county of Leicestershire, or their heirs, administrators or assigns, the sum of 300l., together with interest after the rate of 4l. per cent. per annum.

"Joseph Marshall.

"John Marshall.

"Edwin Coltman.

"Witness, Joseph Givers."

Neither Joseph Marshall nor either of his sureties were members of the society.

The Friendly Societies Act, 1875, by s. 16, provides that the trustees (of a registered friendly society) may invest the

In re Coltman.

funds of such society, or any part thereof, in any of the ways specified in sub-sections *a, b, c* and *d*; and (sub-section *e*) "upon any other security expressly directed by the rules of the society, not being personal security."

The chief clerk had allowed the claim. At the instance of the defendant, the administratrix, the summons was now adjourned into Court.

Mr. Glasse and Mr. Dunning, for the administratrix.—The 300*l.* was advanced upon "personal security" to three persons, not members of the society, in direct contravention of the statute. Such a contract is "wholly void, and cannot be ratified"—

The Ashbury Railway Carriage and Iron Company v. Riche, 44 Law J. Rep. Exch. 185; Law Rep. 7 E. & I. App. 653.

The claim must therefore be disallowed.

Mr. North and Mr. Woodroffe, for the claimants.—Each of the three persons who signed the note is a principal debtor to the trustees; though, as between themselves, one of them is the principal, and the other two are sureties.

Section 16 of the Act does not say that to invest in any way (other than the ways thereby authorised) is illegal; it simply says that if the trustees invest in any unauthorised security, they cannot claim the benefit of the section.

Secondly, assuming the investment to be illegal—we are not seeking to enforce an illegal contract; we are simply asserting our right to recover money actually received under such a contract—

Sharp v. Taylor, 2 Ph. 801, 818;

Browne v. Duncan, 10 B. & C. 93;

5 Moo. & R. 114; 8 Law J. Rep. (o.s.) K.B. 60;

The Corporation of Liverpool v. Wright, John. 359; 28 Law J. Rep. Chanc. 268.

There is no reason of policy why the section should be construed so as to deprive the trustees of the power of getting back their money.

They also referred to

18 & 19 Vict. c. 63. s. 32;

The Great Eastern Railway Company

v. Turner, 42 Law J. Rep. Chanc. 83; Law Rep. 8 Chanc. 149;

The Friendly Societies Act, 1875, s. 16. sub-s. 9.

Mr. Glasse, in reply.—Whether an agreement is merely contrary to the general policy of the law (as in

Humphreys v. Welling, 1 Hurl. & C. 7; 32 Law J. Rep. Exch. 33),

or, as here, in violation of an express provision of an Act of Parliament (as in

Stevens v. Gourley, 7 Com. B. Rep. N.S. 99; 29 Law J. Rep. C.P. 1),

the illegality of the agreement may be set up as a defence to an action founded upon it.

Judgment reserved.

FEB, J. (on Aug. 3).—The question which has been argued before me is this: Was the loan an act merely beyond the powers of the trustees, or was it one which was unlawful and prohibited by the statute?

In order to answer that, of course it becomes necessary to refer to the statute in force with regard to friendly societies. That statute (1) (by section 16) provides that the trustees may invest the funds of the society "in any of the following ways": then five methods are enumerated, the first four of which have nothing to do with a loan of this description. The last is "upon any other security expressly directed by the rules of the society, not being personal security," except as thereafter mentioned (by section 18) with respect to loans to members. In terms, therefore, the loan in question is prohibited by the statute.

In the next place, if I regard the object of these societies, that object is inconsistent with loans to persons other than members. The first statute which was passed with regard to friendly societies contains a recital of the object of such societies, which I believe to be substantially correct at the present day, and to have been correct throughout the whole period which has elapsed between the passing of that statute in 1793 (2) and the present time. It recites: "Whereas

(1) 38 & 39 Vict. c. 60.

(2) 33 Geo. 3. c. 54.

In re Collman.

the protection and encouragement of friendly societies in this kingdom for raising by voluntary subscriptions of the members thereof separate funds for the mutual relief and maintenance of the said members in sickness, old age and infirmity, is likely to be attended with very beneficial effects by promoting the happiness of individuals, and at the same time diminishing the public burdens." It is obvious that if some of the moneys raised by the subscriptions of members are to be lent to persons other than members, the relief will not be of the mutual description which is the main object of these friendly societies; and these societies may easily and almost naturally be converted into institutions for a perfectly different object, and become, in fact, loan societies.

Furthermore, the statute, to which I have already referred, contains provisions with respect to the investment of the funds of these societies; and there are no less than nine subsequent Acts of Parliament which contain provisions with regard to the mode of investment of these funds—a fact which is enough to shew that the subject of investment of these funds has been one of anxious concern to the Legislature of the country.

It appears to me, therefore, impossible to avoid the conclusion that the Legislature has, for a fixed purpose and design, confined the loans to be made by these societies to their own members; and that a loan made to a person other than a member is in direct violation of the object of these societies, and of the express statutory provision in force with regard to them. I think, therefore, that the transaction was illegal, and one on which no action can be maintained.

I only desire to make one other observation. In the case of *Hardy v. The Metropolitan Land and Finance Company* (3) the Court of Appeal gave relief to a friendly society as against a person who had borrowed money from the society in violation of the restriction to which I have referred. But that case appears to me to be perfectly different in principle to the present. The money in that case

was the money of the society independent of the illegal transaction; and accordingly the Court of Appeal held that, it being trust money, and trust money still in the hands of the defendants, it could be recovered by the plaintiffs. Here, but for the illegal transaction, there was no relation whatever subsisting between the claimants and the intestate. The whole right against the intestate's estate arises out of the transaction which I hold to be illegal. Consequently I disallow the claim.

Solicitors—Robinson, Preston & Stow, agents for Pilgrim & Preston, Hinckley, for the claimants; Wright & Law, agents for J. T. Wright, Leicester, for the administratrix.

BANKRUPTCY.

BACON, C.J.

1881.

July 4.

In re GREEPE; ex parte GREEPE.

Act of Bankruptcy—Period of Committal—Six Months from Presentation of Petition—Exceeding Twelve Months from Order of Adjudication—Bankruptcy Act, 1869, ss. 6 (sub-s. 6), 8, 11.

Sections 6 and 11 of the Bankruptcy Act, 1869, are perfectly distinct, and an adjudication may be good, if the act of bankruptcy on which it is founded was committed within six months from the presentation of the petition, though the same act of bankruptcy is the only one to which the title of the trustee can relate back, and was committed more than twelve months before the order of adjudication.

The bankrupt, a non-trader, was served with a debtor's summons on the 24th of January, 1879. He did not pay the debt, and, consequently, at the expiration of twenty-one days from that date, namely, on the 14th of February, 1879, committed an act of bankruptcy. On the 9th of August, 1879, a bankruptcy petition was presented against him, founded on the act of bankruptcy committed by his non-compliance with the debtor's summons for twenty-one days after service thereof. From various causes the hearing of the

(3) 41 Law J. Rep. Chanc. 257; Law Rep. 7 Chanc. 427.

In re Grepe ; ex parte Grepe, Bankr.

petition stood over from time to time, and in the result the adjudication was not made until the 15th of March, 1880.

The bankrupt applied to the Judge of the County Court at East Stonehouse to annul the adjudication, on the ground that he had not within twelve months of the order of adjudication committed an act of bankruptcy available for adjudication. It did not appear that any other act of bankruptcy had been committed except that on which the petition was founded. The County Court Judge refused the bankrupt's application, and from that refusal the latter now appealed.

Mr. Winslow and Mr. G. W. Lawrance, for the appellant.—We submit that sections 6 and 11 should be read together, and that an adjudication should not be allowed founded on an act of bankruptcy too remote for the title of the trustee to relate back to, as is the case here. At any rate, we ask that it may be declared that the title of the trustee does not relate back to this act of bankruptcy.

Mr. De Gez and Mr. F. Knight, for the trustee, were not called upon.

BACON, C.J.—I cannot accept the invitation of the appellant's counsel. Under section 13 the Court has power to restrain, and in this case did restrain, the proceedings until the fact of the indebtedness has been decided; but when (in the case of a non-trader) the debt and the act of bankruptcy are proved, the adjudication is imperative. Reference has been made to section 11, but that relates to a wholly different matter; it assumes that there has been a valid adjudication, and enacts that then certain consequences shall ensue. What the trustee's rights as to relation may be he must decide hereafter; but on this occasion I cannot enter into that, and have only to declare this adjudication valid.

Appeal dismissed, with costs to be paid out of the deposit.

Solicitors — Wright & Law, agents for G. H. E. Rundle, Devonport, for appellant; Surr, Gribble & Co., agents for Elworthy, Curtis & Daws, Plymouth, for respondent.

[IN THE COURT OF APPEAL.]

JAMES, L.J.	} <i>In re BROWN'S SETTLEMENT.</i>
BAGGALLAY, L.J.	
LUSH, L.J.	
1881.	
May 11, 13.	} <i>In re BROWN'S WILL.</i>

Will—Settlement—Condition Precedent—Marriage with Consent of Guardian or Guardians—Infant.

A testator bequeathed 5,000*l.* to each of his daughters upon her attaining twenty-one, or on her marriage with the consent of her guardian or guardians, and gave his residue to trustees, upon trust, after the death of his wife, to pay to each of his daughters who should attain twenty-one, or should be or have been previously married with the consent of her guardian or guardians, 3,000*l.* He appointed his wife sole guardian of his infant children, and gave a power of maintenance and education out of the income of each child's presumptive share, to be paid after the death of his wife to his or her guardian or guardians.

Under the testator's marriage settlement certain funds stood settled, on the death of his wife, on trust for all and every the children and child of the marriage who, being a daughter or daughters, should attain twenty-one or marry "with the consent of her or their parents or guardians."

The testator's widow died, and no new guardian was appointed.

O. E., one of the testator's daughters, after her death married, and died under age, leaving issue:—

Held (affirming *Fry, J.*), that O. E. did not take a vested interest either in the legacies or in the funds comprised in the settlement.

Dawson v. Oliver Massey (45 *Law J. Rep. Chanc.* 519; *Law Rep.* 2 *Ch. D.* 753) distinguished.

The consent of a guardian appointed by the infant herself would not have been an effectual consent within the meaning of the provision.

This was an appeal by Henry Griffith, the administrator *durante minoritate* of M. G. Dundas, against a decision of *Fry, J.*, holding the wife of M. G. Dundas not entitled to interests under a will and settlement, by reason of her having married

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him without the consent of any guardian, and having died under age.

The case is fully reported *Ante*, p. 507.

Mr. J. Pearson and Mr. C. Comyns Tucker, for the appellant, repeated the arguments and cited the cases which had been referred to in the Court below. The following additional authorities were referred to:—

Boyce v. Corbally, L.L. & G. temp.

Plunket, 102, 110;

Aislalie v. Rice, 8 Taunt. 459; 3 Madd. 256.

And as to the power of the infant herself to appoint a guardian—

Bridgman's Precedents of Conveyances, 248;

Jarman and Bythewood (ed. 1841), p. 559, 568 n;

Davidson's Precedents (2nd ed.), p. 1077.

Mr. Glassey, Mr. A. B. Bagnold and Mr. Holt, for the different respondents, were not called upon.

JAMES, L.J.—This case has been very fully and, if Mr. Tucker will allow me to say to him, ably argued, and we are much indebted to Mr. Tucker both for the substance and the form of his argument, and I think everything has been said by Mr. Pearson and by him which could be said.

The real question before us is whether the principle that this Court laid down in *Dawson v. Oliver Massey* is capable of being applied, or ought to be applied, to a case of this kind. That was felt to be at the time, and must be admitted to be now, a very strong case indeed. The Master of the Rolls, who is a great authority upon these questions of construction, felt in that case that the decision ultimately arrived at, and which we were asked to arrive at, was a direct violation of the first principles of English law—that is, that a gift upon a condition precedent could stand if the condition precedent were not performed. He said he could not do that. In that case of *Dawson v. Oliver Massey*, it must be recollected that we proceeded upon what we considered to be a long train of authorities, some of cases and some of writings, of

great weight and value and importance for more than half a century before we delivered our judgment. We considered that, following those authorities and eminent writers whom we referred to, and an eminent Lord Chancellor of Ireland in a case of *Green v. Green* (1), we were in that case warranted in holding, if not bound to hold, that where there was a consent required by the parents, and one of the parents had died, the consent of the surviving parent was sufficient. That was what we had to decide, and was the only point before us for decision. In the judgment delivered by me in that case, I am reported to have said, apparently, that the same principle would apply if both the parents had died. Mr. Justice Fry, in his judgment in this case, considers that that was the logical result of the decision; that is to say, if one parent died, that would make the consent of the survivor sufficient, and the result would be, that the death of the parents would leave the matter in the same position. Then it must be recollected what was the ground upon which we proceeded in placing a construction on the will which it seemed to the Master of the Rolls impossible properly to put upon it. We considered the implied intention of the testator, and we thought, having regard to the nature of the case, the nature of the provisions he had made and the purpose of these provisions, that there was that implied condition as to the parent or parents (if any), and that, if there were none, then that condition was to be omitted. But then there was this also, that it was utterly impossible by any mode whatever to supply the want of a parent or parents. If the parents were both dead, then it would be utterly impossible to supply the individual from whom the consent was to be obtained. Mr. Justice Fry seems to me to have properly drawn the distinction in this case. There was no impossibility and no difficulty in regard to what the testator contemplated in supplying a guardian or guardians. The testator contemplated throughout his will, and even in this very clause itself, that there should be a guar-

(1) 2 Jo. & Lat. 529.

In re Brown's Settlement, App.

dian or guardians appointed, because he appoints the wife, and the wife only, the guardian of the child, and does not go on to say that the daughter may marry with the consent of her said guardian, but, omitting all reference to the particular individual, he goes on to speak of marriage, with the consent of the guardian or guardians, pointing to the class, and not the particular guardian, of whom there was only one, the wife. After the death of the wife he makes provision again for the maintenance of the children, and for the appointment of a guardian or guardians, evidently contemplating that a guardian or guardians would be appointed in the ordinary course, and ought to be so appointed. That was really the intention of the testator. We must be guided by what we can see upon the face of the will was the intention of the testator. He intended that his daughter should not get the legacy till she was twenty-one, unless that was accelerated by marriage; but, undoubtedly, also, he intended to throw a safeguard around the marriage, as a prudent parent always would desire to throw around a daughter—that is, the daughter was not, as soon as she attained a marriageable age, to marry without any consent at all. That was to prevent her marrying any person who might make no provision for her, or an adventurer. I do not suggest that there was any misconduct on the part of the young gentleman in the marriage in this case. He seems to have been as young, if not younger than the daughter; but the testator contemplated that there should be a safeguard thrown around his child, and the safeguard he has provided is that she should marry with the consent of the guardian or guardians—a consent which, so far from being impossible to obtain, was one which it was the easiest thing in the world to get, and which would have been obtained in the ordinary course adopted with regard to persons having sufficient means, after a death of a guardian to require the protection of the Court of Chancery. If we are to say that because nobody on behalf of the infant obtained a guardian, and the infant herself did not, through her next friend, obtain a guardian, therefore she was free to

marry without that protection which the testator intended to throw around her, we should be entirely violating the plain intent and meaning of the testator, and should be doing that thing which, of all others, he intended should not be done.

Then it is said that there is some uncertainty which makes it void—that is, as to what guardian or guardians there should be. Would a guardian or guardians appointed by the infant herself under that power have been sufficient? I do not know whether that power has been often exercised in English history, but no case has ever come before the Courts as to the power of a guardian appointed by the infant; but it probably would not be within the meaning of the testator when he said his daughter was not to marry except with the consent of her guardian or guardians. He must have meant by that the consent of a guardian or guardians other than the guardian or guardians appointed by the young lady herself, and he must have meant the only guardian or guardians who are known to the law and the practice of the Courts of this country, namely, a guardian or guardians duly appointed according to law by the Court of Chancery, which, as representing the Sovereign as *parens patriæ*, is the guardian of all infants who have means sufficient to enable the Court to act.

That being so, it appears to me it would be an unwarranted extension (if it could be called an extension) of the case of *Dawson v. Oliver Massey*, wholly beyond and outside the reasoning and principle of it, if we were to hold that the temporary non-existence of a guardian or guardians, which temporary non-existence could be supplied at any moment with the greatest ease, and without detriment to anybody, would be equivalent to the death of the parent, which was the subject we had before us in *Dawson v. Oliver Massey*. Supposing there had been two guardians appointed by the Court of Chancery, and that the two guardians happened both to die, and then the young lady wanted to marry in the interval between the death of the two guardians and the proceedings in chambers to appoint new guardians, it would be unreasonable to suppose or to suggest that an infant could during that

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interval marry at once, and say that the marriage was perfectly valid because there were no guardians at that moment in existence whose consent that infant could obtain. An infant under those circumstances would have to wait for the approbation of the Court. I may add, in conclusion, that I agree in the principle of the distinction drawn by Mr. Justice Fry between the case of guardians and the case of parents.

BAGGALLAY, L.J.—I was a party to the decision in the case of *Dawson v. Oliver Massey*, the judgment in which was delivered by Lord Justice James, and in the course of that judgment he very fully explained the principles on which it proceeded, and commented on a variety of the authorities quoted in the course of the argument, and he has again to-day, in the judgment he has delivered, adverted to the principles of that case. I entirely agree with what he then said, as I expressed myself on the former occasion, and as I may express myself now with regard to the further observations he has made this morning, and therefore upon that part of the case I do not think it is necessary to add anything more. I agree also in the distinction drawn by Mr. Justice Fry between the circumstances of that case and the present. Of course there was an impossibility of any such consent as was required by the testator's will in the case of *Dawson v. Oliver Massey* ever being obtained, because the only parent was dead; but that state of circumstances does not exist in the present case. To my mind it is quite clear, upon reading the whole will through, that the testator had present to his mind not only the probability of the necessity arising for the appointment of other guardians, but that the intention of his will was that there should be guardians appointed after the death of his wife, at any rate if any of the children then remained under the age of twenty-one years. Not only do we find that there is a provision made for the legacy of 5,000*l.* immediately upon his death being paid upon attaining twenty-one or marriage under that age with the consent of the guardian or guardians, but we find the like provision with regard to

the further legacy of 3,000*l.* which he gives upon the death of his wife. In each case the provision is the consent of the guardian or guardians, and it is clear he could not have used the words guardian or guardians as has been suggested—namely, in a sort of conveyancing way, by putting the word in the plural as well as in the singular—because, upon the death of his wife, there would be no guardian remaining appointed; and yet in the provisions for the maintenance of the children after the death of the wife he directs the trustees of the will for the time being to apply the proper amount of income themselves to maintain the children, or to pay it to the guardians in order that they may so apply it. Having regard to these circumstances, I think the distinction drawn by Mr. Justice Fry was a very proper distinction, and I entirely concur in the view he has taken. There was no similar restriction imposed as regards the gift of the residue, and so no question arises with regard to that on the present appeal.

LUSH, L.J.—I fully concur in the judgments delivered by my colleagues in this case. It is plain that the object the father had in view was to protect his daughters from imprudent marriages while under age, and in order to carry out that purpose he began by appointing his wife sole guardian of his children during their respective minorities. Then he says, "I bequeath to each of my daughters upon their attaining the age of twenty-one, or their marriage with the consent of their guardian or guardians, whichever shall first happen, the sum of 5,000*l.*" Now if he had said, "with the consent of her said guardian," that would have referred to the mother, and then, according to the authorities cited (with which I need hardly say I entirely concur), as the mother died before the intended marriage, the performance of the condition became impossible by the act of God, and in that event the condition would have been considered as struck out of the will. He does not, however, confine it to the said guardian. He had appointed his wife sole guardian. This legacy is given to the daughters upon marriage before twenty-

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one, provided the marriage was with the consent of the guardian or guardians. Therefore in that part of the will he certainly assumes that a guardian or guardians will exist at the time when the daughters propose to marry. Of course the duty of the guardian would be to protect the young ladies against imprudent marriages, and to secure a settlement for them. But that is not the only part of the will. He goes on to deal with the residue afterwards; and it is plain upon that part of the will that he contemplates the marriage of his daughters still under age after the death of his wife, because he provides, after giving a life interest to his widow in his residuary estate, that the trustees are after her death to hold the funds "upon trust to raise and pay to each of my said children, except my daughter Constance" (who is out of the question), "who shall survive me and have attained or shall attain the age of twenty-one years, or, in the case of daughters, shall be or have been previously married with the consent of her guardian or guardians." Then he supposes that his widow is dead, and yet that the daughter, being under age, is about to marry, and he requires that that shall be with the consent of the guardian or guardians, and assumes that a guardian or guardians will be appointed to carry out his object, namely, to protect the girl from an imprudent marriage. Then there is a further provision as to another legacy, as to which he says that, on certain events happening, the proper share of the legacy to which such child or children may be entitled in expectancy may be applied for or towards the maintenance and education of such child or children, and the trustees may either themselves pay or apply the same, or they may pay the same to the guardian or guardians of such child, again assuming that the guardian or guardians of the children will be appointed, if they are infants, after the death of his wife. Nothing can be more clear to my mind than that he intended throughout that the children, if they married when under age, should have the benefit of the advice of a guardian against contracting an imprudent marriage, and in order to secure a proper settlement.

Now, it is contended that we ought to read the words "if any," after the bequest, as if he had said, "I give to my daughter upon her attaining the age of twenty-one years, or on her marriage with the consent of her guardian or guardians (if any)." Those words are not in that particular clause in the will at all, but I may observe that in the residuary clause, when he has a contingency in his contemplation, he does use the words "if any," because, immediately after the passage I have read, after saying it shall go to the daughter who shall be married with the consent of her guardian or guardians, and to the issue (if any) of any child of his who shall die in his lifetime leaving issue, those words are put in, and they are not put in in any other part of the will. It is, therefore, impossible to read this will without seeing that he contemplated that, as the children would have property, it would be easy to make an application to this Court to have guardians appointed, and although, as the learned counsel has said, a guardian may betray his duty and consent to an imprudent marriage, that need not be anticipated. Of course his duty would be, when appointed by the Court, faithfully to advise the young lady, and put his veto upon any marriage he thought was not for the benefit of the young lady. It happens this young lady died after the marriage, but before she arrived at the age of twenty-one. If she had reached the age of twenty-one years the legacy would have been secured. She died before she was twenty-one, and she married without the consent of any guardian or guardians. Therefore she has not complied with the condition in the will; and there was no difficulty in her complying with it, because it is well known that an application to this Court would have resulted in the appointment of a guardian for the purpose of her protection.

In answer to a question of counsel, whether the decision of the Court applied to the settlement as well as the will,

JAMES, L.J.—We are of opinion that there is no distinction. If there had only been one parent, I think it must have been intended that the one parent should

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be the person to consent. I may add, with a view to future cases, that we are all of opinion that a guardian appointed by the infant herself could not have given an effectual consent.

Mr. Glasse refers to

Ex parte Watkins, 2 Ves. sen. 470;

In re Woolcombe, 1 Madd. 213;

Curtis v. Rippon, 4 ibid. 462;

as supporting that view.

Solicitors—Emmett, Son & Stubbs, agents for Griffiths & Eggar, Brighton, for appellant; Simpson, Hammond & Co., for respondents.

FRY, J. } *In re SLADE.*
1881. } SLADE v. HULME.
Aug. 2, 3. }

Sequestration—Probate and Divorce Division—20 & 21 Vict. c. 85. s. 25—Jurisdiction—Administration.

An order was made on summons in an administration action directing payment to sequestrators appointed by the Probate and Divorce Division of income of a beneficiary under the trust being administered.

These were two actions for administering the estate of a testator, Adolphus Frederick Slade.

Walter Slade, a beneficiary under the will of the testator, was made co-respondent to an action of *Weston v. Weston* in the Probate and Divorce Division of the High Court. An order was made on him in that action for payment of damages and costs. And on his making default a writ of sequestration was issued in that division, and Messrs. Routh, Stacey and Castle were appointed sequestrators.

On the 9th of July, 1880, an order was made in these actions on the trustees of the testator's will to continue making, among other payments, the payment of the annual sum of 130*l.* to Walter Slade on account of income, notwithstanding notice of the writ of sequestration. The sequestrators obtained an order *nisi* in

chambers that the trustees should pay them the 130*l.* until the amount payable under the sequestration was satisfied, and charging the interest of Walter Slade in the testator's estate.

The matter now came on upon summons to determine whether the order should be discharged or made absolute.

Mr. Cookson and *Mr. Fellows*, for Frederick Slade, contended that the sequestration could not be enforced against the beneficial interest in the trust property, except by means of an action for that purpose brought by the sequestrators.

Mr. Glasse and *Mr. Smart*, for the sequestrators, said the Court had jurisdiction to make an order in favour of the sequestrators who were in the position of incumbrancers on the interest of Frederick Slade in this action without the circuitry and expense of separate proceedings.

Mr. Byrne, for the trustees of the testator's will.

Mr. Cookson replied.

The following authorities were cited on this point:—

Simmonds v. Lord Kinnaird, 4 Ves. 735;

Francklyn v. Colhoun, 3 Swanst. 276;

Johnson v. Chippindall, 2 Sim. 55;

Wilson v. Metcalfe, 1 Beav. 270;

Claydon v. Finch, 42 Law J. Rep. Chanc. 416; Law Rep. 15 Eq. 266;

Ward v. Booth, 41 Law J. Rep. Chanc. 729; Law Rep. 14 Eq. 195;

In re Hoare; *ex parte Nelson*, 49 Law J. Rep. Bankr. 44; Law Rep. 14 Ch. D. 41;

Seton on Decrees (3rd ed.), 1578.

FRY, J., said—The present question before me arises on an order *nisi* which has been made in the present action of *Slade v. Hulme* at the instance of certain sequestrators under an order of the Probate and Divorce Division of the High Court, which had ordered William Slade to pay certain sums of money. He had made default in payment, and was therefore in contempt and the writ of sequestration had issued. And under the statutes in force that writ had exactly the

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same effect as a writ of sequestration out of the Court of Chancery had.

Notice of the writ was served on the trustees of the estate being administered in this action, and Vice-Chancellor Malins made an order that the sum of 150*l.* should be continued to be paid to Mr. Slade on account of income notwithstanding the notice of sequestration. The order, if I may venture to say so, appears to me to have been made with the utmost propriety; because nothing is more plain than that where sequestrators desire to obtain possession of a *chose in action* they must do something to assert their right. That something had not been done, and therefore I conceive the order strictly followed the case of *In re Hoare; ex parte Nelson*. Now the case stands upon a different footing, because the sequestrators have attempted to do something to assert their interest by obtaining the order *nisi*, and the question really is whether the obtaining that order is a proper step or the proper step to enforce sequestration, or whether they are bound to come to the Court by means of an independent action.

Upon that question unfortunately very little authority is to be found. The first case bearing in any way on the subject is that of *Simmonds v. Lord Kinnaird*. There a bill was filed. That bill either never came to a hearing, or the hearing was not reported. The only report is on a demurrer which raises other questions. The next case is that of *Francklyn v. Colhoun*, before Lord Eldon in 1819, and there his Lordship ordered Rucker, a stranger to the action as it stood at the time of the motion, to pay into Court a sum alleged to be due from one Rucker to the debtor. That certainly was a strong decision. The Lord Chancellor made use of these words: "The true question is, whether this *chose in action*, considering it either as the whole sum due from Colhoun, or only so much as exceeds what is due to Penney, can be taken by the sequestration? Speaking with the caution which befits one of a process so unusual, I have supposed it to be clear that where there is tangible property the Court will allow the sequestrators to lay their hands on it whatever claims third

persons may have, and will compel them to come in *pro interesse suo*; but a *chose in action* cannot be so taken, and the question arises, How are the rights of third persons to be decided? It is generally done by order"—that means, the decision of the rights of third parties; "whether it can be done in a case in which the third person does not appear may be another question. Before I decide this case I will refer to *Simmonds v. Lord Kinnaird*"—and having done so he appears to have made the order. That case is, of course, not precisely in point, for the order *nisi* is not made against a stranger to the action, but was obtained by a stranger to the action. The next case is that of *Johnson v. Ohippindall*. That throws very little light on the point; all that was determined was that the order could not be made against a stranger. It seems from that that the cases of *Francklyn v. Colhoun* must be attributed to consent or some special circumstance. Then came the case of *Wilson v. Metcalfe*, where an order was also made against a stranger by submission; this is, therefore, not exactly in point to the present case. But the Master of the Rolls made these observations, which are not at all immaterial. He says, "It appears to me that in such a case as this a *chose in action* is subject to the process of sequestration, but how the sequestration is to be made effective in respect of *chooses in action* may be a question requiring much consideration; in a clear and simple case it may be by order only, or a voluntary payment may be protected, or in other cases it may be necessary to resort to an action or suit under the direction of the Court." Then comes the case of *Ward v. Booth*, which was a suit brought by a person at whose instance sequestration had issued, and the simple question was as to priorities between him and a mortgagee, and therefore a bill was resorted to as most convenient and proper, and it does not determine whether such an order can be obtained on motion. Lastly, in the most recent case of *Claydon v. Finch*, where an order was made in the action on the petition of sequestrators. Now that is the case far the most in point. The application was made by per-

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sons strangers to the action, and an order was made. The only observation that can be made against the authority of that case is that the point of jurisdiction does not appear to have been raised. But it appears that the Vice-Chancellor thought he had jurisdiction, and the learned counsel might have thought the point clear. However that may be, it is an authority.

That, I believe, exhausts all the authorities that bear on the subject. I find no case saying positively that a separate action is necessary, and I find one case shewing that an order may be made on the simple application of the sequestrators. Is there any inconvenience in allowing that course to be taken? I can find none. I can find no advantage in putting the sequestrators to the expense of an independent action. The Court is administering an estate. One of the persons interested has in effect incumbered his interest. Nothing is more familiar than for an incumbrancer to be allowed to assert his title in the proceedings though not a party; and by giving effect to the order I shall only be allowing an incumbrancer on Walter Slade's interest to assert his right. Principle and convenience are therefore in favour of holding that order may well be made on motion in the action.

There remains the question whether the form of the order made by the chief clerk is correct. With regard to that I think the more convenient and proper course would be to direct payment of the 130*l.* to the sequestrators, and order that no other money be paid to Walter Slade without notice to the sequestrators.

Solicitors—Stibbard, Gibson, & Co., for plaintiff
W. Slade; Routh, Stacey & Castle, for the
sequestration; Lucas & Son, for defendants.

FRY, J. }
1880. }
June 21. }

BARKSHIRE v. GRUBB.

Easement — Right of Way — General Words.

General words in a deed of partition carry a right of way over an existing path in actual use over one property to the other.

In 1863, on the death of Mrs. Grubb, the equitable tenant-for-life of certain freehold property near Maidenhead, her four children, William Grubb, Elizabeth Barkshire (then Elizabeth Martin), Thomas Grubb and Mary Andrews became equally entitled in equity to the property. An agreement was come to between them that Mary Andrews should receive a sum of 50*l.*, Thomas Grubb should have a part of the freehold property, and the other part, which consisted of a double cottage and two gardens, one belonging to each part of the cottage, should be divided between William Grubb and Mrs. Martin, the former taking the cottage and garden nearest the road, and Mrs. Martin that further from the road. This arrangement was carried into execution so far that Mary Andrews received the 50*l.*, and the premises assigned as the share of Thomas Grubb were conveyed to him, but the double cottage and gardens attached, instead of being conveyed as to the respective shares for the benefit of William Grubb and Elizabeth Martin respectively, were conveyed, as to one undivided moiety, to the use of William Grubb, and, as to the other, to the use of a trustee for Elizabeth Martin.

William Grubb occupied the one cottage and garden from that time, and the other was occupied by Elizabeth Martin and her husband, Thomas Martin, down to his death in 1869. She lived there as a widow till 1874, when she married James Barkshire.

This action was brought by Elizabeth Barkshire, the defendants being William Grubb, the plaintiff's husband, and Mr. Mabyn, her trustee. She claimed to have the property partitioned, and to have the conveyance, which was actually made in 1863, rectified, to carry out the previous agreement.

Barkshire v. Grubb.

The only question between the plaintiff and the defendant William Grubb was whether she was entitled to have a right of way over his garden to her part of the double cottage.

The facts, as found by the Judge, were: There had existed, previously to the family arrangement in 1863 for the division of the property, a gravel path over William Grubb's garden, which gave access to the plaintiff's part of the cottage from the road, from which she had no other access, her part of the property being shut off from the road by the property of the defendant William Grubb, and contiguous on all other sides to property of strangers. That path was used for some time as the only way to the plaintiff's premises, but the defendant asserted a right to close it, and after a time the plaintiff, for the sake of peace, bought a right of way over another person's property.

Mr. Glasse and *Mr. Yate Lee*, for the plaintiff, insisted on her right to have a way over the defendant Grubb's part of the property.

Mr. George Murray, for the plaintiff's husband, and *Mr. J. Henderson*, for the trustee.

Mr. Northmore Lawrence, for the defendant Grubb, argued, distinguishing

Watts v. Kelson, 40 Law J. Rep. Chanc. 126; Law Rep. 6 Chanc. 166,

that as the gravel path had never been enjoyed as a right appertaining to a dominant tenement, a right over it did not pass by the general words—

Thomson v. Waterlow, 37 Law J. Rep. Chanc. 495; Law Rep. 6 Eq. 36;

Langley v. Hammond, 37 Law J. Rep. Exch. 118; Law Rep. 3 Exch. 161.

Mr. Glasse referred to

Kay v. Ozley, 44 Law J. Rep. Q.B. 210; Law Rep. 10 Q.B. 360.

FRY, J., stated the facts, and said—The question is, in such an executory agreement, and with such facts as I have stated in respect of the road leading up to the cottage to be taken by the plaintiff, how ought the conveyance to be framed?—

ought it or ought it not to contain a conveyance of a right of way over the gravel path? In my opinion it clearly ought to be taken with such a grant. In the first place the contract is executory, and in construing it the Court will have regard to the existing facts affecting the land at the time of the contract: it could not exclude from consideration the fact of the gravel path being the way actually used up to the house. Further, I must observe that I find there was, according to the evidence at that time, no other path leading to the house, and it was in fact the only access there, and there could not well be any other path, because on all sides the land was surrounded either by the garden of the other part of the cottage or the land of strangers; it did not abut on any highway. Therefore I should say the right of way ought to be granted.

But I will carry the investigation further. I will suppose that the agreement was that the conveyance should contain the usual general words, and it remained to be enquired whether those general words would pass the right of way. I think among the general words would be "all ways now used with the premises," and if those words had been inserted the simple enquiry would have been, Was that a way then used?—if so, the way passed; if not, it did not. As a matter of fact I have already found that it was used.

The authorities on the subject go back to an early time. In *Oomyn's Digest*, under the head "Chemin" (1), I find this passage: "If a man seised of Blackacre and Whiteacre, used a way through Whiteacre to Blackacre, afterwards grants Blackacre with all ways, &c., this way through Whiteacre shall pass to the grantee." The same rule prevailed in the case of *Kooysra v. Lucas* (2) in the year 1822. There Justice Holroyd said this: "By the lease certain premises delineated in the plan in the margin thereof, comprising a part of Sprang's dairy, were demised to the plaintiff, together with all ways thereto belonging or appertaining, or therewith or with any part thereof used or enjoyed. The way in question was a

(1) 5th ed. (by Hamond), p. 58.

(2) 5 B. & Ald. 830.

Barkshire v. Grubb.

way used and enjoyed with a part of the demised premises. It therefore passed to the plaintiff by the very words of the lease." Those authorities seem to me clear were it not for two later ones, which I venture to think unfortunately introduced a doubt into the law. The two cases of *Thomson v. Waterlow* and *Langley v. Hammond* give countenance to the proposition that "where a way has existed, of right, over property B to property A, and the properties come into the same possession, a grant of or with all ways now or heretofore used will pass the right of way; but where after unity of possession only the way has been used, such general words will not pass it." I ask myself upon what principle such a distinction can exist. Is not the right within the very words of the description? But any doubt arising from those cases appears to be displaced by the two subsequent cases of *Kay v. Ouley* and *Watts v. Kelson*, which appear to revive the earlier law. In *Kay v. Ouley* Lord Blackburn said, "It cannot make any difference in law whether the right of way was only *de facto* used and enjoyed, or whether it was originally created before the unity of possession, and then ceased to exist as a matter of right, so that in the one case it would be created as a right *de novo*, in the other merely revived." And in *Watts v. Kelson*, an earlier authority in point of date, the Judges in the Court of Appeal seem to have taken exactly the same view. The Judges in the course of argument asked whether it would make any difference that the easement existed before the unity of possession. Lord Justice Mellish said, "I am not satisfied that, if a man construct a paved road over one of his fields to his house, solely with a view to the convenient occupation of the house, a right to use that road would not pass if he sold the house separately from the field;" and when he came to deliver his considered judgment he referred to *Langley v. Hammond* in this way: "We may also observe that in *Langley v. Hammond* Baron Bramwell expressed an opinion, in which we concur, that even in the case of a right of way, if there was a formed road made over the alleged servient tenement, to and for the apparent use

of the dominant tenement, a right of way over such road might pass by a conveyance of the dominant tenement with the ordinary general words." I adopt that view. I think that where there are two closes, one adjoining the other, and that on one a constructed way exists which is in fact used for the purpose of the other, and that the second close is granted with all ways now used, a right of way passes. And I have no doubt that on the true construction of this agreement the right of way ought to pass.

Solicitors—Ewbank & Partington, agents for R. A. Ward, Maidenhead, for plaintiff; Venn & Woodcock, for defendant.

BACON, V.C. }
1881.
May 6. }

In re CLARKE.
BARKER v. PEROWNE.

Apportionment—Tenant-for-Life and Remaindermen—Purchase of Stock "cum div."—*Apportionment Act, 1870.*

A testator bequeathed to trustees 15,000*l.* to be raised out of his estate, and to carry interest at $4\frac{1}{2}$ per cent. from his death until appropriated, upon trust for investment with the consent of A, and to pay the annual income, including therein the $4\frac{1}{2}$ per cent. interest, to A for life with remainder over.

The trustees, with A's consent, placed the 15,000*l.* on deposit account at a bank for nearly three months, at the end of which time they invested it in the purchase (partly) of railway debenture stocks, on which, at the time of purchase, five months' out of the half-year's interest had already accrued:—

Held, that A, being entitled under the will to the whole income of the 15,000*l.*, was entitled to the entire half-year's dividends, and that the *Apportionment Act, 1870*, had no application to such a case.

The testator by his will, dated the 11th of September, 1873, and a codicil thereto, bequeathed to trustees the sum of 15,000*l.*, to be raised out of his estate, such sum to carry interest at the rate of $4\frac{1}{2}$ per

In re Clarke.

cent. from the date of the testator's death until it should be paid or appropriated, upon trust, with the consent of his wife, to invest the same as therein mentioned, and to pay the annual income thereof and of the investments thereof, including in such income the interest payable in respect of the said sum, unto his wife during her life, and while covert for her separate use without power of anticipation, and after her decease upon trust as therein mentioned.

The testator died in 1879 and his wife had since married Captain Grimble.

By an order made in this action on the 26th of February, 1880, the trustees were directed on or before the 8th of March, 1880, to raise out of the personal estate of the testator the sum of 15,000*l.* and 12*4l.* 4*s.* 2*d.* for interest thereon up to the 8th of March, 1880.

On the 6th of March, 1880, the trustees raised the 15,000*l.*, and with Mrs. Grimble's consent placed it on deposit with the Joint-Stock Bank, the 12*4l.* 4*s.* 2*d.* being paid to Mrs. Grimble.

On the 27th of May, 1880, the trustees invested the 15,000*l.* in (amongst other stocks) 4,500*l.* four per cent. debenture stock of the Great Western Railway Company, and 4,478*l.* four per cent. debenture stock of the London and North Western Railway Company, with the accruing half-year's dividends on those stocks for the half-year ending the 30th of June, 1880.

The trustees paid to Mrs. Grimble 67*l.* 7*s.* 11*d.*, the interest on deposit allowed by the bank up to the 27th of May, but the latter claimed the payment to her, in addition, of two sums of 87*l.* 18*s.* 9*d.* and 87*l.* 10*s.* 1*d.* in the trustees' hands, being the interest for the half-year ending the 30th of June, paid by the Great Western and London and North Western Railway Companies respectively on their respective amounts of debenture stock as above mentioned; and Mrs. Grimble and her husband took out a summons asking for an order upon the trustees to that effect, which was adjourned into Court.

Mr. Hemming and *Mr. Kingdon*, for the summons.—*Mrs. Grimble* is entitled to the

whole income of the 15,000*l.* and its investments. It is not incumbent on trustees to adjust minutely the respective rights of tenants-for-life and remaindermen on every change of investment, nor will the Court do so. The Apportionment Act, 1870, does not apply.

They referred to the following cases:—

Scholefield v. Redfern, 2 Dr. & S. 173; 32 Law J. Rep. Chanc. 627;

Lord Lonsborough v. Somerville, 19 Beav. 295; 23 Law J. Rep. Chanc. 646;

Bulkeley v. Stephens, 10 Law Times, N.S. 225;

Freeman v. Whitbread, 35 Law J. Rep. Chanc. 137; Law Rep. 1 Eq. 266.

Mr. Horton Smith and *Mr. Heath*, for the remaindermen.—*Mrs. Grimble* has received interest up to the 27th of May. If, therefore, she receives the half-year's interest on these stocks she will get interest twice over. If the stocks had been bought immediately after the end of the half-year, more stock could have been bought for the same money, and therefore the accrued part of the half-year's interest should be considered capital. The Apportionment Act, 1870, applies.

They referred to the following authorities:—

Olive v. Olive, 41 Law J. Rep. Chanc. 386; Law Rep. 7 Chanc. 433;

Pollock v. Pollock, 44 Law J. Rep. Chanc. 168; Law Rep. 18 Eq. 329;

Shipperdson v. Tower, 8 Jur. 485;

St. Aubyn v. St. Aubyn, 1 Dr. & S. 611; 30 Law J. Rep. Chanc. 917;

Donaldson v. Donaldson, Law Rep. 10 Eq. 635;

In re Ingram, 11 W.R. 980;

Seton on Decrees (4th ed.), p. 490.

Mr. Speed, for the trustees.

BACON, V.C.—The Apportionment Act, 1870, is now reasonably familiar to us, and the principle is perfectly well established, that when a person has a limited interest in a fund, and his interest determines between two periodical payments of the income of it, the new owner is not entitled to the whole of the income

In re Clarke.

accrued since the last period of payment. A case like the present, however, has not, I believe, happened before, for the cases cited of a date since the Apportionment Act, 1870, were all within the spirit if not the words of the Act. Here the testator directed 15,000*l.* to be raised out of his estate, and to be held for the benefit of his wife during her life with remainder over, and said that until the 15,000*l.* was invested, 4½ per cent. interest upon it was to be paid to her; but whatever is done with it, whether it is invested or not, his wife is to have the whole benefit of it during her life. How does the Apportionment Act, 1870, apply to such a case as that? The trustees first, with the widow's consent, deposit the money in the bank, and afterwards lay it out in fruit-bearing stock, which they hold upon the trusts of the will. What are those trusts? For her for life with remainder over. In my opinion the will and the order of this Court decide the matter, and neither the Apportionment Act nor any of the cases cited affect it at all; the widow is therefore entitled to every shilling of the income.

The summons must be allowed.

Solicitors—Rose & Fry, for Mr. and Mrs. Grimble;
C. M. Barker, for the remaindermen; Lindsay,
Mason & Greenfield, for the trustees.

Fry, J. }
1881. }
July 27, 28. } **FUTCHER v. FUTCHER.**

Pleading—Statute of Frauds—Demurrer—Order XIX. rule 23—Order XXVIII. rule 2.

The defence of the Statute of Frauds cannot be raised by demurrer.

This was an action brought by a widow against the representatives of Robert Futcher, her deceased husband, and she claimed specific performance of an alleged promise or agreement by the deceased prior to marriage to give the plaintiff control over her own property.

The statement of claim alleged as follows: "Prior to the said marriage between the plaintiff and the said Robert Futcher, the plaintiff on several occasions suggested that there ought to be a settlement of her property on herself and her child and her grandchildren. The said Robert Futcher on those occasions, in order to induce the plaintiff not to insist upon a settlement, promised and agreed with her that she should have full control over her property, and full power to give it or leave it by her will to the said Ellen Wallis and her said grandchildren, or otherwise amongst her own family as she desired, although no settlements were made, and advised her that under these circumstances a settlement was unnecessary."

The defendants demurred to the claim for specific performance. By the demurrer they said that the claim "is bad in law on the ground that the alleged promise and agreement of which the plaintiff seeks to have specific performance was not, nor was any memorandum or note thereof made in writing or signed by the said Robert Futcher, or by any other person thereunto by him lawfully authorised within the meaning of the statute 29 Car. 2. c. 3, entitled 'An Act for the prevention of Frauds and Perjuries.'"

Mr. Glasse and Mr. Giffard, for the demurrer, argued that on the statement of claim it was clear there would have been no agreement in writing to satisfy the Statute of Frauds. The statement of claim was therefore demurrable—

Johnasson v. Bonhote, 45 Law J. Rep. Chanc. 651; Law Rep. 2 Ch. D. 298.

The defendants had complied with the requirements of the 23rd rule of Order XIX., which requires the statute to be pleaded by stating it to be the ground of demurrer. In that respect the case differed from

Catling v. King, 46 Law J. Rep. Chanc. 384; Law Rep. 5 Ch. D. 660,

before the Court of Appeal, where it was objected by the Judges in the course of argument that the statute could not now be a ground of demurrer; that, however,

Fletcher v. Fletcher.

was not the actual ground of decision in the case, and the point does not appear to have been fully argued or finally considered. Neither

Johnasson v. Bonhote (*ubi supra*) nor Order XXXVIII. rule 2 were brought to the notice of the Court.

They cited also

Dawkins v. Lord Penrhyn, 48 Law J. Rep. Chanc. 304;

Spurrier v. Fitzgerald, 6 Ves. 548;

Rist v. Hobson, 1 Sim. & S. 543; 3 Law J. Rep. (o.s.) Chanc. 86;

Wood v. Midgeley, 5 De Gex, M. & G. 41; 23 Law J. Rep. Chanc. 553;

Barkworth v. Young, 4 Drew. 1; 26 Law J. Rep. Chanc. 153;

The Vale of Neath Colliery Company v. Furness, 45 Law J. Rep. Chanc. 276.

[FRY, J., referred during the argument to

Stephens on Pleadings (7th ed.), 140;

Clarke v. Callow, 46 Law J. Rep. Q.B. 53,

and an unreported case before the Master of the Rolls in January, 1881,

Shadlow v. Cotterill was also mentioned.]

Mr. North and *Mr. G. H. Lea*, for the statement of claim, were not called upon.

FRY, J., said—The plaintiff sues upon an allegation of contract between herself and her late husband prior to their marriage. The statement of claim alleges the agreement to have been repeated, and I am asked to infer from that statement that the agreement and promise were not in writing. In my judgment I can come to no such conclusion, because the agreement may well have been gone through more than once, and have been in writing on some occasion. It is impossible, therefore, in my judgment, to come to the conclusion that written evidence is inconsistent with the allegations in the statement of claim. I regard it, therefore, as a statement of claim which alleges an agreement, but is silent as to whether there was a writing.

The question is therefore whether such allegation of contract, if the Statute of

Frauds requires it to be evidenced by writing, is open to demurrer.

Before the Judicature Acts there was a diversity of practice at law, and in equity. At law it was not necessary to allege in the declaration the existence of writing upon the principle which is stated in a note to *Williams' Saunders* in these terms (1):—

“For this difference is holden that where a thing is originally made by Act of Parliament, and required to be in writing, it must be pleaded with all the circumstances required by the Act, as in the case of a will of lands it must be alleged to have been made in writing; but where an Act makes writing necessary to a matter where it was not so at common law, as in the case in the preceding note, where a lease for a longer term than three years is required to be in writing by the Statute of Frauds, it is not necessary to plead the thing to be in writing, though it must be proved to be so in evidence.” The result was that at law on an allegation of a simple agreement the plaintiff must be prepared to prove the existence of the agreement and all that was necessary to satisfy the Statute of Frauds, and that, though the defendant had given no notice to set up the statute.

In equity the practice was extremely different. The Court required a plaintiff, who relied on an agreement within the ambit of the statute, to allege a writing which satisfied the statute. The principle is explained by Vice-Chancellor Kindersley in the case of *Barkworth v. Young*, where, after referring to a paragraph in the bill of complaint, which alleged in general terms the contract sued upon, he said this (2): “I am of opinion that this paragraph must be taken to be an allegation of nothing more than a verbal agreement, and that the defendant may avail himself of the Statute of Frauds by way of demurrer. As a general rule, to render a bill proof against a demurrer, it ought to state all the facts necessary to entitle the plaintiff to the relief prayed; and if it only states some of them and omits others, it must be assumed that those

(1) Vol. i. p. 276, note 2.

(2) 4 Drew. 10; 26 Law J. Rep. Chanc. 156.

Futcher v. Futcher.

which are omitted do not exist, unless indeed they are necessarily to be inferred or presumed from what is stated. The maxim applies, '*De non apparentibus et de non existentibus eadem est ratio.*'"

There being that difference in mode of allegation on the plaintiff's part at common law and in equity, there followed a difference in taking advantage of the absence of allegation by demurrer, as the plaintiff was required in equity to allege the writing, a bill not alleging it could be demurred to. As the plaintiff at common law was not required to allege the writing, its absence in the declaration could not be taken advantage of by demurrer.

Thus matters stood before the Judicature Acts. The 23rd rule of Order XIX. provides, "When a contract is alleged in any pleading, a bare denial of the contract by the opposite party shall be construed only as a denial of the making of the contract in fact, and not of its legality or its sufficiency in law, whether with reference to the Statute of Frauds or otherwise." That rule, in my judgment, allows an allegation of contract simply, and throws on the defendant the burden of alleging the Statute of Frauds, because the rule goes on to provide the manner in which he shall allege it. The result of the rule, in my judgment, is twofold. In the first place, it abolished the old rule of Chancery that a writing must be alleged by the plaintiff. Secondly, it abolished the old rule of common law that the point might be raised at the trial for the first time. The rule leaves the plaintiff open to allege a contract without reference to written evidence, and requires the defendant, if he desires to avail himself at the trial of the statute, to raise by his pleadings that issue.

That being my view of the construction of the rule, how do the authorities stand? In the first place, in the case of *Callling v. King*, according to my reading of the decision of the Court of Appeal, and not merely of what was said in the course of argument, the Court held that the defence of the Statute of Frauds cannot now be raised by demurrer. That case came to the consideration of the House of Lords, who expressed the same opinion in *Daw-*

kins v. Lord Penrhyn. Lord Chancellor Cairns said, "The analogy which was referred to of the Statute of Frauds is not an analogy of any weight. The Statute of Frauds must be pleaded because it never can be predicated beforehand that a defendant who may shelter himself under the Statute of Frauds desires to do so." There appears to have been a subsequent case before the Master of the Rolls, the exact nature of which is not before me, which confirms my view of the case. I have referred to the case of *Clarke v. Gillow* before the Queen's Bench Division. The question requiring adjudication in that case was, whether, where the statement of claim had alleged that there was an acceptance and receipt of the commodity sold, so as to take the contract alleged out of the Statute of Frauds, it was necessary for the defendant to plead the statute if he wished to take advantage of it; and Lord Justice Brett said this: "Order XIX. rule 3 is, in my opinion, intended partly as an enunciation of the jealousy with which the law regards that class of defences, and partly to assimilate the practice at law and in equity. If rule 23 is to be obeyed, if the defendant intends to insist on the defence that, though he undoubtedly entered into a contract yet, as that contract was not in writing, he does not intend to observe it, then he must clearly state his intention, or if he means to deny the legality of a contract he has entered into, he must say so in plain terms." Without saying that that case determines the present, it certainly leans towards the view I have expressed.

I hold, therefore, that the demurrer cannot be sustained, and overrule it with costs.

Solicitors—Stocken & Jupp, agents for Webb, Basingstoke, for plaintiff; Taylor, Hoare & Taylor, agents for Wilson & Sons, Salisbury, for defendants.

FRY, J. } *In re* BROWN, BAILEY AND
1881. } DIXON (LIMITED); *ex parte*
Aug. 4. } ROBERTS AND WRIGHT.

Company — Winding-up — Companies Act, 1862, ss. 87, 138, 163—Distress—Mortgage.

An application in a winding-up under supervision by mortgagees for leave to distrain under a power in their mortgage for interest due before the winding-up was refused.

This was an application for leave to distrain on property on the premises of the above company in respect of interest under a power of distrain given in a mortgage-deed. The applicants were, as trustees for debenture-holders, mortgagees under an instrument dated the 21st of May, 1879, which in case of default in payment of interest reserved a right to the trustees to enter on the property of the company and distrain and sell the property distrained in the same manner as a landlord could. A resolution to wind up the company voluntarily was passed on the 7th of January, 1881, and on the 14th of the same month a supervision order was made. The present application related to interest in arrear up to the 31st of December, 1880. Subsequent interest was paid in full.

Mr. J. Pearson and Mr. Speed, for the mortgagees, distinguished this case from distrain for rent, and contended that the effect of the power in the mortgage-deed was to give a charge on the property subject to distrain. The Court had discretion to allow the distrain, and would not allow the mortgagees to be put in a worse position by the act of the debtors in putting themselves in the position of being wound up—

In re David Lloyd & Co., Law Rep. 6 Ch. D. 339;

In re The Longendale Cotton Spinning Company, 48 Law J. Rep. Chanc. 54; Law Rep. 8 Ch. D. 150.

Mr. North and Mr. Buckley, for the liquidators, said that there was no charge on the goods and chattels subject to be distrained until they were actually taken. There was no difference in principle be-

tween this power of distress for interest and the ordinary power a landlord had for rent. The principles on which the Court acted in not allowing distress for money due at the commencement of the winding-up, or payable in respect of matters which happened before that date, was that one creditor would not be allowed to obtain a priority he had not otherwise by the exercise of such a power. With regard to subsequent matters rent was allowed to be paid in full under what amounted to a bargain with the liquidator acting with a view to preserve the property of the company and realise to advantage—

In re The South Kensington Co-operative Stores, *Ante*, 446; 17 Ch. D. 161;

In re The Exhall Mining Company, 4 De Gex, J. & S. 377; 33 Law J. Rep. Chanc. 595;

In re The Traders' North Staffordshire Carrying Company, 44 Law J. Rep. Chanc. 172; Law Rep. 19 Eq. 60;

In re Hamilton's Windsor Iron Works Company, 27 W.R. 827;

In re The Withernsea Brick Works Company, *Ante*, 185; Law Rep. 16 Ch. D. 337.

The relationship between the parties was that of landlord and tenant—

In re The Stockton Iron Furnace Company, 48 Law J. Rep. Chanc. 417; Law Rep. 10 Ch. D. 335.

Mr. Pearson replied.

FRY, J., stated the facts and said—The trustees now apply to the Court for leave to enter and distrain. It is not in dispute that such leave is necessary to their entry; and the question which I have to determine is this: Upon what principle ought the discretion of the Court to be exercised in granting or refusing that leave?

Now one principle has been clearly enunciated, which is this, that as far as possible the independent rights of independent persons ought to be respected. The Lord Justice James, in the case of *David Lloyd & Co.*, to which my attention has been called, said this: "A power was given to the Court to interfere with actions by restraining them or not allowing them to proceed, but this power was given because it was understood that the

In re Brown; ex parte Roberts.

Court would exercise it with a due regard to the rights of third persons, who were not members of the company, and who had not to come in and claim to share in the distribution of the company's assets among the creditors, and who were not therefore *quasi* parties to the winding-up proceeding. The Court would have due regard to the rights of independent persons. A mortgagee is, to my mind, such an independent person, and his rights ought not to be interfered with because his mortgagors have chosen to become insolvent and to have a winding-up." In like manner a lessor is for many purposes an independent person. His rights ought not to be interfered with more than is necessary by reason of his lessee having become insolvent, and having chosen, to use the Lord Justice's expression, to have a winding-up.

There is, however, another principle, which I take to be this, that the Court will administer the assets of a company among all the creditors at the time of the winding-up, *pari passu*; and will, so far as is possible, not give any preference or priority between the various creditors. That principle was enunciated very fully by the Master of the Rolls in the case of *The Traders' North Staffordshire Carrying Company*. Speaking of the application which was then made, he said this: "In substance it is getting payment by the creditor out of the goods of his debtor, and a preferential payment as between that creditor and the other creditors of the debtor, and as I understand the very object and the meaning of the Act of Parliament was to prevent any such preference being obtainable after the commencement of the winding-up."

Those are the two principles to be considered. In their generality they are manifestly inconsistent. In my view they are to be reconciled by drawing the line at the date of the winding-up. A mortgagee and a lessor, although in one sense independent persons, are nevertheless creditors of the company in respect of any amount due on the mortgage or on the lease at the date of the winding-up, and as such creditors they ought, in my judgment, to have neither preference nor priority. In respect of any rights arising

after the winding-up by reason of the company or the liquidators remaining in possession of the demised or of the mortgaged premises, they ought, in my judgment, to be treated as independent persons, and if the company or liquidator choose to remain in possession of the demised or mortgaged premises, they must so remain upon the terms and conditions of the instrument just as any other person must observe those terms. In that way then I draw the line at the commencement of the winding-up; and I hold that all claims by creditors before that date should be administered upon the principle of equality; but that with regard to the rights after that, the company is in no better position because it has become insolvent, and has had a winding-up. That appears to me to be consistent with the current of decisions which has drawn the line with regard to the exercise of the power of distress in respect of rent accrued before and rent accrued after the winding-up. The practice certainly has grown up of allowing the lessor to distrain or to be paid in full in respect of rent after the winding-up, but with respect to rent before the winding-up, to allow him only his right to compete with the other creditors by proving in the winding-up.

I come very much to the same conclusion on the consideration of the 163rd section. That shews in the first place that "Where the company is being wound up by the Court or subject to the supervision of the Court, any attachment, sequestration, distress, execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents." Why is that? In order that equality may be the rule in the administration of the assets. That restraint on attachment or distress and on execution is a fetter imposed by the Legislature on the rights of independent persons. Because no one can doubt a lessor's right of distress flowing from the relation of landlord and tenant is one which in the usual way is respected by the Court, but nevertheless for the sake of equality the exercise of that power is restrained. No doubt the Court has under the general operation of that section, and the earlier sections, exercised

In re Brown : ex parte Roberts.

the right to allow distresses to prevail ; but it has allowed them in the way I have already referred to. I think, therefore, this application cannot be granted, and that it must be refused with costs.

action, urged the same arguments as in the Court below.

Mr. North and *Mr. C. James*, for the respondent, the Irish administratrix, were not heard.

Solicitors—*Baxters & Co.*, for the applicants ;
Pattison, Wigg & Co., agents for *Broomhead*,
Wightman & Co., *Sheffield*, for the liquidators.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
BAGGALLAY, L.J.
LUSH, L.J.
1881.
June 24, 27.

JAMES v. HACON.

Administration—Irish Domicil—General Administratrix in Ireland—Limited Administrator in India—Surplus Assets in India—General Administratrix entitled to receive and give good Discharge for same.

General administration was granted by the Irish Court to the widow of an intestate, who died in Ireland, and who left property in India. The Irish letters of administration were sealed in England. F., under a power of attorney from the administratrix in the usual form, obtained limited administration to the intestate in India, and, after satisfying all claims, remitted the surplus Indian assets to his agents in England, who refused to pay over the same to the administratrix without the receipt of all of the next-of-kin of the deceased:—Held (affirming the decision of FRY, J.), first, that the intestate having died in Ireland, his domicile, in the absence of evidence to the contrary, was Irish ; secondly, that F. was bound to hand over the surplus Indian assets to the Irish administratrix, the next-of-kin not having intervened.

De la Viesca v. Lubbock (10 Sim. 629) approved and followed.

This was an appeal from a decision of *Fry, J.*, reported *Ante*, p. 182.

Mr. M. Cookson and *Mr. Methold*, for the appellants, the defendants in the

JESSEL, M.R.—I must most emphatically express my disapproval of what the defendants have done. The Irish letters of administration are the ordinary grant of general administration. That being so, and there being funds in India due to the administratrix, she sent over a power of attorney to Messrs. Forbes to get in that fund as her attorneys. Acting under that power of attorney, Messrs. Forbes obtained a grant of limited administration in India. Having obtained those letters of administration as her attorneys, they have a modest surplus amounting to about 196*l.*, which they remit to their London agents, with instructions to hand that fund over to the parties entitled. The administratrix asked them to pay it over to her, and they refused to do so. Then she brings this action to enforce payment, and obtains judgment with costs. In my opinion, considering the small amount of the fund, the defendants, even if technically right, would have done well in paying over the amount to her. But when we consider the nature of the transaction, we ask ourselves, What right have Messrs. Forbes to refuse to pay over the fund to the person for whom they had acted as attorneys ? On what ground of law or on what theory of policy they are entitled to refuse, I am entirely at a loss to see. I agree they were liable to be sued in India for the debts of the intestate. But in this case there is an admitted surplus. It appears to me that, under the ordinary law of principal and agent, Messrs. Forbes, as attorneys of the general administratrix, were bound to pay over the fund to her, and could get a good discharge, no one else intervening ; and no one else has intervened. It is said that the case was decided below on an improper ground—that is to say, on the ground that the plaintiff was the administratrix in the country of the intestate's domicile, when, in fact, his domicile was not Irish. Now the principal administrator has a right to receive the

Eames v. Hacon, App.

surplus assets from every other administrator, and, as a rule, the principal administrator is the administrator in the country of domicile. Here there is no doubt about it. The plaintiff is the general administrator, and is suing a limited administrator who has remitted surplus assets to England for the purpose of being paid to the person entitled to it, and, as she is general administratrix, both in Ireland and in England, she is entitled to call upon him to pay over the fund. If it were necessary to decide whether an Irish domicile was proved, I think it was. The fact that the intestate died in Ireland, and that general administration was granted in Ireland, is *prima facie* evidence that he was domiciled in Ireland at the time of his death. No doubt there are cases where it has been held that parties have obtained what is called an Anglo-Indian domicile; but there is no proof of that here. It seems to me that those who dispute the presumption of the Irish domicile of the intestate should have been prepared with evidence to disprove it. I prefer, however, to put the case on the larger ground that this is a case of the principal administratrix suing a limited administrator for payment of an admitted surplus. The exact point was decided in *De la Viesca v. Lubbock*, so long ago as 1840, and that decision has never been impugned. That case is precisely in point and is correct in principle, and, in my opinion, the decision of Mr. Justice Fry is entirely correct.

BAGGALLAY, L.J.—Agreeing entirely with the Master of the Rolls as to the facts and the law of this case, I do not think it necessary to add anything to what he has said.

LUSH, L.J.—I entirely agree.

Solicitors—Hacon & Turner, for appellants; J. Wilkinson, agent for Henry Davies, Oswestry, for respondent.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.

SELBORNE, L.C.

BRETT, L.J.

COTTON, L.J.

1881.

August 4.

In re WILLIAMS; ex parte WILLIAMS.

Bankruptcy—Composition—Duties and Powers of Registrar—Refusal to Register—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 126.

The duty of a Registrar upon an application to register resolutions is not, even in the absence of all opposition to the registration, purely ministerial. He is entitled and bound, even in the absence of opposition, to refuse to register resolutions when he sees that they must necessarily have been passed in the interest of the debtor.

This was an appeal from a refusal of Mr. Registrar Pepys, acting as Chief Judge, to register certain resolutions of composition.

J. Williams filed his petition for liquidation or composition. At the first general meeting of his creditors, held on the 13th of May, 1881, a resolution was come to by the statutory majority of his creditors to accept a composition of twopence in the pound, to be paid within three months after registration of the resolution; and at a second general meeting, held on the 27th of May, this resolution was duly confirmed. The payment of the proposed composition was unsecured. From the debtor's statement of affairs it appeared that his debts amounted to 1,167*l.* 8*s.* 7*d.*, while his assets were *nil*. At the first meeting twenty-one creditors were present or represented, having debts for 811*l.* 1*s.* 11*d.*; of that number sixteen creditors, whose debts amounted to 706*l.* 7*s.* 11*d.*, assented to the composition.

At the second meeting ten creditors were present or represented, whose debts amounted to 357*l.* 15*s.* 10*d.*, and of that number eight, with debts amounting to 285*l.* 15*s.* 10*d.*, assented to the resolution.

Upon the application being made to the Registrar for registration of the resolutions, no one appeared for dissenting creditors to oppose the registration, but

In re Williams; ex parte Williams (App.), Bankr.

the Registrar refused the registration "on the ground that the payment of the composition of twopence in the pound unsecured is wholly in the interest of the debtor and not for the benefit of the creditors."

The debtor appealed.

Mr. Sidney Wolff, for the appellant, urged that the statutory requirements having been duly complied with, in the absence of any opposition the Registrar was bound to register the resolutions. His office was purely ministerial, to see that the requirements of the Act had been observed. He referred to

The Bankruptcy Act, 1869, s. 125;
The Bankruptcy Rules, 1870, rule 295;

Ex parte Elworthy; in re Elworthy,
44 Law J. Rep. Bankr. 123;
Law Rep. 20 Eq. 742;

Ex parte Terrell; in re Terrell, 46
Law J. Rep. Bankr. 47; Law
Rep. 4 Ch. D. 293;

Ex parte Williams; in re Williams,
36 Law Times N.S. 324;

Ex parte Early; in re Golding, Law
Rep. 13 Ch. D. 300;

Ex parte Matthews; in re Sharpe,
Ante, p. 284; Law Rep. 16 Ch. D.
655.

[COTTON, L.J.—In the last two cases the question was whether one creditor should be allowed to sweep away the whole assets.]

SELBORNE, L.C.—The principle on which cases like the present are to be decided—a principle founded on his interpretations of decisions which he considered binding on the Court—is laid down by Lord Justice James in the case of *Ex parte Terrell* in these words: "This Court has laid it down that the resolutions must be passed *bona fide* in the interest of the creditors, and must not be mere sham resolutions. The facts of the present case shew that the resolution could not have been passed *bona fide*. The debtor had no assets;" nor has he here. "He merely gives his promise to pay the composition and nobody else offers to give any security for it;" exactly the same state of circumstances as we have here. "The creditors

merely accept the hope that the son will in the course of a month find the money to pay it;" in the present case three months. "That is not the sort of arrangement which, as it appears to me, was contemplated by the Act as one which could bind the dissentient minority of the creditors. I think the Registrar was quite right in refusing to register the resolution;" and Lords Justices Baggallay and Brett concur in that judgment.

The only difference between that case and the present is, that in the present the terms of the composition are worse for the dissentient creditors than they were there. The debts are 1,167*l.*, the assets *nil*; and it is proposed that an unsecured composition of twopence in the pound, payable in three months, shall be imposed upon dissentient creditors, those dissentient creditors representing debts to the amount of 460*l.*

It cannot be within the spirit and justice of the Bankruptcy Act that such an arrangement should, under the name of a composition, be imposed upon a dissentient minority. Sitting here as a Judge of facts, I am clearly of opinion that that resolution cannot have been passed in the interest of the creditors, but must have been in favour of the debtor; and the appeal must be dismissed.

BRETT, L.J.—I agree. The undisputed facts of the case justify the Registrar in his refusal, and the cases which have been cited all shew that if he can perceive that the proposed resolution must necessarily have been in favour of the debtor and not of the creditors, he is able and bound to refuse registration.

COTTON, L.J.—I also am of the same opinion. The only point not hitherto touched upon in the judgments is the question whether, in the absence of opposition by any creditor to the registration, the Registrar was entitled to refuse to register. I consider that he was so entitled if upon the evidence before him he could see that the proposed resolutions were of necessity in the interest of the debtor rather than of the creditors. Under the provisions in the Act for composition the majority of the creditors have large powers to bind

In re Williams; ex parte Williams (App.), Bankr.

the minority, and must be strictly watched in the exercise of these powers; and even in the absence of all opposition, if it appears that what they have done has been to shew favour to the debtor rather than to the creditors, it is the Registrar's duty to refuse registration. I think upon the evidence here that it is clear that what was done was to favour the debtor at the expense of the creditors, and that the Registrar was quite right.

Solicitor—E. Farman, for the debtor.

Mr. Eastwick, for the applicant.—Since, by the Judicature Act, 1873, ss. 3 and 16, each division of the High Court can now exercise the jurisdiction formerly possessed by the several Courts consolidated under that Act, I submit that the chief clerk has the same power as a Master formerly had to make an order under section 40 of 3 & 4 Will. 4. c. 42.

A subpoena to a witness to attend before an arbitrator not being effectual, the only course to compel his attendance is by obtaining the order I now ask for.

THE MASTER OF THE ROLLS said it was clear that such an order might now be made on summons in the Chancery Division, and accordingly made the order as asked, directing it to be served as an ordinary subpoena.

JESSEL, M.R. }
1881.
June 23. }

CLARBROUGH v.
TOOTHILL.*

Solicitor—C. Butcher, agent for T. Pierson,
Sheffield.

Practice—Action in Chancery Division—Reference to Arbitrator—Compelling Attendance of Witness—Subpoena—3 & 4 Will. 4. c. 42. s. 40—Judicature Act, 1873, ss. 3 and 16.

An order may now be made on summons in the Chancery Division, under 3 & 4 Will. 4. c. 42. s. 40, requiring the attendance of a witness before an arbitrator appointed in an action in that division, and the order will be directed to be served as an ordinary subpoena.

An arbitrator having been appointed in this action, the plaintiff applied by summons, under 3 & 4 Will. 4. c. 42. s. 40, that one Brierley might be ordered to attend before the arbitrator, to give evidence on her (the plaintiff's) behalf, and produce a certain indenture. The chief clerk, however, declined to make an order, on the ground that inasmuch as the Act referred in terms to common law actions only, it seemed doubtful whether, even under the present practice, the Chancery Division had jurisdiction to make an order.

The matter was now mentioned to the Master of the Rolls in his private room.

* *Ex relatione.*

FRY, J. }
1881.
April 26. }

SNOW v. BOLTON.

Practice—Sequestration—Costs—Order XLVII. rules 1 and 2.

The plaintiff had been ordered to pay certain costs. A four-day order was made and at the same time leave to issue sequestration in case of non-payment of costs on the day named was given to the defendant.

Orders had been made on the plaintiff for payment of certain costs to the defendant. He was a half-pay officer in the army, and evidence was given that he had no property besides his pension of 290*l.*

This was a notice on behalf of the defendant that the plaintiff might be ordered to pay the costs within four days of service of the order asked for on him; that in default of such payment a writ of sequestration might issue against the pension.

Mr. Rawlins, for the motion.—The practice as to obtaining a sequestration for

Snow v. Bolton.

costs was to obtain a subpoena for costs. That is taken away by Order XLVII. rule 2 (of April, 1880), and the leave of the Court to the issue of such subpoena is requisite. I now ask for such leave. The issuing of writs of sequestration is regulated by Order XLVII. rule 1, which only provided that the writ may issue where a time has been limited for payment of money or the closing an account, to require which sequestration is brought, therefore the application is for a four-day order.

Mr. Onwald argued that sequestration was an extreme measure not to be put in practice till other methods had failed. A *fi. fa.* might be sued out on an application made under the Debtors Act.

FRY, J., stated the facts and said—It has been suggested that sequestration ought not to issue, but recourse ought to be had to some other method of enforcing payment. A *fi. fa.* would be useless in this case, because the defendant has sworn, and it is not denied, that the plaintiff has no goods. It is suggested that application ought to be made under the Debtors Act to send the plaintiff to prison, but that would be, in my judgment, a harsher proceeding; and it does not follow that the defendant would be successful in such application, because the power to imprison is only to be exercised where there is proof that the debtor has had, or has means, and refuses or neglects. I think, therefore, there is no other mode open to the defendant to enforce the order for payment of costs, and the sequestration must issue. What the effect may be will be matter of further consideration.

Solicitors—*G. J. & P. Vanderpump*, for plaintiff;
Bolton, Robbins & Busk, for defendant.

FRY, J. }
1881. }
July 20. }

In re BROOK.
SYKES v. BROOK.

Practice—Judicature Act, 1873, s. 56—
Official Referee—Notice of Objection.

Objection to a part of a report of an official referee may be taken on the report coming before the Court for adoption. But notice of objection should be given.

This was an action by beneficiaries against a trustee for administration of the trust estate, the appointment of new trustees and a receiver in the meanwhile.

Questions between the parties were referred to an official referee who had made a report. The action now came on for further consideration.

Mr. Eyre, for the plaintiffs, took objection to some of the findings of the referee.

Mr. Gregory Walker (*Mr. Millar* with him) said it was too late now for a party to object to the findings of the referee, which were treated as findings of a jury—
Sullivan v. Rivington, 28 W.R. 372.

Mr. Eyre said it was for the Judge to adopt now as much or little of the findings as he thought just under the terms of the Judicature Act, 1873, s. 56.

Sections 57 and 58 of that Act, Order XXXVI. rule 34, and

Seton on Decrees (3rd ed.), 1663, were also referred to.

FRY, J.—It is clear that I cannot object to hear the plaintiffs when they say that the report of the official referee is wrong, because the 56th section of the Judicature Act, 1873, says the report of the referee may be adopted wholly or in part by the Court. Now that report does not come before the Court except on further consideration, because it is on that occasion that question arises, whether the report shall or shall not be adopted by the Court. Yet, undoubtedly great inconvenience will arise if points in the report are to be argued without any previous intimation by the person who makes the objection. Therefore I shall order the case to stand over if the defendant so desires. I cannot lay down any general rule as to what length of time should be allowed for

In re Brook.

notice of objection. I think two clear days would be desirable.

The defendant did not desire an adjournment, and the case was disposed of.

Solicitors—M. J. Burn, agent for T. Drake, Huddersfield; J. W. Sykes, agent for J. H. Dransfield, Huddersfield.

FRY, J. }
1881. } HARLOCK v. ASHBERRY.
June 20. }

Statute—Construction—Statutes of Limitations (37 & 38 Vict. c. 57. ss. 1 and 8; 7 Will. 4 and 1 Vict. c. 28)—Mortgage—Foreclosure—Payment.

A foreclosure action is not within the 8th section of 37 & 38 Vict. c. 57, but is within the 1st section of that Act.

Payment of rent by a tenant of a mortgagee on his demand, but without the authority of the mortgagor, is a payment under 7 Will. 4 and 1 Vict. c. 28, so as to keep alive the right of the mortgagee to bring a foreclosure action.

This was a foreclosure action in respect of certain freeholds and copyholds in Ely. The defendant insisted by her statement of defence upon the statute 37 & 38 Vict. c. 57, and all other statutes for the limitation of actions and suits as a bar to the plaintiff's demands.

It appeared from the evidence that one Wade, a tenant on the demand of the mortgagee's agent, had paid 5*l.*, a half-year's rent, to him without the authority of the mortgagor. Wade said he paid the 5*l.* because he thought he was obliged to, and he afterwards received notice from the defendant not to do so any more, and paid subsequent rent to her.

Mr. Cookson, for the plaintiff, argued that a foreclosure action was not within the 40th section of the statute of 3 & 4 Will. 4. c. 27, or the corresponding section of the Act now in force, but was within the 24th section as amended by 7 Will. 4 and 1 Vict. c. 28, and which

makes any payment on account of the mortgagee's debt within the period limited save the right of the mortgagee. It was not necessary to argue that payment by a mere stranger would be sufficient, for such payment would be no payment on account of the debt. Even if the action was within the 40th section the payment need not be made by the mortgagor himself, and this payment would be sufficient.

Mr. North and Mr. Giffard, for the defendant, contended that whether the section applicable was the 40th section of the Act 3 & 4 Will. 4, or the Act of 7 Will. 4 and 1 Vict. the payment could not be by a mere stranger, and must be limited to a payment by the mortgagor or his agent, or some person standing in the place of the mortgagor, and a payment made by a tenant behind the mortgagor's back and without knowledge of the mortgagor was not sufficient.

The following cases were cited:—

Chinery v. Evans, 11 H.L. Cas. 115;
Du Vigier v. Lee, 2 Hare, 326; 12 Law J. Rep. Chanc. 345;
Sinclair v. Jackson, 17 Beav. 405;
Wrizon v. Vize, 3 Dr. & War. 192;
Dearman v. Wyche, 9 Sim. 570; 9 Law J. Rep. Chanc. 76;
Brookhurst v. Jessop, 7 Sim. 438;
Ward v. Carttar, 35 Beav. 171; Law Rep. 1 Eq. 29;
Fordham v. Wallis, 10 Hare, 217; 22 Law J. Rep. Chanc. 548;
Heath v. Pugh, 50 Law J. Rep. Q.B. 473; Law Rep. 6 Q.B. D. 345;
Bolding v. Lane, 1 De Gex, J. & S. 122; 32 Law J. Rep. Chanc. 219.

FRY, J., stated the facts and said—The first question is, Is this action, as being a foreclosure action, within section 40 of 3 & 4 Will. 4 c. 27, or, what is the same thing, the 8th section of 37 & 38 Vict. c. 57—the only difference between the two enactments being the number of years given as the limit of time? Those sections refer to "actions, suits, or other proceedings to recover any sum of money secured by any mortgage judgment, or lien or otherwise charged upon, or payable out of any hand or rent at law, or in equity." In my judgment an action for foreclosure is not within section 40 of the Act of

Harlock v. Ashberry.

Will. 4, for the simple reason that the object of the action is to cut off the right to redeem the land and the recovery of the money charged on the land if it result at all out of the action, is not the object of the action but results from a condition imposed by the Court in restraint of carrying out the object of the action. That was the opinion of Lord St. Leonard in the case of *Wrixon v. Vize*, and that was the view the Court of Appeal took in the case of *Heath v. Pugh*. But if not within the 40th section the action appears to be within the 24th section of the same Act, which provides, "No person claiming any land or rent in equity shall bring any suit to recover the same but within the period during which by virtue of the provisions hereinbefore contained he might have made an entry or distress, or brought an action to recover the same respectively if he had been entitled at law to such estate, interest, or rights in, or to the same as he shall claim therein in equity." That carries the matter back to the 4th section, which provides that no person shall make an entry or distress, or bring an action to recover any land or rent not within twenty years next after the time at which the right to make such entry or distress, to bring such action or suit, shall have first accrued. I must add that the statute 7 Will. 4 and 1 Vict. c. 28, provides that "It shall and may be lawful for any person entitled to, or claiming under any mortgage of land, being land within the definition contained in the 1st section of the said Act, to make an entry or bring an action at law or suit in equity to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage."

It appears that the period limited for bringing the action had expired. But then comes the question whether the right to bring the action was not saved by a payment made within twelve years next before the issue of the writ.

The whole argument turns on the question, What is the meaning of "payment"? because a payment of some sort was made by Wade. It is said on behalf of the defendant that such payment must

be made by the mortgagor himself or his agent, and I am asked to read the language exactly in the same way as if the words in the 40th section had been incorporated. I do not feel myself at liberty to depart from the strict language of the Act. I observe that Lord Westbury, in the case of *Chinery v. Evans* thought it important to observe with reference to the 42nd section and the decision in *Bolding v. Lane* that "the persons by whom the same is payable" were words of such large import that they would not only comprise the mortgagor and his personal representatives on whom the contract to pay would be personally binding, but would also include the second or the third mortgagees.

At the same time I agree with the argument of the defendant that payment by a mere stranger would not be sufficient to keep alive the rights of the mortgagee. I think the payment will keep the rights alive if made by the mortgagor or the mortgagor's agent, or by any person who as between the mortgagor and mortgagee is bound to make any payment in satisfaction of the mortgage. Supposing, e.g., the mortgage carried a right to receive an annuity, and that annuity was received, it would be extremely difficult to say that there was not a payment within the meaning of the Act. It is quite clear the mortgagees would have to bring the sum paid by a tenant into account. And the tenant is a person liable as between the mortgagor and mortgagee to pay his rent to the mortgagee, and the mortgagee may at any time require such payment. Therefore if I am right in the proposition I have laid down the payment is one within the operation of the statute to keep alive the right of the mortgagee. That appears to me the good sense of the case. I hold, therefore, that the payment did keep alive the right of the plaintiff.

One further observation remains. Even if that view is not correct I am strongly inclined to hold in the present case that there is sufficient evidence of ratification of that payment by the defendant to make the payment made on her behalf; for this reason, that Wade continued tenant and paid her subsequent rent, and it does not appear that any demand was ever made by

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her against Wade for the sum so paid, and knowledge was brought home to her shortly afterwards.

If it were necessary to decide that point I should be strongly inclined to hold that sufficient evidence of ratification. The ground of my decision is that I have previously given.

Solicitors—T. H. Bartlett, agent for Wm. Marshall, Ely; Gregory, Rowcliffes & Rawle, agent for J. Rogers, Ely.

FRY, J.
1881.
July 25. }

BRIGGS v. MASSEY.

*Trustees — Liability — Breach of Trust
— Company — Shares — Accretions.*

A trustee who had neglected to get in trust property was held liable to replace shares in a company allotted in respect of other shares subject to the trust, and which had been taken up.

The plaintiff was the surviving trustee of a settlement made in 1851, on the marriage of Hannah Marsden with Richard Massey, a defendant to this action, by which she assigned to the trustees the reversion in the residuary personal estate of Samuel Baker, to which she was entitled under his will, on the death of the survivor of Hannah Baker, testator's widow, and Thomas Wingfield. The settlement provided that when the said Hannah Marsden should become absolutely entitled to the residuary estate, the trustees should procure a transfer of it to themselves, and should either permit the same to remain in their actual state of investment, or, with her consent in writing during her life, or after her decease at their discretion, sell any leasehold property or any share in any public company, and re-invest in securities authorised by the settlement. Thomas Wingfield was the executor, and Hannah Baker and Hannah Marsden were the executrices of the will of Samuel Baker.

Thomas Wingfield died in 1862, and Hannah Baker died in December, 1864.

The personal estate of Samuel Baker was not transferred to the plaintiff, but remained in the power of Mr. and Mrs. Massey, and was applied by the defendant Richard Massey to his own purposes. Mrs. Massey died in November, 1878, and the defendant Richard Massey was bankrupt.

The object of the action was to ascertain the plaintiff's liability, and to impound the life interest of the defendant Richard Massey.

The defendants were Richard Massey, his trustee and his children, who were entitled to the funds in settlement after his death. By counter-claim the latter sought the appointment of new trustees.

The action now came on upon further consideration, and a question was, to what extent the plaintiff was liable in respect of certain gas shares belonging to the testator at his death, and new shares which had subsequently been allotted with respect to those shares.

The facts bearing on this question, as found by the chief clerk, were as follows: Part of the testator's estate consisted of original shares in the Barnsley Gas Company, which at the time of the certificate were represented by 200l. consolidated stock. In 1864 forty new A shares were allotted in respect of the testator's shares in the gas company, and the first call, amounting to 43l. 3s. 4d., was paid on the 30th of April, 1864, but there was no evidence to shew by whom it was paid. After the death of Hannah Baker the defendant Richard Massey paid calls on such new shares to the amount of 80l. Subsequently other classes of new shares in the gas company were allotted either to the executors of the testator or to Richard Massey, in respect of the testator's original shares and their accretions. The calls on all these were paid by Richard Massey.

Mr. North and *Mr. Dunning*, for the plaintiff, contended that he was only liable in respect of the new shares for what the right to take them up would have fetched in the market at the time it was given, for the settlement provided neither

Briggs v. Massey.

funds nor power to take up new shares; the trustees would not be liable for any accretion on accretions.

If the plaintiff was to be held liable for the new shares themselves, he ought to be allowed the sums paid for calls on them, which clearly could not have been paid out of the trust funds—

Bowley v. Unwin, 2 Kay & J. 138.

Mr. Fischer and Mr. Harry Greenwood, for the children of the marriage, contended that the trustee was liable for all the shares. It was not shewn out of what funds the calls had been paid; they were, therefore, presumably paid out of the trust funds.

If anyone had a lien for the amount of these calls it was Massey, and it could not be determined in this action whether he had a lien.

The trustee was liable to account for the increased value of the shares—

Cooper v. Phibbs, Law Rep. 2 E. & I. App. 149;

The Aberdeen Town Council v. The Aberdeen University, Law Rep. 2 App. Cas. 544;

Byrne v. Norcott, 13 Beav. 336.

Mr. North replied.

FRY, J. (after holding that the plaintiff must be charged with the value of the original shares), said—It appears, in the next place, that before the death of Hannah Baker in 1864 certain shares had been allotted as additional to the shares which belonged to the testator, and that those shares came into the hands of Richard Massey. Are those shares part of the personal estate of the deceased Baker? Of course in one sense they are not, because while he was living he never held those shares. In another sense they were, because they were the natural accretions to the property which had been his; they were the accretions in the sense that the right to receive them resulted from the fact that the executors or the persons who claim under Baker hold those shares. It is said they are not properly accretions, but that the only accretion was an election to take or not to take. That is perfectly true, but the election was followed up by the taking; and it appears to me, therefore, that those

shares are really the fruit of the residuary estate of the deceased as it existed at his death, and that no person who has that estate can be heard to say that they are no part of the residuary estate. If I were to hold that the residuary estate from time to time consisted only of the actual property which had existed in the hands of the testator at the time of his death, I should prevent the possibility of following such residuary estate, and I should let loose the rule with regard to property which in any mode altered its condition afterwards. It appears to me, therefore, that all the shares allotted in 1864 are shares which the trustees of the settlement ought to have received, and that Mr. Briggs must accordingly be charged with those.

The same rule appears to me to apply to the shares allotted after 1864, in respect both of the original shares and the shares allotted in 1864. Those again were accretions in respect of the personal estate. They were in fact received by Massey, and being received by him as part of the personal estate, neither he nor anybody else can be heard to say they are not part of the personal estate. The result is, I must charge Mr. Briggs with the whole of those. I think he must either replace the amount of stock and shares, or, if it should be impossible for him to do that, he must pay the sum representing their value at the present time.

[His Lordship directed an enquiry, at the risk of the plaintiff, whether any part of the sums paid in calls had been paid out of the proceeds of the testator's estate which came to the hands of Massey, and which the plaintiff had already made good by certain payments into Court.]

Solicitors—Singleton & Tattershall, agents for Newman & Sons, Barnsley, for plaintiff; F. W. Reynolds, for defendants.

FRY, J. } *In re* THE LOMBARD DEPOSIT
1881. } BANK; *ex parte* THE LOM-
July 14. } BARD BUILDING SOCIETY.

Company—Winding-up—Proof—Costs
—*Companies Act, 1862, Order of 1862,*
rule 27—Consolidated Order XL. rule 24.

A creditor claimed to prove in a winding-up for sums parts of which were allowed. The liquidator made a claim against the creditor, which was disallowed:—Held, that costs of the creditor so far as they resulted from his own claim were to be added to his debt, and so far as they resulted from the claim of the liquidator were to be paid in full out of the assets of the company.

The Lombard Building Society claimed to prove as creditors for two sums in the winding-up of the Lombard Deposit Bank. The liquidator on the other hand asserted that there was a debt due from the society to the bank. The whole matter was investigated in chambers, and it was certified that parts of the sums claimed by the building society were due to them, but the claim of the liquidator was entirely disallowed. The matter now came before the Court to determine how the costs of the investigation were to be provided for.

Mr. Warmington, for the society, contended that the applicant was entitled to add the costs of his proving his debt to his debt; but that the costs occasioned by the attempt to set up a counter debt were distinct and analogous to the costs of an independent action or counter-claim, which, as the liquidator failed, would have to be paid in full—

In re The Bank of Hindustan, China and Japan; Smith's Case, 37 Law J. Rep. Chanc. 185; Law Rep. 3 Chanc. 125;

In re The Trent and Humber Ship-building Company; Bailey and Lestham's Case, 38 Law J. Rep. Chanc. 485; Law Rep. 8 Eq. 94;

In re The Home Investment Society, Law Rep. 14 Ch. D. 167.

Mr. F. Cooper Willis contended that the whole litigation was one proceeding in which neither party had been entirely suc-

cessful, and no costs should be given. If any costs were given to the applicant they should be added to the debt allowed.

[*FRY, J.*—Are not the costs regulated by the 27th rule of the Order in 1862 made to regulate a winding-up which refers to the practice regulating administration costs?]

Mr. Cookson, *amicus curiae*, referred to the case of

Morshead v. Reynolds, 21 Beav. 638.

Mr. Warmington replied.

FRY, J., stated the result of the investigation, and said—It is clear that the investigations of the claims on both sides were mixed up together, and the chief part of the expense was incurred in respect of both claims. It has been justly said by *Mr. Warmington* that the nature of the controversy was equivalent to claim and counter-claim.

The first question which arises is as to the costs incurred in proving the two debts established by the society. Now the rule which regulates the costs of creditors proving is the 27th rule of the Order of 1862, regulating the winding up of companies, which provides, "Such creditors as come in and prove their debts or claims pursuant to notice from the official liquidator, shall be allowed their costs of proof in the same manner as in the case of debts proved in a cause."

Now the practice in 1862 in respect of costs of proof of debts in a cause (which has not been altered) was regulated by the 24th rule of the 48th Consolidated Order, which provides, "A creditor who has come in and established his debt in the Judges' chambers under a decree or order in a suit shall be entitled to the costs of so establishing his debt, . . . and the amount of such costs, or the sum allowed in respect thereof, shall be added to the debt so established." That practice it is difficult to induce the Court to depart from, and *Mr. Cookson* has been kind enough to refer me to a case of *Morshead v. Reynolds*, which confirms that view.

The general costs of the claimants in proving their debt must be added to their debt. But with respect to the enquiries consequent on the counter-claim, a

In re Lombard Deposit Bank; ex parte Lombard Building Society.

different consideration appears to me to arise. It is not likely but that to some extent the costs were increased by that counter-claim, and it seems to me to stand on an independent footing, not to have been a mere negation of the society's claim, but an independent claim. I see no reason why the costs of the evidence and examination, so far as they were increased, should not be borne by the liquidator, and I direct him to pay out of the assets of the company so much of the costs as have been incurred by reason of his claim. The other costs, including the costs of this application, will be added to the debt.

Solicitors—Edward Lee, for the Society; Plunkett & Leader, for the liquidator.

child of John Gale, for there was no such child and there could be no lapse.

Mr. Price argued, in favour of the next-of-kin, that one share would be taken to have been given to a supposed child of John Gale, and that the property was divisible into fifteen parts, of which one went by way of lapse to the testatrix's next-of-kin.

He cited

In re Chaplin's Trusts, 33 Law J. Rep. Chanc. 183.

FRY, J.—There is no intestacy because there was no gift to an individual that has failed. I think the point has been well put by *Mr. Russell* in that way when he says there could be no lapse when there was no gift. The peculiarity is that the description of persons is by reference to a contingency that never happened. The case of *Re Hornby* is in point if authority is wanted.

FRY, J. } *In re SPILLER. SPILLER*
1881. } *v. MADGES.*
May 21. }

Will—Construction—Lapse.

Where there was a gift of residue among such of the children of A as are now alive, and fourteen named persons, and there were no children of A,—Held, that there was no lapse, but the residue was divisible among the fourteen persons named.

Elizabeth Spiller by her will directed the proceeds of her residuary estate to be divided "between the following persons—that is to say, Sarah, the wife of John White, of Hemiock, daughter of Amos Gale, and such of the children of John Gale, my late deceased uncle, as are now living," and thirteen other persons *nominatim*. The testatrix had had an uncle of the name of John Gale, who was dead, but never had any children. A question raised in this action was, whether there was a lapse of any part of the residue.

Mr. J. Pearson and *Mr. Cecil Russell*, for the residuary legatees, contended that the case was covered by

Re Hornby, 7 W.R. 729.

There could be no legacy given to any

Solicitors—Bowlings, Foyer & Hordern, agents for Stamp & Son, Honiton, Devon, for plaintiffs and defendant Madges; E. F. Sealy, agent for Tucker & Forward, Chase, for defendant White.

FRY, J. } *HARVEY v. THE PRINCIPAL AND*
1881. } *ANCIENTS OF BARNARD'S INN.*
Aug. 8. }

Vendor and Purchaser—Specific Performance.

Specific performance of an agreement, "subject to a contract to be settled," or "subject to a proper contract," will not be enforced.

This was an action for specific performance of two agreements. The first agreement was alleged in the statement of claim in the following terms:—

"By an agreement in writing made on the 24th of August, 1880, between the defendants (through Henry Davis Poole, their agent in that behalf duly authorised) and the plaintiff, the defendants agreed to sell to the plaintiff, and the plaintiff agreed to purchase from the

Harvey v. Principal and Ancients of Barnard's Inn.

defendants, certain freehold hereditaments situated and being Barnard's Inn, in the parish of St. Andrew's, Holborn, in the city of London, for the sum of 50,000*l.*, subject to a contract to be settled between Messrs. Carr, Fulton & Carr, the plaintiff's solicitors, and the defendants."

The second agreement was alleged to be between the same parties and for the sale of the same property at the same price, but it was alleged to be dated the 1st of September, 1880, made through George Kenrik, the defendant's agent, on this behalf duly authorised, and to be "subject to a proper contract," and the payment of a deposit to be agreed upon.

The defendants demurred.

Mr. North and *Mr. O. T. Simpson*, for the demurrer, said that neither allegation of contract shewed a completed agreement subject to being reduced to form, which could be enforced—

Crossley v. Maycock, 43 Law J. Rep. Chanc. 379; Law Rep. 18 Eq. 180;

Winn v. Bull, 47 Law J. Rep. Chanc. 139; Law Rep. 7 Ch. D. 29.

Mr. Cookson and *Mr. Bourne*, for the statement of claim, contended it shewed that the real terms of contract had been agreed on, and all that remained to be done was the signing of a more formal contract, which was not necessary to bind the parties, or to give the Court power to enforce specifically the existing agreement—

Roskiter v. Miller, 48 Law J. Rep. Chanc. 10; Law Rep. 3 App. Cas. 1124;

Hussey v. Payne, 48 Law J. Rep. Chanc. 846; Law Rep. 4 App. Cas. 311.

Fry, J., referred to the averment of the contract of August, and said—The first question I have to determine is whether or no there is a contract in the absence of the future contract which it was subject to. In my opinion there is no contract. If the matter was *res integra* I believe I should have thought that wherever it is the common case that there is to be a future contract both

parties state that there is no existing contract. However reasonable that view may be, it is not the law. And there are cases in which, though there be a reference to a contract to be signed, the Courts have nevertheless held there is a binding contract. In the present case the reference to a contract to be settled appears to me to impose a condition, and the allegation says that the so-called contract is not to be binding except on the condition of a contract being settled, and as that agreement never was carried into effect, there was no contract at all.

There is another difficulty in respect of the first contract sued upon, namely, that a second and different contract is alleged, which is only consistent with the former allegation if there has been a novation, by which the first contract has been cancelled. Therefore, on that ground, I could give no relief on the contract of August.

I come, then, to the contract of September. The allegation in respect of that is similar to the allegation in respect of the former, except that a different agent is alleged, and it is "subject to a proper contract and payment of a deposit to be agreed upon," instead of "a contract to be settled." Now those words very explicitly state that there is to be a future agreement between the parties—in other words, that they have agreed to agree, and that amounts to nothing. There is no agreement with any binding effect alleged, and it is beyond the power of the Court to make an agreement for the parties or to force persons to agree.

The demurrer will be allowed.

Solicitors—Carr, Fulton & Carr, for plaintiff;
J. Plaskitt, for defendants.

FRY, J. }
1881. } *In re* DRYDEN'S SETTLED
August 8. } ESTATES.

Leases and Sales of Settled Estates Act
—19 & 20 Vict. c. 120. ss. 11 and 16.

A sale out of Court will not be allowed
under the Leases and Sales of Settled Estates
Acts.

Persons entitled to a part only of the
rents and profits may petition.

This was a petition under the Leases and Sales of Settled Estates Acts, for the sale of real estate now vested in nine persons as tenants-in-common in equal shares. The petitioners were eight of such nine persons, all *sui juris*. The ninth tenant-in-common was an infant and the sole respondent.

Mr. J. T. Hutchinson, for the petitioners, submitted whether it was necessary that all the persons entitled to the rents and profits should be petitioners, and whether therefore it was necessary to amend the petition.

FRY, J., held that the order could be made on the petition as it stood. All that the Act required was that the petitioners should be entitled as tenants-for-life; they need not be the sole tenants-for-life.

Mr. T. A. Roberts, for the respondent, asked that the sale might be made out of Court.

FRY, J., said he was aware that sales had been allowed out of Court. In his opinion a sale out of Court was contrary to the Act, and he should not allow such sale.

Solicitors—Singleton & Tattershall, agents for McKelvie & Whitesides, for petitioners; Helder, Roberts & Gillett, agents for Brockbank & Helder, Whitehaven, for respondent.

FRY, J. }
1881. } *In re* THE SILKSTONE AND DODD-
July 21. } WORTH COAL AND IRON COM-
PANY (LIMITED). WHIT-
WORTH'S CASE.

*Companies Act, 1862, s. 115—Contribu-
tory.*

*An order, allowing contributories to at-
tend the examination of witnesses by the*
official liquidator and further examine
them, was enforced.

An application was made in chambers by Messrs. J. G. Holden, J. Holden and J. Kershaw, contributories of the above company, for leave to issue summonses under section 115 of the Companies Act, 1862, for the examination of such witnesses as they might be advised. On that application the official liquidator elected to take proceedings for such examination, and the chief clerk ordered that the applicants should be at liberty to attend at their own expense upon the examination of any person or persons examined by or on behalf of the official liquidator, and to examine and cross-examine such witnesses.

Mr. Whitworth, a director of the company, was examined before a special examiner on behalf of the official liquidator. Counsel on behalf of Messrs. Holden and Kershaw attended and proceeded to question Mr. Whitworth, who, under the advice of counsel, refused to answer.

This was a motion for an order on Mr. Whitworth to attend the special examiner at his own expense and make answer to all questions put to him by or on behalf of J. G. Holden, J. Holden and J. Kershaw concerning the trade dealings, estate or effects of the company.

Mr. North and *Mr. Wallace*, for the motion, said there was an existing order which Mr. Whitworth had not and could not have impeached, which he had disobeyed, and which the Court would now order him to obey.

Mr. Chadwick Healey, for Mr. Whitworth, said the only mode he had of questioning the order was to refuse to answer the questions put; and the order giving leave to contributories to cross-

In re Silkstone and Dodsworth Coal and Iron Co.

examine was improper, inasmuch as where the liquidator examined, he being the representative and protector of everybody's interests, no contributory ought to interfere—

In re The Gold Company, 48 Law J. Rep. Chanc. 650; Law Rep. 12 Ch. D. 77;

In re Penysgloy Iron Mining Company, 30 Law Times, 861.

FRY, J.—The 115th section gives the Court power to call before it, or before an examiner for the Court, all persons in the opinion of the Court capable of giving information concerning the trade dealings, estate or effects of the company. No doubt in the ordinary way the conduct of such an examination rests with the official liquidator if he is minded to take it up; or, if he does not choose to take it up, then with those contributories who do so choose. There is, however, nothing to prohibit the Court from giving liberty to contributories to attend and add questions for the examination of a witness. Now, in this case, the chief clerk, for some reason I do not know, and which is not now before me, has made such an order, that certain contributories be at liberty to attend at their own expense and examine and cross-examine the witnesses. One of the witnesses now says that he will not obey that order. It appears to me that the argument is addressed to the use of the discretion of the Court, and it does not lie in the mouth of a witness to use it. But the order, unless it is a nullity, must be obeyed. And section 115 leaves the Court a discretion as the mode of exercising the power given by it; and the Court having exercised that discretion, a witness cannot say it is wrongly exercised.

I shall make an order that the witness do attend, and pay the costs of this application.

Solicitors—M. J. Burn, agent for Gartside & Robinson, Ashton-under-Lyne, for applicants; Pritchard, Englefield & Co., agents for Grundy & Co., Manchester, for liquidator.

FRY, J. } *In re POYNDR'S SETTLED ES-*
1881. } *TATES. DICKSON-POYNDR v.*
July 29. } *COOK.*

Settled Estates Act, 1877 (40 & 41 Vict. c. 18), ss. 20 and 21—*Drainage of Agricultural Land—Drainage Act*, 1845 (8 & 9 Vict. c. 56).

The Settled Estates Act, 1877, does not empower the Court to direct the carrying out of schemes of drainage for agricultural purposes; but the powers given by sections 20 and 21 have reference to the development of lands for the purposes of a building estate.

Order of reference under the Drainage Act (8 & 9 Vict. c. 56).

This was a petition under the Settled Estates Act, by the infant tenant-for-life of estates in Wiltshire, seeking the sanction of the Court to the making of certain drains and watercourses on agricultural lands, and that so much of the estate as was required might be laid out and appropriated to the proposed drains, watercourses and works, and that the trustees might be at liberty to execute the works, and that the expenses might be declared a charge on the settled estates.

The will by which the estates were settled contained no provisions for drainage.

The petition contained a prayer in the alternative that the petitioner might be at liberty to make permanent improvements in the lands by draining them, and otherwise, as provided by 8 & 9 Vict. c. 56, and to cause the expense of making such improvements to be a charge upon the inheritance under that Act.

The largest work required was the straightening of a brook or natural watercourse; there were also other main and subsidiary drains to be made. The entire acreage of the two estates affected was stated to be about 3,400 and 1,900 acres respectively, entirely agricultural land.

Mr. Giffard, for the petitioner.—Section 20 of the Settled Estates Act may be construed distributively, so as to authorise the laying out or dedication of part of an estate for sewers, drains or watercourses, without any part being laid out for streets

In re Poynder's Settled Estates.

roads, &c. There is nothing in the Act limiting the application of these provisions to an estate to be laid out for building. We propose that the parts of the estates which are required for the watercourse and drains be laid out in the watercourse and drains, and remain vested in the present trustees for that purpose. Hall, V.C., in the case of a settled estate near Dartford directed two strips of land to be laid out as roads.

[FREY, J.—That was for developing the estate.]

Mr. Willis Bund, for the respondent beneficiaries, supported the petition, stating that the scheme was in their view essential for keeping up the rental value of the estate.

FREY, J.—In my judgment I have no power under the Settled Estates Act to authorise what is proposed. I find the power given by section 20 in connection with a power to lay out for streets, roads, paths, squares, gardens or other open spaces, and followed by a direction for vesting of the parts of the estate laid out. The project before me is one for the drainage for agricultural purposes of a large part of an agricultural estate. At present it has the natural drainage of a stream. It is proposed to straighten the stream, and lay down drains leading to it, and smaller drains in connection. In fact, what is intended is to make an ordinary agricultural improvement on the property. If this is within the purview of the Act, every piece of drainage would be so. In my judgment, however, the object of these statutory provisions was connected with the development of land for what is called a building estate. This is the construction which I put upon the 20th and 21st sections. If the drainage which the present scheme proposes was carried out, the land occupied would not remain dedicated to the purpose of the drains, it would continue dedicated to the use of the farmers and part of their farms. I have some regret at coming to the conclusion to which I have come, but I cannot consider that the Act enables me to make the order asked for.

Mr. Giffard then asked for an order under the Drainage Act of 8 & 9 Vict. c.

56, and his Lordship made a reference to chambers under that Act, the order to be in the form in *Morgan's Chancery Acts and Orders* (3rd ed.), p. 673, the consent in writing of the persons in actual occupation to be proved before drawing up the order.

Solicitors—Burns, Hunt & Burns, for all parties.

[IN THE COURT OF APPEAL.]

JAMES, L.J.
BRETT, L.J.
COTTON, L.J.

1881.

Feb. 5, 7.

March 14, 15,

18, 19, 21.

April 4.

EARL DE LA WARR v. MILES.

Common—Common Pasturage—Herbage—Extent of Right—Custom—Prescription—Prescription Act (2 & 3 Will. 4. c. 71. ss. 1 and 7—Profit à prendre in alieno solo—Evidence—Admissibility to explain ancient decrees.

By a decree made in 1693 in a suit between the owners of Ashdown Forest and persons claiming rights of common, after allotting to the owners for inclosure and improvement portions of the forest within which the commoners were to be excluded and debarred from any common of pasture, herbage or pasturage, the residue, consisting of 6,400 acres, was allotted, to remain open and uninclosed, so that the commoners should have and take "sole common pasturage and herbage" thereof, the owners, their trustees and assigns, being for ever excluded "from having or claiming" any common of pasture or herbage upon or in the said lands so left for common:—Held (affirming BACON, V.C.), first, that under "common pasturage and herbage" the commoners were only entitled to take what could be taken by the mouth or bite of their cattle, and not to cut or carry away any part of the growth of the soil. Secondly. That no special custom existing at the date of the decree entitling the commoners to take any part of the growth of the soil was proved. Thirdly. That evidence of subsequent usage was not admissible to

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affect the construction of the decree, which was plain and unambiguous. Held (reversing BACON, V.C.), that the defendant and his predecessors in title having been shewn to have claimed to take and to have actually taken as of right, litter for the use of his particular tenement for upwards of sixty years, immediately before the commencement of the action had acquired under the Prescription Act a right to do so, and the fact that they had claimed to do so under the mistaken supposition that all the commoners were entitled to do so did not prevent the acquisition of the right by prescription.

The object of the Prescription Act is to legalise a thing done as of right for sixty years.

A defendant, to maintain a defence under the Prescription Act, must prove two facts: first, that he has taken or enjoyed, as a fact, for the period for which he prescribes, a certain right, profit or benefit; second, that he has taken and enjoyed this right, profit or benefit for the requisite period as of right, without regard to the permission of the lord. When these two facts are proved, the question of law is, Could the acts done for that period as of right have been the subject-matter of a custom or prescription or grant?—not whether they were claimed as a matter of prescription, or custom, or grant.

Where a Judge is asked to find the fact of a grant, and to say that it has been lost, he must have some grounds for believing that such was the fact, *per* BRETT, L.J.

This was an appeal from a judgment of Vice-Chancellor Bacon granting an injunction to restrain the defendant John Miles, who was in the employment of his co-defendant Bernard Hale, and acted under his orders, from cutting and carrying away litter from part of the waste lands of Ashdown Forest.

The plaintiff was lord of the manor of Duddleswell, and tenant-for-life of the forest. The defendants appealed.

The case below is so fully reported (49 Law J. Rep. Chanc. 476) that it is unnecessary to add any further statement.

A good deal of evidence was produced for the purpose of endeavouring to prove that Hale had purchased from tramps and gipsies litter for the use of his farm, but

the Court was of opinion that no such case was proved. Reference to this is made in the judgment.

Mr. J. Williams, Mr. B. Webster and Mr. P. H. Lawrence, for the appellants, claimed that the right of sole pasturage and herbage included the right of managing and dealing with the herbage, and of mowing down rushes and fern or litter which would otherwise be destructive to the herbage, a profit à prendre necessary to the enjoyment of their right of sole pasturage and herbage.

That the decree of 1693 gave them sole common pasturage and herbage. The Vice-Chancellor had interpolated the word "of," but "common" was a substantive under which a right to estovers would be given—"herbage" meant anything that grows on the surface of the land, other than bushes and trees, and would include more than can be taken by the bite of cattle. They cited, to shew the meaning of herbage—

Co. Lit., 4b;

Carta de Forestis, c. 1;

Bracton, lib. 4, c. 38. ss. 1, 12, 13;

Britton, lib. 2, c. 24;

Cowell, Interpreter, "Herbage," Jacob Law Dict.;

Du Cange Glossary, "Herbagium";

Thew v. Wingate, 10 B. & S. 714, 719, 721;

Spelman Glossary, Pollexfen, "Arguments and Reports," p. 14.

That "sole common pasturage and herbage" included the cutting of litter—

Douglas v. Kendall, 1 Brown. 219;

Com. Dig. iii. 68, 69, 70;

Bean v. Bloom, 2 W. Black. 926; 3 Wils. 456.

The right of cutting litter claimed could be prescribed for as a right of common, not a right of soil—

Manwood Forest Law, c. 24, ss. 65, 66;

Suckerman v. Warner, 2 Bulst. 248, 249;

Vin. Abr. xvii. 547, tit. "Profit Appreuder," and tit. "Common, A," pl. 7;

Smith v. The Earl of Brownlow, 39 Law J. Rep. Chanc. 636 n; Law Rep. 9 Eq. 241;

Warwick v. Queen's College, Oxford,

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39 Law J. Rep. Chanc. 636; Law Rep. 10 Eq. 105; on appeal, 40 Law J. Rep. Chanc. 780; Law Rep. 6 Chanc. 716;

The Commissioners of Sewers v. Glasse, 41 Law J. Rep. Chanc. 409; Law Rep. 7 Chanc. 456.

This right was sufficiently evidenced by enjoyment, even though it had been against a succession of tenants-for-life—

Greenslade v. Darby, 9 B. & S. 428; 37 Law J. Rep. Q.B. 137; Law Rep. 3 Q.B. 421.

That a custom may be prescribed for entitling copyholders to "sole pasture of land" to the exclusion of the lord or owner of the soil—

Potter v. North, 1 Wms. Saund. 350, 353 a;

Hopkins v. Robinson, 1 Mod. 74;

Hoskins v. Robins, 2 Keb. 842; 2 Vent. 163;

but not for sole common, except confined within certain times of the year—

Co. Lit. 122 b.

Any ambiguity in the decree could be explained by constant modern usage, which could also vary the sense of particular or technical words—

Taylor on Evidence (5th ed.), 1037;

Johnson v. Barnes, 41 Law J. Rep.

C.P. 250; 42 *ibid.* 259; Law Rep.

7 C.P. 592; *ibid.* 8 C.P. 527;

Stammers v. Dixon, 7 East, 200;

The Duke of Beaufort v. The Swansea Corporation, 3 Exch. Rep. 413;

Calmady v. Rowe, 6 Com. B. Rep. 861.

The defendants claimed under the Prescription Act, without the consent of and against the lord, and a larger right may be proved than has been prescribed for—

Rogers v. Allen, 1 Campb. 309, 313 n;

The Bailiffs of Tewkesbury v. Bricknell, 1 Taunt. 142.

The cases cited by Vice-Chancellor Bacon did not apply.

In

Blewitt v. Tregonning, 3 Ad. & E. 554; 3 Law J. Rep. K.B. 223,

there was a claim under a custom of the district for all the inhabitants to take sand; the claimant had no prescriptive right appurtenant to his tenement independently of the custom. In

Lord Rivers v. Adams, 48 Law J.

Rep. Exch. 47; Law Rep. 3 Ex. D. 361.

the right claimed was a right to a profit *à prendre in alieno solo*, claimed by persons as the inhabitants of a parish, and it was held that a prescriptive right to cut underwood in respect of a particular house was not established by proof of user, when the evidence shewed that the right was exercised in respect of the inhabitants of the parish generally.

In

The Attorney-General v. Matthias, 4 Kay & J. 579; 27 Law J. Rep. Chanc. 761,

the right claimed was an unreasonable one, and claims by prescription to be good must be reasonable and certain.

So in

Willingale v. Maitland, 36 Law J. Rep. Chanc. 64; Law Rep. 3 Eq. 108; and

Ohlton v. The Corporation of London, 47 Law J. Rep. Chanc. 433; Law Rep. 7 Ch. D. 735,

the claims were by inhabitants as such.

The appellant's claim was not under a custom of a district, or as one of an uncertain body as parishioners, but of a prescriptive right appurtenant to the particular farm, and that right was established by proof of user as exercised merely in respect of that particular farm, and was a claim for over sixty-five years.

A plea of a prescriptive right in a man and his ancestors, and in his and their trustees and assigns of sole and several pasturage, is good, and such a right can be granted to others—

Welcome v. Upton, 6 Mee. & W. 536; 9 Law J. Rep. Exch. 154.

[An attempt was made to produce farming books relating to the tenements of other commoners to support Hale's right, on the ground that they were against the interest, and for that were cited—

Higham v. Ridgway, 10 East, 109;

Marks v. Lakes, 3 Bing. N.C. 408;

3 Sc. 137; 6 Law J. Rep. C.P. 69;

Doe d. Kinglake v. Bevis, 7 Com. B.

Rep. 456; 18 Law J. Rep. C.P. 128;

but the Court held it inadmissible.]

They further submitted that the commoners had as a class proved their title under the Prescription Act, and cited

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The Commissioners of Sewers v. Glasse
(*ubi supra*);

Warwick v. Queen's College, Oxford
(*ubi supra*);

Lord Rivers v. Adams (*ubi supra*);

Johnson v. Barnes (*ubi supra*);

Tickle v. Brown, 4 Ad. & E. 369; 6
Nev. & M. 230; 5 Law J. Rep.
K.B. 119,

and that it was immaterial how the user began, whether through the sufferance of the lord or by mistake, or by claim of right, provided there was no licence in writing: and permission must be proved, not assumed. Where there had been sixty years' user, the *onus* did not lie on the person who had enjoyed such user to negative permission—

Beeston v. Weate, 5 E. & B. 986;
25 Law J. Rep. Q.B. 115;

Campbell v. Wilson, 3 East, 294;

Angus v. Dalton, 48 Law J. Rep.
Exch. 225; Law Rep. 4 Q.B. D.
162;

Codling v. Johnson, 9 B. & C. 938;
4 M. & R. 671; 8 Law J. Rep.
(o.s.) K.B. 68,

and referred to the observation of Mel-
lish, L.J., in

Aynsley v. Glover, 44 Law J. Rep.
Chanc. 523; Law Rep. 10 Chanc.
283;

and of Lord Westbury in

Lee v. Johnstone, Law Rep. 1 H.L.
Sc. 426, at p. 435.

Mr. Elton, Mr. Cope and Mr. Costelloe,
for the respondent.

[The Court restricted the argument of counsel for the respondent to the effect under the general law or the Prescription Act of what had been proved to have taken place since the decree.]

The right as pleaded cannot be supported by the commoners or by Hale, as not being a claim which could lawfully be made at the common law by custom, prescription or grant—he must justify under a custom—but then a claim by custom must be a legal custom in a defined ancient district, and a district could not be constituted by a number of different persons claiming the right—

Gateward's Case, 6 Co. 59 b;

Sowerby v. Coleman, 36 Law J. Rep.
Exch. 57; Law Rep. 2 Exch. 96;

Co. Lit. 110 a, b.

Bean v. Bloom (*ubi supra*)

was only a question of pleading.

Selby v. Robinson, 2 Term Rep. 758;

Grimstead v. Marlowe, 4 Term Rep.
717,

were against the appellant's contention.

He could claim by lawful prescription, but there was no evidence of his claiming a particular right as appurtenant to his tenement. He had done it in fact, but under a colour of right, which could not be supported. Out of a general right asserted, which could not have a legal origin, a small part could not be selected the origin of which might be legal, and treated as proved. The proof must not be too wide—see *per Jessel, M.R.*, in

Hammerton v. Honey, 24 W.R. 603,
604.

Then prescription must be in respect of a tenement, and although the owner of the tenement may have done the act, yet if he did it as under the general custom of the district and not as in respect of his tenement, he could not avail himself of the prescription—

Blewitt v. Tregonning (*ubi supra*).

The claim must be of something which could be lawfully granted—

Olavton v. Corby, 5 Q.B. Rep. 415;
11 Law J. Rep. Q.B. 239;

Baylis v. Tyssen Amhurst, 46 Law J.
Rep. Chanc. 718; Law Rep. 6 Ch.
D. 500;

Blundell v. Catterall, 5 B. & Ald.
268, 315;

Hammer v. Chance, 4 De Gex, J. &
S. 626; 34 Law J. Rep. Chanc.
413.

There was no proper evidence of user of the right in the first or in the last year of the sixty, and the necessity of proof of user is settled as to the first year by

Carr v. Foster, 3 Q.B. Rep. 581; 11
Law J. Rep. Q.B. 284;

as to the last by

Parker v. Mitchell, 11 Ad. & E. 788;
3 P. & D. 655; 9 Law J. Rep.
Q.B. 194;

both of which are recognised in

Lowe v. Carpenter, 6 Exch. Rep. 825;
20 Law J. Rep. Exch. 374.

[COTTON, L.J., referred to

Bailey v. Appleyard, 8 Ad. & E.
161; 3 N. & P. 257; 7 Law J.
Rep. Q.B. 145.]

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The act being highly technical, all its requirements must be most strictly complied with by the person who claims the benefit of it—

The Staffordshire and Worcestershire Canal Navigation v. The Birmingham Canal Company, 35 Law J. Rep. Chanc. 757; Law Rep. 1 E. & I. App. 254, 278.

If the right could not be lawfully claimed by custom the Court could not invent a legal right—

Lord Rivers v. Adams (ubi supra).

The enjoyment must be connected with the claim—

Holford v. Hankinson, 5 Q.B. Rep. 584,

but here the claim was too wide. The evidence is as to the right of a class, and under that the claimant could not succeed.

Mr. J. Williams replied.

JAMES, L.J.—We are of opinion that upon the only point on which we have heard the respondent, which was whether Mr. Hale has made out his defence on the 15th paragraph, that he has made out such defence, and therefore that he will be entitled to the costs of the suit—that is to say, the suit fails, because he has not done anything wrong—he has justified what he has done. But a great number of issues have been raised, and a great quantity of evidence given—as to which we will hear one counsel on each side, as to what directions (if any) we should give as to the costs of the suit in respect of the other matters which have been raised. What we consider he has succeeded in is his defence raised by the 15th paragraph, which was the only point we think he had any right to raise.

In my opinion the defendant, Mr. Hale, has proved that for a period of upwards of sixty years he has claimed to take and has taken, not by way of permission, not by way of concession on the part of the lord, but has taken as being his own right, and as of right—that is to say, as a thing which he was entitled to do upon some right or other—the litter from the forest to the farm for the use of that farm for the agricultural purposes for which litter would be used in the particular farm. That is what he has set up by the 15th

paragraph, and it appears to me that he has succeeded in proving distinctly that he has done so.

Now is that within the Prescription Act? It appears to me that if we were to hold it was not we should be repealing the Act. What the Act was intended to legalise was a thing done, as of right, for a sufficient period—that is to say, for sixty years. It has been contended on behalf of the plaintiff that not only must it be shewn to have been done as of right, but it must be shewn to have been done under a claim of some right capable of being supported as valid by prescription, or grant, or custom; and that if it could be shewn that the thing was done under some claim which was not a claim to a valid legal right, the thing must fail.

Now, in my opinion, that is not so in point of law, and is not so in point of fact in this case. It does not signify, as it seems to me, what was the exact nature of the claim, provided the right actually exercised, the thing actually done, was a thing a right to do which could have been legally granted to the man who was doing it, and which therefore could have had a legal origin. Now, the thing which was actually done, according to the evidence, is going on the forest to cut litter—not for the purpose of sale, not for any other purpose, but for the purpose of being used on the farm to which that litter was carried. A right to do this could be legally claimed by prescription. If the thing has been done—if the same man has been doing it for sixty years for the purpose of sale, a claim of a right to do so might be good, being confined to one particular matter growing upon the common—that is, the litter. However, the user here is confined to the taking of the litter to the farmyard, there to be used as litter. Then it is said, "Yes, but you are doing this as one of a great body of persons." Now there might have been something in that objection, if what was done had been done by every inhabitant and by everybody, so that you could never distinguish between what one inhabitant or person was doing from what the others were doing—that there was nothing by which you could infer the acts of the one which did not apply to the others. I may

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give an example of that. It is not because the owner of a particular house in London shews that he and all the people who have lived in that house have gone every year to Hampstead Heath, and run about the Heath, that he could establish a particular right, as annexed to that house, to go upon Hampstead Heath, when it was quite clear that he was only going there like every other person who was coming from London who chose to go and recreate himself there. But here it is quite manifest from all the documentary evidence, and from all the evidence, that there was a distinct right claimed, and a distinct right of a legal character claimed, by a particular class of persons who could in law have taken that right—that is to say, not *qua* class, not as a corporation or *quasi* corporation, but persons constituting a class—that is, the persons owners of particular tenements, every one of whom might have had a valid legal grant in exactly the same words to the same extent of such a right as is claimed by this defendant. It is not a grant to a class, but they are a class only because every one of them has got the same right. It is not a claim by custom. It is not a claim by a body of persons incapable of receiving such a grant, but a claim by each and every of a particular defined class of persons, each of those persons being recognised and being marked in respect of a particular tenement as appurtenant to which he was claiming the right. Therefore there was nothing illegal—there was nothing in point of law to prevent a grant of this kind, which might have been made if the lord had chosen to do it: “Whereas certain persons have already got the right of sole common of pasture upon the land, now I do grant to every one of those same persons that, in addition to that right of common, each and every of them shall have the right of cutting litter for the improvement of his farm.” That would have been a perfectly valid grant, even if granted by one general deed to each person. Therefore there is nothing in the fact that this defendant was doing that which every other person in the same circumstances as himself was doing, and it does not derogate from his own special right that

other persons in the same condition with himself were doing exactly the same thing. It cannot be brought up to this, that he and all of them were in fact members of that class of trespassers which he and the other landowners, as well as the lord, were endeavouring to the best of their powers to put down, because they were trespassers, and because they had no rights. Therefore, it appears to me, that that objection as to the nature of the claim made by the defendant fails.

Then it is said, with respect to that same objection, that it is not proved he did not buy from a wrongdoer; that instead of cutting the fern himself he was not buying from some of the persons there during some of the years. To my mind that is so improbable as to be absolutely incredible: that a man, supposing he had the right which this defendant must have supposed he had—a right acknowledged by the lord, and acknowledged and believed to exist by everybody in the forest—that he must be regarded as a trespasser and not as a man taking that which was his right; and that, instead of cutting it himself or employing a man to cut it, he was paying the man for that which that man must have been stealing from him and the other commoners and the lord. I would as soon believe that he was paying a man who had stolen his own mangel-wurzels or swedes instead of taking the mangel-wurzels and swedes himself from his field. I am satisfied upon that. Therefore there really was no foundation for the very long criticism we had on the supposed nature of the user which Mr. Hale had; and without going further into it, speaking as a juryman and speaking also as a judge of fact, I am satisfied that Mr. Hale has proved, not that he bought it from anyone, but that he and his predecessors in title did, by themselves and their workmen, for the whole period of sixty years required by the statute, go upon this forest and cut the fern and take it to be enjoyed on his farm. That disposes of that.

There was another point which we did not call upon the respondent's counsel to deal with—that is to say, as to what was the construction of the decree

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of the Duchy Court, and what was the effect of that decree. It is impossible, as it seems to me, to give to that decree the meaning which has been attempted to be assigned to it by the appellant's counsel. When we see what the object of the suit was, and the nature of the suit, the decree seems to me to be plain beyond all reasonable doubt. The lord having a very large waste, and a waste that evidently was a great deal more than was wanted for the commonable cattle of the persons who had rights of common, commenced a suit in the Duchy Court of Lancaster, which had jurisdiction over this matter—it is said to have been, and apparently was, an amicable suit—for the purpose of seeing how much of the waste he could take without really injuring the commoners, and how much ought to be left to the commoners for the exercise of their rights of common. It was an approvement under the Statute of Merton through the medium of the Court; that is to say, the Court was asked to ascertain how much the lord could properly and justifiably approve under the statute as against the common of pasture. That appears to me to be really the only thing that was determined, and the only thing that was intended to be determined, except some question about particular estovers which are comparatively of little amount—estovers of birch, willow and alder. Then all that was done afterwards was this: Whereas the commoners and the lord have now the right of enjoying the whole pasture by the mouths of their cattle in common, you, the commoners, shall now, on a particular part of that common, have the sole common pasturage and herbage; and the lord shall take the rest for himself, and shall not have any more common of pasture or herbage upon that part which has been assigned to the commoners. It appears to me that the meaning of that was perfectly plain—that the commoners were to have not any new common—no new right in the herbage or pasturage, but that they were to have the enjoyment, as under the old right of common, of common of pasture and herbage in this spot, exclusive of the lord, sole as against the lord, but in

common as between themselves; and that the lord was to be excluded from having any further right of common with them in that spot. They were to have the common ordinary well-known common of pasture or herbage which was known to the law at that time as it is now known. I am of opinion that we cannot enlarge it. We can only say that they did take that common of pasture and common of herbage to themselves, exclusive of the lord, which they had before; that was common of pasture and herbage in the ordinary sense of the word—the taking of the grass by the mouths of their commonable cattle. Therefore, it appeared to me, and to the other members of the Court, that the decree was perfectly clear upon this point, and that we could not attend to the great body of evidence that was used for the purpose, as it was said, of construing by the evidence of user an ambiguous term in that decree. I do not find any ambiguity. The user would not have explained it, and it was not admissible for the purpose of explaining it. Therefore, upon that part of the case the defendant fails, and utterly fails, according to my view, in establishing by user anterior to the decree that any such right existed anterior to the decree, when the matter was before the Duchy Court.

Therefore I am of opinion upon the whole that the defendant has failed in everything but the right set up in the 15th paragraph, but that he is entitled to the judgment of the Court upon that paragraph, and therefore to have the action dismissed. But, as I said before, we will say exactly what we will do with regard to costs upon a future occasion.

BRETT, L.J.—This action was brought claiming relief in respect of certain alleged acts which were said to be trespasses, and in respect of a manifest intention to continue those acts unless they were stopped. The action was brought by the owner of the land. Those acts of which complaint was made were necessarily *prima facie* trespasses, and the defendants were called upon to defend those acts.

Now the defendants by the statement

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of defence set up several distinct defences. Their first defence was founded upon an allegation that the acts now complained of had been in suit between the predecessors of the plaintiff and the predecessors of the defendants, and that those acts had been determined, by a decree which was pleaded, to be lawful acts on the part of the predecessors of the defendants; their first defence therefore raised a question as to what was the true construction of that decree. They next assumed to defend on the ground of a common law prescription, that is to say, an immemorial prescription on the part of the predecessors of the defendants and others to do the acts complained of. They then set up another defence, which was that a grant by the predecessors of the plaintiff had been made to the predecessors of the defendants and others to do these acts, which grant was lost. They, then, as an absolutely distinct defence, set up the user by themselves and their predecessors for sixty years as giving them under the Prescription Act a right to do what is complained of by the plaintiff.

With regard to the defence under the decree. The words of the decree were relied upon, and we had very learned and abstruse readings given to us from old books and from dictionaries, in order to lead us to the conclusion that in the words "the sole common pasturage and herbage" was included the right to cut and carry away the brake, fern, heather and litter for the use of the farms of the commoners. Now I declined, upon reading the whole of the proceedings in the suit in which that decree was made, to construe that decree by old books or by dictionaries. It seems to me that the words, taking the whole of the decree and the pleadings in that suit, are perfectly plain. They are not ambiguous. It seems to me apparent from the pleadings in that case that the defendants in it were claiming nothing but a well-known right, namely, the right of common of pasturage and herbage; that is to say, a right in respect of their tenements and in respect of certain cattle to feed upon this waste by the mouths of their cattle; not

merely the grass, but whatever the cattle would eat, which I take to be included under the word "herbage" in that decree. It seems to me to be clear from the pleadings that that was what they claimed, and that that was all they claimed as being part of the value of the whole waste to them which was to be taken into consideration in apportioning that which was the real subject-matter of that suit, and determining how much the lord should be entitled to enclose, and how much should be left open for the commoners. If that was the state of the pleadings, the meaning of the decree seems to me to be perfectly clear. It only dealt with that which was claimed. It empowered the lord to enclose a certain portion of the waste, and it left the other portion to be used by the commoners in the same way as they had claimed, but shut out the lord from that which would otherwise be his right, namely, to share in that mode of dealing with that part of the waste or forest which was not enclosed. Therefore the real meaning of the decree was, that as to these 6,400 acres which were left open, the commoners were to have the right of taking estovers, which is what they had claimed in certain woods, and in certain woods only; and they were to have the right, with regard to the cattle on their farms, to common of pasture and herbage in the sense I have stated, that is, feeding by the mouths of their cattle; that the lord was to give up his right to put his own cattle on that part of the forest; and any right of taking that wood which they would have to take as estovers; but it left the lord in the possession, with regard to that unenclosed part, of every other right which he had possessed before. It did not, therefore, give the commoners, who were then setting up their rights, the right which they now claim, namely, to cut brake, fern, heather and litter growing upon that open waste for the use of their farms. That they had not claimed, and that was not given to them. Indeed that subject-matter did not enter into the contemplation of any of the parties to that suit at all. Therefore, upon the interpretation of the decree, I think that the contention of the

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defendants here has been wrong from the beginning, and that the plaintiff was right in his contention.

It was attempted to make us come to a contrary conclusion by a mass of evidence of alleged user since the time of that decree until now, for the purpose of construing that decree. It is obvious that you may always give evidence of the state of things existing at the time that a decree is made or a deed is executed. It is very rarely, indeed, that you are allowed, for the purpose of construing a document, to bring in evidence of what has been done since; but, at all events, it seems to me to be clear that in the present case the evidence was not admissible for that purpose; because, upon the true construction of the decree, taking it in company with the pleadings in the suit which ended in that decree, there was no ambiguity in the words or phrases at all; and such evidence was to my mind inadmissible, and certainly cannot control the construction of the document.

But then, with regard to the second defence, it was said that from the modern user we have a right to infer a grant at common law or an immemorial prescription. It seems to me that no such claim as is now made by the commoners was made by them at the time of that former suit, and that leads me to the conclusion that no such practice existed; because, if they had had any such claim, it would have been most material for them to put it forth in order to see how much of the forest should be left to them—it seems to me to be clear that no such practice existed before that decree, as is now alleged, and that no such right was claimed, and therefore any claim to an immemorial prescription is put an end to. It is shown by that fact alone that the user must have commenced as a claim of right after that decree, and therefore within a known and given time.

Then as regards the other allegation that we ought to presume a lost grant, the doctrine with regard to presumption of lost grants, and what it is necessary to prove, and what ought to be in the mind of the Court, is, at the present moment, a very much controverted matter. For my part, I have always been of opinion,

and, until corrected, I must hold to that opinion, that if a Judge is asked to find the fact of a grant, and to say that it has been lost, he must have grounds for believing that it was so. I decline to find it here. It seems to me that there is no evidence upon which one ought to find that there had been a grant since the time of that decree by the owner of this property, and that such a grant has been lost. Therefore the case comes to be whether the defendant has made out his defence under the Prescription Act; that is the only defence which is left for him to maintain.

Now, the first point with regard to that is this: What is the true construction of the Prescription Act? It seems to me that, in order to maintain a defence under the Prescription Act, those who set it up must first show, if they set up a prescription for sixty years, that they have exercised—that is, that they have taken or enjoyed as a fact for sixty years—a certain right, or profit, or benefit. Right in that sense means a right to do something; that is, a right which can be taken or enjoyed. In this case, therefore, what the defendant has to show is that he and his predecessors have for sixty years taken or enjoyed the right of cutting by themselves or their servants the brake, fern, heather and litter upon these unenclosed acres for the use of this particular farm. That is the first fact that he has to prove. The next fact, according to the true construction of the Act, which anyone who relies upon it has to prove, is that that right, profit or benefit which he has so taken or enjoyed for sixty years, he has taken as of right. Now the true interpretation of those words “as of right” seems to me to be that he has done so upon a claim to do it, as having a right to do it without the lord’s repeated permission, and that he has so done it without that permission. If he shows that he has claimed to do it not as a thing permitted to him year by year by the lord, but as a thing that he had a right to do, whether the lord said “You may do it” or not; that is all that is necessary for him to prove. Now, having proved those two things as matter of fact, the remainder of that which is

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necessary in order to make the statute applicable is a pure question of law, and not of fact at all. It is a question of law upon a hypothetical case, namely: Could those acts which have been so done—if people had been so minded to do it in fact—have been the subject-matter of a custom or prescription or grant?—not whether they were claimed as a matter of prescription or custom or grant; but whether those acts which are done as a pure question of law could have been the subject-matter of a prescription, or custom or grant. So that in any tribunal where the adjudication of the facts is separated from the adjudication of the law, as in the case of a trial by Judge and jury, it would be for the jury to say what were the acts done—whether they had been done for sixty years, and whether for sixty years they had been claimed to be done, and done without regard to the permission of the lord. That is all they would have to find, and if they found that certain acts were done for the requisite period as of right without permission, then, as a pure question of law, the Judge would have to decide whether such acts so done could have been the subject-matter of a custom, prescription or grant.

Then comes the question, first of all, what are the facts which the defendant has proved? I am bound to say that it seems to me that where the statute is set up by a defendant to a suit, that what is done by other people or in other cases, is no evidence with regard to that issue raised between the plaintiff and the defendant; that the only evidence which is admissible is the evidence of what has been done by the defendant or his predecessors; and as to whether he had done so on the claim of doing it, without the consent of the lord, or contrary to his consent. It seems to me that the defendant did prove that for sixty years previous to the commencement of this suit his predecessors and himself in this farm had exercised the right which I have stated, namely, the right by themselves and their servants to cut these brake, fern, heather and litter to be used upon the farm, and to cut them during certain months of the year. It seems to me that

that was all that he proved. He did not prove a right to mow the grass upon this waste where there was no heather, if that is now asserted or pretended. It seems to me he did not shew that they had exercised the right of cutting down anything which could be fairly and reasonably called fir trees, even of young growth. If in cutting the heather he cut that which some people may call young fir trees—that is, the shoots of a year's growth—or things which are really not noticeable and which nobody could distinguish from the heather, or if he cut grass which was growing among the heather, it would be idle to suppose that he is prevented from cutting the heather because he may cut a blade or because he may cut this very young growth. But if it is asserted that in cutting the heather he has a right to cut anything like a real growth of fir trees, I say that that has not been proved, and that he would exceed his rights if he did so.

But then it was said that even if this right had been exercised at the commencement of the sixty years, it was not shewn that it had been exercised during the whole of them. I think it is necessary for the defendant to shew that he had exercised the right year by year, and that if he failed to give satisfactory evidence that he had done these things during some part of the intermediate period, in my opinion, he would not prove that which lies upon him under the statute. If, therefore, it had been shewn that instead of cutting this litter by his own servants he had submitted to that which was alleged, namely, to the fact of tramps or gipsies, or people who were undoubtedly trespassers, cutting the fern on their own account and appropriating it to themselves, if he or his predecessors had bought it from those people, as buying from them that which they had a right to sell—if it could have been shewn that he had done that for a year or two years without cutting any litter during that year or those two years, by his own servants at all, I should have thought that there would be a gap made in the user for sixty years, and that he could not have succeeded

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under this plea. If he had bought from such people in each year, but also during each year had cut a part by himself and his servants under the claim of right, the mere fact of his wrongful buying from these people would not, in my opinion, have destroyed the continuity of his actual user. But I think it clear that there was no evidence to shew that any such trespassers had ever sold such things to him. The whole effort was made to deduce this supposed fact from entries in books. Nothing to my mind could be more dangerous. The entries in the books are of the money actually paid at the time it is paid; and how you can deduce from that anything like a reliable state of things, I have failed to see. It seems to me that the evidence is conclusive—that this had been done from year to year.

But then it was said that, although it was done, and although he has taken this litter by himself and his servants, only such litter as he did use on his farm, yet he fails because he claimed to do it in respect of a claim which could not be supported in law, which is by way of prescription, or custom or grant; as, for instance, it was said that although he had taken this litter by his servants, and for the use of his farm, yet he asserted he did so because all the inhabitants of the district had a right to do so.

Now, first of all, I do not think he did make the claim in that form. But, secondly, it seems clear to me, upon the construction which I have already put upon the statute, that if he had, it would have made no difference; that the claiming to exercise the right, which he did in fact exercise, in respect of some claim, or if you please a right in that sense, which could not be supported, is wholly immaterial, because, as I have said, the only question is, when he has once proved the facts, whether the Court is of opinion that the right to do the acts complained of could be supported by a prescription, or a custom or a grant, if such had been proved. Therefore, that objection seems to me to fail. If it had been shewn that the defendant and his predecessors had not only taken the litter which was to be used on their farms, but had taken litter

for the purpose of selling it—if their actual user, therefore, had not been merely the taking the fern for the use of the farm, but the taking of fern generally although part of it was used on the farm, then I think we should have had to consider at all events the ruling in the case which was cited, which was a decision of the Master of the Rolls. That is what I should call taking only part of the claim, and I should be inclined to think that if that had been the user proved, that that would have destroyed the claim to take it in respect of the farm. But if all that was taken was taken for the use of the farm, then the assuming to take that under an erroneous view, or in respect of an erroneous claim, seems to me immaterial.

It was then said that the litter was taken because the defendant and his predecessors had been of opinion that they had a right to do so under the words of the decree, and that that view was erroneous. For the same reason if they had so claimed it, and perhaps they did, it seems to me to be immaterial. Therefore I think that the user has been established, and I think it is clear that the defendant and his predecessors, from whatever view they did so, assumed to do it at all events upon a right to do it, whether the lord permitted them or not. That is all.

Then comes the question, Could such a right be the subject-matter of a grant? In my opinion, clearly it could, as a matter of law. Therefore the defence under the Prescription Act was made out.

There was one other point, which was as to the frame of mind with which a Judge should come to the contemplation of a claim made under the Prescription Act; and there seems to be considerable authority, *dicta* at all events by learned Judges sitting in the Court of Chancery, that where the facts of user are proved, the Court ought to be astute to discover some legal mode in which the claim might be maintained. That is to say, that the Court ought to lean and lean heavily always in favour of this defence of a prescription under the statute. Now, if by that it is meant that the

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Court ought to look at the evidence with anything like an extremely indulgent view, I beg leave to say that I cannot accede to that view. It seems to me that there is nothing so dangerous as to lay down, as if it were matter of law, a mechanical rule for dealing with matters of evidence and of fact. Where the Prescription Act is vouched in order to maintain that which one really believes to have been a true right, although the evidence of it may be wanting, I should be inclined, and I should certainly advise a jury, always to look at the evidence with considerable indulgence. But if one was of opinion that the statute is vouched in order to create a right which one believes did not really exist, I should myself act upon this view, and I should advise a jury to act upon the same—to look, under those circumstances, at the evidence with considerable strictness. But here, looking at it in what way you will, it seems to me that the evidence fairly considered is conclusive as to the user; that user may be the subject of a valid right, such as is described in the statute; and that the defendant's defence in the 15th paragraph is therefore made out; and that though the defendant's defence upon every other part of the statement of defence has failed this appeal must be allowed; and that the decree of the Vice-Chancellor ought to have been founded upon that view—that the defendants had made out that paragraph and that paragraph alone; and with a decree so made in that view, questions may arise as to the mode in which the costs ought to be allowed; but according to what my Lord has said as to the mode in which the costs ought to be allowed, we should desire to have it discussed on a future day.

COTTON, L.J.—This is an action of trespass, and the alleged acts of trespass complained of are cutting heather and fern for the purpose of carrying it away to be used as litter on a farm called Suintings. The question is whether the defendant, by any of the defences he has raised, has justified those acts, so that the plaintiff cannot succeed in his action of trespass.

Now, in my opinion, the defence, and

the only defence upon which the defendant has succeeded, is that raised by the 15th paragraph of his statement of defence, in which he alleges that these acts of alleged trespass have been done by him and his predecessors in title in respect of that farm of Suintings for upwards of sixty years.

Of course, the first question to be decided, and which the Vice-Chancellor seems to have decided in favour of the plaintiff, is this—whether that is such a defence as in this case was capable of being raised. The Vice-Chancellor's view was that it was not capable of being raised. Now, to a great extent that was decided when the Master of the Rolls (and there was no appeal from his order) declined to strike out this 15th paragraph as an alternative defence. I think he was right in not striking it out, because although there are other defences raised which, if the evidence had gone to support them, might have made this a defence which could not have been raised, yet, in my opinion, the defendant was justified in putting this on the record as an alternative defence. Of course it would be a question whether, having regard to the statute, by the evidence which he has adduced, he has made out his defence, and for that purpose I will refer very shortly to the statute.

It was said that, in order to bring a case within the statute, it must be shewn that the same right which the statute will support has been vouched in support of the acts which have been done—that is to say, that the acts which have been done must have been done under a title supported by the statute; and it is said here that these acts, if they are made out in fact to have been done for sixty years, were done not under what the Court thinks would give a good defence, but as under a custom which the Court holds incapable of proof and not proved. Now I quite agree with what Lord Justice Brett has said, and I shall be very short therefore in my observations upon the statute. What the statute requires is this. You must see whether the acts which the defendant claims a right to do in the suit are such as could be supported as lawful by custom, prescription or

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grant; and then you must see whether the acts have been done as of right, that is to say, not secretly, not as acts of violence, not under permission from time to time given by the person on whose soil the acts were done. I say "from time to time given," not that it should necessarily be yearly, but from time to time during the period, the exercise during which is said to establish the right; because if there has been permission before that time, if the time is sixty years, that is not sufficient to prevent the defendant from establishing his claim unless it has been by consent or by agreement in writing. That is expressly provided by the 1st section of the statute. But, in my opinion, if there is permission from time to time given and accepted during the period relied upon, that does prevent (what in my opinion is essential) the acts being done as of right; and I may also say, because it bears upon the present case, that it must be shewn that the acts were done in respect of some tenement owned by the defendant and his predecessors in title.

Now what we have to consider here is, first of all, whether the acts of the defendant have in fact been done by him and his predecessors in title for the period of sixty years. Upon that point I must say that until I heard the evidence read again by Mr. Joshua Williams, I entertained some doubt, and I did so for this reason. We must have evidence of the beginning of the period, and we must have evidence to satisfy us that successively from year to year, where the right claimed is so capable of being exercised, and which probably, if it were a right, would be exercised from year to year, the acts have been done not only in the first year, but in successive years down to the commencement of the suit. The only evidence which could be relied on as regards the doing of these acts at the beginning of the sixty years was the evidence of Robert Edwards, and I agree with Lord Justice Brett that we ought to come to the conclusion on his evidence that he has established that in respect of this farm of Suntings the cutting and carrying away of litter has been done by the predecessors in title of the defendant at the beginning

of the period of sixty years—that is, for at least sixty years.

But then it was said that here it had not been done by the defendant or his predecessor in title. Of course that would be material, because if persons had, without any directions from him, cut the fern and litter, and then, treating it as their own, had come and sold it to him, that would not have been an exercise by him in respect of this farm of the right of cutting and carrying away the litter. But in my opinion it is immaterial whether the act done on his behalf was done by his regular servants—that is to say, by persons permanently employed by him—or by persons whom he made for the time being his servants by directing them to go and cut; and the question must be, whether that is what he did, for certainly he did not always do it by his own servants; or whether he bought it from persons who, not as his agents, cut it. [His Lordship held that the latter contention had not been made out, and came to the conclusion that this act was done by the predecessor in title at the beginning of the sixty years; that there was continuous exercise of that right to cut by him from time to time down to the commencement of the suit, without any regard to permission by the lord.]

But there is another matter which is perhaps of a more serious nature. It is said that nearly all the persons who cut litter were doing it not in respect of their own particular farms, but under a general supposition that the decree gave them a right to do so, or that there was some custom which justified it. Certain cases were referred to, two of which I will deal with. In my opinion, as I have already said, it is not necessary under the statute that the acts done should at the time have been attempted to have been justified in a way in which we think they can legally be justified, if the person doing them was claiming to do them as of right. What particular right the persons doing the acts have alleged, unless there was permission from time to time given by the lord, in my opinion is not material under the statute. But, no doubt, it must be shewn that the acts of the defendant are acts of user in connection with

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his particular tenement; and here, I think, we have that shewn, because what has been proved in respect of this defendant and his predecessors in title is, that they cut the litter in respect of and for the use of that farm only; and that being so, he does exercise this as a right in respect of that tenement, and connects it with the tenement—that is, with the possession and occupation of the tenement and the ownership of the tenement. That, in my opinion, entirely distinguishes it from the two cases which have been referred to. One was the case of *Blewett v. Tregunning*, and all that was laid down was this. "It must be pointed out to the jury that they must be satisfied that the occupiers of the farm enjoyed the privilege because they were occupiers, and that the right was attached to the farm." This is Mr. Justice Patteson's judgment, and Mr. Justice Williams is to the same effect or very nearly so. However much other persons who have no right claim to cut litter, and although there was a general supposition that this right was given by the decree, or possibly that nobody could or would be interfered with who cut it, or that there was a custom in the district, yet when we do find that Mr. Hale and his predecessors in title cut it for the purpose of carrying it off to Suntings, and there used it, and only cut what they required for the purposes of that farm, in my opinion that does connect the acts done with the farm, and enables them to be given in evidence in support of the claim to prescription under the Prescription Act. The other case which was referred to, and which at first sight seemed more in favour of the respondent here, was the case of *Hamerton v. Honey*. What was attempted to be there asserted was a claim of all the inhabitants of a village to use a green for the purpose of recreation. The evidence given was that all people, whether of the village or elsewhere, had used it; and therefore that would not support a claim of right in respect of the inhabitants of that village. Some of the persons who used it happened to be inhabitants of the village, but there was no distinction at all as between their user and that of all the rest of Her Majesty's

subjects, and therefore the user by all Her Majesty's subjects as such, the villagers not using it as villagers, but as Her Majesty's subjects, did not afford any evidence in support of the claim that was there sought to be established. There was no distinction between those who were not inhabitants of the village in their user and those who were. Therefore that case, in my opinion, does not support the contention of the respondent in the present case. That I think is all I need say on the defence which, in my opinion, the defendant has succeeded in proving; but although that disposes of the case, I think one ought not to leave altogether untouched that which occupied a great deal of the argument for the appellants, and a great deal of the evidence and pleadings—the claim under the decree of 1693.

Now I quite agree with the view of the Vice-Chancellor and of the other Lords Justices on that point. The decree of 1693 does not in terms give the defendant and the other commoners the right which he claims here, and, in my opinion, looking at the decree, it is decidedly against such a construction, so decidedly as not to leave the words of the decree in any way ambiguous. The decree is founded upon the report of the commission. What they recommend was, that the commoners should have these 6,400 acres for common of pasture and herbage, and that the lord should not be allowed to turn out any cattle there. What the lord is excluded from shews what the commoners were to have. Then when we come to the words in the latter part of the decree which were relied upon, and alone give foundation for the argument, "sole common pasturage and herbage," which it was said was something different from common of pasture, we must construe those words fairly by looking at the whole of the decree; and when we consider how the commissioners' report as regards the lord, the owner of the soil, is construed, and the language there used, we find that "common of pasture" is used for just the same as common pasturage; in fact, in the one case common is used possibly improperly as a substantive, and in the other possibly

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properly as an adjective, for the lords are excluded from claiming any common of pasture or herbage upon the said land. In my opinion, on the construction of that decree, all that there is given over these 6,400 acres to the commoners is common of pasture in the ordinary sense of those words; and we cannot, in my opinion, properly construe those words of the decree by any reference to usage subsequently to the date of the decree.

There is only one other matter, namely, the user alleged to be proved before the date of that decree. To go through the various documents which were referred to on that point would take a great deal of time. In my opinion, the Vice-Chancellor was quite right in the conclusion at which he arrived upon the careful examination which he had of all the documents in the case. In my opinion, there was not any evidence to satisfy the Court, and from which the Court ought to have drawn the conclusion, that the commoners, as they are called, the owners of these tenements, had, previously to that decree, the right of cutting the litter and fern as in manner claimed here by the defence.

I must say one word as regards another matter. The defendant has claimed very largely, in the statement of defence, a right entirely to exclude the lord from any interest, not only in the litter and herbage, but also in the young seedlings. Now it does not appear here that what has been done by the defendant has included the cutting of seedlings; but, in my opinion, all that he is justified in doing is this, cutting the litter, and that he will not be answerable for anything which he unavoidably does in cutting the litter; but that he has no right at all to destroy trees as trees, or to destroy seedlings, if in cutting the litter, which, in my opinion, he has a right to do, he can avoid cutting and destroying those seedlings and trees.

JAMES, L.J.—I think it right to add that I am not at present prepared myself to say that the evidence as to the other farms was not admissible for this purpose by way of reply to the case of the plaintiff, that the defendant was only one

of a mob of trespassers and wrongdoers, which was the case the plaintiff opened; and then I think it requires some further consideration before we entirely adopt what was said in one of the cases by one of the Judges—that in the case of a profit *à prendre* claimed under the statute, it must be shewn to have been exercised in every one of the years. If from any accident or merely for the convenience of the man himself the right was in some years not exercised, I think it deserves consideration whether such a pretermission as that would defeat the right if shewn to have begun more than sixty years ago, and then continued whenever it was wanted during the whole sixty years.

April 4. The question of costs was argued by

Mr. Webster, for the appellant, and by *Mr. Elton*, for the respondent.

JAMES, L.J.—The order is that the defendant shall have the general costs of the action and of the appeal, but shall not have either in the action or in the appeal the costs occasioned by other issues than the issue raised by the 15th paragraph. Evidence to shew the character of the acts done, that is, that they were done by Hale and the others, owners of tenements in respect of their tenements and not by indiscriminate trespassers—is admissible on that issue. No evidence of anything anterior to the decree of 1693 nor of the decree is admissible. As to the excepted costs each party must bear his own. The costs will be costs in the action.

BRETT, L.J., and COTTON, L.J., concurred.

Solicitors—Horne, Hunter & Birkett, agents for Raper & Ellman, Battle, for appellants; Cope & Co., for respondent.

FRY, J. }
1881. }
Aug. 2, 3. } *In re BARBER'S SETTLED
ESTATES.*

*Estate pur Autre Vie—Executory De-
vise—Wasting Security—Tenant-for-Life
—Renewal—Leases and Sales of Settled
Estates Acts.*

*Leaseholds for lives were devised to A
and his heirs, and, in case A died without
issue, to B:—Held, in analogy to a fee-
simple, that A could not by dealing with
the property defeat the executory interest
of B.*

*Leaseholds for lives in settlement subject
to a trust for renewal were, after refusal of
the lessor to renew, sold under the Leases
and Sales of Settled Estates Acts:—Held,
that the first taker was entitled only to the
income of the purchase-money.*

John Barber by his will gave his real estate to trustees. He directed them from time to time to let, and out of the rents and profits "to keep the leasehold and copyhold estate repaired and insured and renewed and full lived, so as for each estate to bear its own burden or share of those expenses." And he declared that his trustees should stand possessed of his farm, called Old Court, upon trust for his two grandchildren, John Barber and Samuel Barber, their heirs and assigns, as tenants-in-common, but if they or either of them should die without leaving lawful issue living at his or their decease, then upon trust as to the share or shares (as the case might happen) of either or both of them as should so die without such issue, for his grandson, William Barber.

The testator died in 1829. He was at that time possessed of an estate for three lives in Old Court Farm, under a lease from the Bishop of Hereford, which had been renewed from time to time on the dropping of any life. A life dropped in 1851, and the trustees renewed the lease on payment of a fine, of which 2,600*l.* was provided by the beneficiaries, who borrowed it on the security of a charge they purported to give on the equitable interest in the property.

In 1859 the testator's grandson, Samuel Barber, died, and William Barber became

therefore absolutely entitled to the beneficial interest in an undivided moiety of Old Court Farm.

In 1863 another of the lives on which the property was held dropped, and the bishop refused to renew, and Old Court Farm was sold under the Leases and Sales of Settled Estates Acts, on the petition of John Barber, the grandson, and the purchase-money was paid into Court.

In an action of *Barber v. Barber* it had been declared that the 2,600*l.* was charged on the whole purchase-money.

This was a petition by John Barber to have the 2,600*l.* paid out of the money in Court, and to have the rights of himself and William Barber in the balance of the sum in Court ascertained.

Mr. Lewin, for the petitioner, argued that he was entitled to the whole interest in half the purchase-money, for the decisions shewed that the *quasi* tenant-in-tail or owner of a *quasi* fee subject to an executory gift over, would by any act of alienation bar the remainders over, whether his interest was legal or equitable. And the petition and sale under the Settled Estates Acts was such act of alienation. It was true that in some instances the power was limited, but that was only by reason of an express contrary intention by the donor.

The following authorities were referred to:—

Reynolds v. Wright, 2 De Gex, F. & J. 590; 30 Law J. Rep. Chanc. 381;

Grey v. Mannock, 2 Eden, 339;

Low v. Barron, 3 P. Wms. 262;

Saltern v. Saltern, 2 Atk. 376;

Doe v. Lutton, 6 Term Rep. 289;

Fearne on Contingent Remainders, p. 495;

Lewin on Trusts, p. 595;

Tudor's Leading Cases in Real Property (3rd ed.), p. 55;

1 *Preston on Abstracts* (2nd ed.), pp. 438, 441;

Co. Lit. 20 a; *Butler's Note*, 120;

Dillon v. Dillon, 1 Ball & B. 77;

Allen v. Allen, 2 Dr. & War. 307.

FRY, J. (without calling on the other side), said—The law as to estates *pur*

In re Barber's Settled Estates.

autre vie is very anomalous and singular. When an estate *pur autre vie* is given to a man and his heirs all he can take under that gift is an estate during his own life; and every person who comes after him takes as occupant of that estate, and not through or as deriving an estate from the first taker. Such a mode of devolution is very different from that which applies to a fee-simple estate. But for the sake of convenience the Courts have enforced an analogy between the disposition of estates *pur autre vie* and estates in fee-simple, and that analogy has been carried out with regard to the capacity and incapacity of alienation as to the power of disposition and the limits put upon that power.

For the reason that the first taker has the whole estate in him it might well be supposed he could dispose of it. Nevertheless his power has been limited, as Mr. Lewin has pointed out, by a contrary intention expressed by the donor that a particular person shall be the special occupant; and in that way a limitation has been put on the power of alienation of the first taker, for the sole reason, as far as I can see, that the analogy of the power of the first taker of an estate in fee-simple has been followed.

Now the Statute of Frauds followed the analogy which I have indicated, because it made an estate *pur autre vie* devisable, and went on to provide that if the owner should not have disposed of it by his will, although the heir came in he should apply it as assets by descent to pay his ancestor's debts in the same way as if it were a fee-simple estate.

In pursuance of the analogy to an estate in fee-simple the Court in the first place had permitted the declaration of limitations of *quasi* tail and *quasi* remainder and *quasi* estates for life; then they have permitted alienation by persons in the position of *quasi* tenants-in-tail in possession, and have gone further and allowed alienation by a *quasi* tenant-in-tail in remainder with the concurrence of the *quasi* tenant-for-life in possession, though the *quasi* tenant in remainder had in fact no estate.

We come now to the cases where alienation has not been permitted. The Courts

have disallowed the alienation by a *quasi* tenant-in-tail in remainder without the concurrence of the *quasi* tenant-for-life in possession—at least they have not allowed it to affect the remainder over, though probably it might create a *quasi* base fee—and they have disallowed the disposition by will of the *quasi* tenant-in-tail in possession; yet they are both in a sense entitled to the whole interest. Yet the designation of a person to take afterwards as special occupant has been held sufficient to put an end to the power of disposition.

I will only further observe that Lord St. Leonards, in *Allen v. Allen*, discussing the peculiar nature of estates *pur autre vie*, said that "the analogy of fee-simple estates ought to be applied as far as possible." In the present case I shall apply that analogy to an estate in fee-simple, and ask, Supposing it had been an estate in fee-simple, could John Barber have defeated the executory devise? Mr. Lewin has admitted that he cannot argue that he could, and I must hold he did not.

Mr. Preston has expressed an opinion in accordance with my view. I lay very little stress on that circumstance, because, though Mr. Preston was an able writer, it was a mere opinion.

The principle on which I base my decision is, that the analogy of an estate in fee-simple is to be applied as far as possible.

Mr. Lewin, for the petitioner, contended that he ought to be paid the same income as he would have received had the property been kept as a wasting security instead of being sold under the Settled Estates Act; that was to say, the net income formerly produced, less the interest on the 2,600*l.* now charged upon it. The Settled Estates Act never was intended to alter the relative rights of parties.

Mr. Fellows, for William Barber, argued that the property had now been brought into the form of a fixed or continuing security, and was impressed with the character in that respect which the testator intended it practically to have, and the petitioner was only entitled to the actual income.

In re Barber's Settled Estates.

Mr. R. W. Ingram, for the trustees.—The following cases were referred to on this point:—

Askew v. Woodhead, 49 Law J. Rep. Chanc. 320; Law Rep. 14 Ch. D. 27;

In re Wood's Estates, 40 Law J. Rep. Chanc. 59; Law Rep. 10 Eq. 572;

Hollier v. Burne, 42 Law J. Rep. Chanc. 789; Law Rep. 16 Eq. 163;

Maddy v. Hale, 45 Law J. Rep. Chanc. 791; Law Rep. 3 Ch. D. 327;

Morres v. Hodges, 27 Beav. 625;

Richardson v. Moore, *Ibid.* 629n;

Tardiff v. Robinson, *Ibid.* 630n.

Fry, J., said—I think the primary wish of the testator was to create a perpetuity by a continual renewal of the leaseholds. He desired to deal with the property as one that should last for ever. By the bishop's refusing to renew, his intention has been frustrated. The parties have come to the Court, and have sold the property in its terminable form, and have produced what is lasting, namely, money. The question is, how that is to be dealt with.

In re Wood's Estates shews the principle that where there is an overriding trust for the purpose of keeping the property in perpetuity, and by the action of a third person the property is converted into property which is of itself perpetual—as money—the Court will leave it in that condition, and will thereby create another property of another character, which will take the place of the original property. As Vice-Chancellor James said, "One property in perpetuity is substituted for another property in perpetuity." And he refused to take away from the remaindermen in order to make good the diminished incomes of the tenant-for-life.

A similar question came before the Lord Chancellor in *Hollier v. Burne*, where the conversion was effected not by the act of a third person but by force of the powers contained in the Act 23 & 24 Vict. c. 124, which the trustees availed themselves of. Renewal having ceased

to be possible, the best practicable terms were made with the reversioner, resulting in the substitution of one kind of perpetual property for another perpetuity. The Court favoured the arrangement, and directed it to be carried into effect.

In *Maddy v. Hale* the Court concluded that the trust for renewal overrode all the dispositions in favour of successive beneficiaries; that the correct course would have been for the trustees to exercise their power of sale as soon as it was ascertained that there could be no further renewal; and that, had the power been so exercised, the tenants-for-life would have been entitled to the income of this fund so produced. The course indicated in *Maddy v. Hale* is that which has actually been pursued, with the exception that the Judge there referred to the exercise of a power of sale, and the sale has been here made under a power conferred by a general Act of Parliament. That makes no difference. In fact, the exercise of a statutory power by the trustees in buying the reversion in *Hollier v. Burne* converted the terminable property into a fee-simple, and the Court approved of the arrangement because it preserved the enjoyment of the property for a succession of interests as the testator had intended. Here the exercise of a statutory power has converted a leasehold which the testator thought would be renewable, but which ceased to be so, into a fund. No doubt the first taker may say he suffers loss. And so he would have done if the refusal to renew had resulted in the termination of the lease during his life; and in that case the remaindermen would have lost everything.

The balance, therefore, should be invested in ordinary securities, and the income be paid in accordance with the devolution of the estate provided by the will. The costs of all parties will be paid out of the fund.

Solicitors—Janson, Cobb & Pearson, agents for W. P. Hughes, Worcester, for petitioner; Hunt & Son, agents for T. G. Hyde, Worcester, for Wm. Barber; Church & Co., agents for Southall, Worcester, for trustees.

[IN THE COURT OF APPEAL.]

JAMES, L.J.	}	ROXBURGHE v. COX.
BAGGALLAY, L.J.		
LUSH, L.J.		
1881.		
May 10, 13.		

Army Agents—Value of Commission—Set-off.

K., an officer in the army, kept a current account with C. & Co. as his bankers. On K.'s retirement from the army the sum of 3,000*l.*, the value of his commission, was paid to C. & Co., as the army agents of his regiment, and was in due course carried to a deposit account kept by C. & Co. with the Army Purchase Commissioners, there to remain till K.'s retirement was gazetted. At this time K.'s current account was overdrawn by 647*l.* The day after K.'s retirement was gazetted C. & Co. received notice of a deed, by which K. had mortgaged the value of his commission to secure the repayment of 5,000*l.* The mortgagees having claimed payment of the whole 3,000*l.* C. & Co. claimed to deduct out of it the 647*l.*:—Held, that as soon as the retirement of K. was gazetted, the 3,000*l.* became, in the hands of C. & Co., money received to the use of K.; and that, independently of the question whether C. & Co. had a banker's lien, they had at common law the right to set off against such moneys the debt due to them.

This was an appeal from a decision of Bacon, V.C.

Some time before the 6th of December, 1877, Lord Charles Ker obtained permission to retire from the army.

Under the provisions of the Regulation of the Forces Act, 1871, the value of his commission was estimated at 3,000*l.*, which sum was, on the 6th of December, 1877, paid by the Paymaster-General to Messrs. Cox & Co., who were the properly constituted agents of the regiment in which Lord Charles Ker held his commission, and who, pursuant to the general directions of the Army Purchase Commissioners, carried it to the deposit account kept by themselves with the Commissioners, to remain there until the retirement of Lord Charles Ker was gazetted.

On the 10th of December, 1877, Cox & Co. wrote to Lord Charles Ker: "Having been authorised by the Army Purchase Commissioners to pay to you, on your name appearing in the *London Gazette*, the sum of 3,000*l.*, on account of the value of your commission, we beg to hand you a receipt for the amount, which be pleased to stamp, sign and return to us at your earliest convenience, in order that as soon as you are gazetted no time may be lost in placing the amount to your credit, or otherwise disposing of the same as you may direct, less any regimental claims which may be preferred against you."

On the 18th of December, 1877, the retirement of Lord Charles Ker was gazetted, and the next morning Cox & Co. were duly served with a written notice on behalf of the plaintiff, whereby it appeared that by a deed, dated the 13th of March, 1868, Lord Charles Ker, then an officer in the Scots Fusilier Guards, had charged all moneys which should be realised by the sale of his commission with the repayment, with interest, of a sum of 5,000*l.* advanced to him by the plaintiff.

There were no regimental claims against Lord Charles Ker, and on the 31st of January, 1878, the receipt mentioned in the letter of Cox & Co. was returned to them duly signed by Lord Charles Ker, together with a copy of the notice of the plaintiff's charge.

Whilst Lord Charles Ker held his commission he kept a current account with Cox & Co. as his bankers, and at the time when his retirement was gazetted he owed them 647*l.* on that account.

Cox & Co. claimed to retain the 647*l.* out of the 3,000*l.*, and thereupon the plaintiff brought this action, claiming that his charge of the 13th of March, 1868, might be declared a first charge on the 3,000*l.*, and that the defendants might be ordered to pay him the 3,000*l.*, with interest at five per cent.

The action was tried before Bacon, V.C., who held that the defendants, as the bankers of Lord Charles Ker, had a lien on the 3,000*l.* in their hands for the 647*l.* due to them from him, and were entitled to deduct it.

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The plaintiff appealed.

Mr. Hemming and *Mr. B. B. Rogers*, for the appellant, contended that the 3,000*l.* came into the hands of the defendants in their capacity as army agents, and not in their character as the private bankers of Lord Charles Ker, therefore they could not assert a banker's lien. They were the agents of the Government to transmit the money to Lord Charles Ker, and had no right to a set-off. They cited

Talbot v. Frere, Law Rep. 9 Ch. D. 568;

Lambarde v. Older, 17 Beav. 542;
23 Law J. Rep. Chanc. 18.

Mr. Chitty, *Mr. Davey* and *Mr. A. T. Watson*, for the respondents, were not heard.

JAMES, L.J.—I really have no doubt in this case. In my view of the facts it is a very simple case, having nothing to do with questions as to trustees and *cestui que trust*, or any peculiar rights arising from that relation. The Government paid to Messrs. Cox & Co. a certain sum of money to the use of Lord Charles Ker. He has assented to that payment being made to them for his use. After that Lord Charles Ker could have sued them for the money, it being money paid to his use, in an action at law. It appears to me that beyond all doubt they could have pleaded a set-off in that action for the money that was due to them from him. Both rights were common-law rights—it was a simple contract debt due from A to B, and at the same moment a simple contract debt due from B to A. It appears to me, therefore, that the right of set-off was complete, and that would have been the result if the action had been brought by Lord Charles Ker himself. It is not brought by him, but it is brought by a person who claims as assignee of that *chose in action* belonging to him. Now an assignee of a *chose in action*, according to my view of the law, takes subject to all the rights of set-off and other defences which were available against the assignor; subject only to this exception, that after notice of an assignment of a *chose in action* the debtor cannot by payment or

otherwise interfere with or do anything to diminish the rights of the assignee, or take it away. That is the sole exception. Therefore the question is, Was this right of set-off existing at the time when the notice was given by the Duke of Roxburghe? Under the old law the proper course would have been, not for the Duke of Roxburghe to have come into this Court, but to have sued at law in the name of Lord Charles Ker; the proper course for an assignee of a *chose in action*, unless there were some equitable circumstances to justify him in coming to a Court of equity, was to sue at law in the name of the assignor, and then, in that case, set-off could have been pleaded as against the assignor. That seems to me really to dispose of the case. There is only one other question, as to whether they were bankers and had a banker's lien. The Vice-Chancellor thought that was so, and I do not mean in the least degree to dissent from the conclusion to which he came in this matter; but, independently of that, I say it is a clear case of a common-law debt and a common-law right to set off.

BAGGALLAY, L.J.—I am of the same opinion. Some time before the 6th of December, 1877, Lord Charles Ker obtained permission to retire from the army. Under the provisions of the Act of 1877 the value of his commission was estimated at 3,000*l.*; and, in accordance with the usual practice and rules of the service, that 3,000*l.* was paid by the Paymaster-General on the 6th of December to Messrs. Cox & Co., who were the properly constituted agents of the regiment in which Lord Charles Ker held his commission, and was carried by them to a deposit account between themselves and the commissioners, not to any account between themselves and Lord Charles Ker; and in accordance with those same rules, that sum was to remain to the deposit account of the commissioners until the retirement of the officer of the army was notified in the *Gazette*. The *Gazette* notice of his retirement appeared on the evening of the 18th of December, and in accordance with the rules to which I have already referred, that sum of money they had previously

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standing to the account of the Army Purchase Commissioners became payable to Lord Charles Ker himself. It has been pointed out by the Lord Justice that at that time, if any demand had been made to them by him for that sum of 3,000*l.*, *prima facie* they would have been entitled to set off any sum of money in which he was indebted to them; subject of course to their having a valid charge created on that fund previously to the time when the demand was so made for it. It is admitted here that there was no notice whatever given to Messrs. Cox & Co. of the present claim of the Duke of Roxburghe until the morning of the 19th of December, and, in point of fact, any notice given by him previously to the property coming into the possession of Messrs. Cox & Co. would have been ineffectual, as was decided in the case of *Somersel v. Cox* (1), which has been recognised over and over again, where similar questions have arisen. I find there was no effectual notice given by the Duke of Roxburghe to Messrs. Cox & Co. before the morning of the 19th which could have created a valid charge on the money in the hands of Messrs. Cox & Co. I think in every respect the conclusion to which the Vice-Chancellor arrived was correct; nor do I at all desire to dissent from the view expressed by him of the rights of Messrs. Cox & Co. as bankers, apart from the ground I have already mentioned.

LUSH, L.J.—This case appears to me to be one entirely free from any reasonable doubt. As soon as the retirement of Lord Charles Ker was gazetted, there being, as it appears, no regimental claims, the 3,000*l.* became Lord Charles Ker's money in the hands of Messrs. Cox & Co., and he might undoubtedly have brought an action immediately for that 3,000*l.* at common law, as for money had and received for his use. At that very time Lord Charles Ker owed Messrs. Cox & Co. this sum of 647*l.*, and they might undoubtedly have pleaded a set-off of that amount in answer to that action. That is exactly this case; it is nothing more or

less than a common law action—a claim on the one hand for 3,000*l.* which Messrs. Cox held to and for the use of Lord Charles Ker, and a claim on the other hand to set off against that payment a debt of 647*l.* odd, which Lord Charles Ker owed to them. That money became money in their hands, the property of Lord Charles Ker, before the notice was given by the Duke of Roxburghe of any assignment.

Solicitors—W. & A. Ranken Ford, for appellant;
Fladgate, Smith & Fladgate, for respondents.

FRY, J. } *In re* WILKINS.
1881. } SPENCER *v.* DUCKWORTH.
July 25. }

Will—Construction—"Final division."

A testator gave each of four persons a fourth of the proceeds of his residue, and in case of the death of any legatee before the "final division" of his estate he gave that legatee's share over. One legatee died more than a year after the testator but before the estate had been distributed:—Held, that his personal representatives were entitled to his fourth share.

Thomas Wilkins, the testator in this administration action, directed his trustees and executors to divide the proceeds of his residuary real and personal estate into four equal parts, and to pay one-fourth each to four persons—Robert Wilkins, Thomas G. Wilkins and George Wilkins, and the plaintiff Mary Ann Spencer; and he declared that if either of his four legatees should die before the final division of his estate, then he bequeathed the share of such trust moneys intended for him or her so having died unto his or her children or child, if more than one, in equal shares, for their own use absolutely.

The testator died on the 15th of January, 1879. All the four residuary legatees survived him. One of them, Thomas G. Wilkins, died on the 1st of April, 1880,

In re Wilkins.

leaving children. The testator's assets had been got in. There was a question whether there was a gift over to his children, because he died before the actual division of the property.

Mr. Dickinson, for the plaintiff.

Mr. O. A. Cook, for defendants.

Mr. Farwell, for the representatives of T. G. Wilkins, contended that by his surviving the period of a year from the testator's death his legacy became absolute and indefeasible—

Collison v. Barber, 48 Law J. Rep. Chanc. 720; Law Rep. 12 Ch. D. 834;

Chaston v. Seago, *Ante*, p. 716.

[FRY, J.—The case of

In re Arrowsmith's Trusts, 2 De Gex, F. & J. 474; 29 Law J. Rep. Chanc. 774; 30 *ibid.* 148,

seems most in point in this case.]

Mr. Clare, for the children of T. G. Wilkins, argued that by "final division" the testator must be taken to have meant what he said, which, without any qualification, in ordinary language meant actual division. There was nothing uncertain in a period capable of being fixed and ascertained—

Johnson v. O'rook, 48 Law J. Rep. Chanc. 777; Law Rep. 12 Ch. D. 639;

nor was there any inconvenience by tying up the property till the whole could be divided, if the reasonable construction were put on the gift over that it should apply only to such parts of the share given over as had not been actually received by the donee.

FRY, J., after stating the facts, said—What is the contingency referred to? What is the event, before which death of the donee will make the gift over take effect? It appears to me that there are only two periods to which the words can relate. The first is a period which the law allows for the distribution of the assets, namely, a year from the death of the testator; the other is the period when the last farthing has been got in, and has been actually divided. If the latter be the reading, it is obvious that great inconvenience would result, because

till the last farthing was got in no single farthing could be paid on account without liability to the trustees to repay that sum over again to the children. The result would be that nothing could be done in the way of distribution till every asset, however remote, could be got in; and nothing could be done by way of division till a total and contemporaneous division could be made on the ground of convenience; therefore it appears to me that the period of a year from the death of the testator is the one I ought to take, and the one I am bound to hold the testator had in his mind. That is a probable period, the other a very improbable one. That conclusion seems to me to be confirmed by the cases that have preceded this. *In re Arrowsmith's Trusts*—there the direction was that the gifts over should take effect if the donees should "die before receiving their shares." The Vice-Chancellor said, "I must hold that in this case the time to which the testator must be taken to have referred, when he used the words 'die before receiving their shares,' was the termination of the period which the law allows to executors for the payment to legatees—that is, the period of twelve months from the testator's decease." He had previously said, "If the widow had been entitled to a life interest in the fund, beyond all doubt her death would have been the moment of payment. But, as I am of opinion that she had no such interest, we must look for some other time. Now the law, at all events the practice of this Court, allows executors twelve months from the death of their testator, within which to wind up his affairs, to pay his debts and satisfy his legacies; in short, to clear his estate. That is the period which the law considers executors entitled to exhaust before a legatee can in ordinary cases reasonably and fairly expect to obtain payment of his legacy, and within which period, therefore, in such cases a legatee cannot complain if he is not paid." And the observations of the learned Lords in the case of *Minors v. Battison* (1) also appear to me to lead in the same direction.

(1) 46 Law J. Rep. Chanc. 2; Law Rep. 1 App. Cas. 428.

In re Wilkins.

Lord Selborne there said, "It was decided in *Hutcheon v. Mannington* (2) and *Martin v. Martin* (3) that such a divesting clause, if it refers to the time of actual receipt, is too uncertain and indefinite to be carried into effect." Now that principle plainly applies where the words used by the testator are "final division."

The Master of the Rolls in the case of *Johnson v. Crook* has come to the conclusion that a gift over on death before time of actual payment is not void for uncertainty. The decision I am now pronouncing does not in any way interfere with the decision in *Johnson v. Crook*, to which I had occasion to refer a few weeks ago, and expressed my entire concurrence with the Master of the Rolls, that if the gift over is on an event which can be ascertained it is good.

The question I have now to determine is, What is the reasonable and true construction to be put on the words of the testator? For the reason I have before given, the probable and true meaning seems to be a period of a year from the death of the testator.

I will add that the argument of Mr. Clare against the inconvenience of the other construction, that the gift over was only to apply to so much as had not been paid or divided, cannot hold, because what the testator has given over is the entirety of the interest of the legatee so dying.

Solicitors—Lambert, Fetch & Shakespear, agents for T. White, Ryde, Isle of Wight, for plaintiff and defendants; Pritchard, Englefield & Co., for the representatives and children of T. G. Wilkins.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.

JAMES, L.J.

LUSH, L.J.

1881.

May 18.

WORMALD v. MUZEEN.

Will—Construction—Gift of Annuity "out of" Rents—Gift over of "Remainder" of Rents—Rents insufficient to satisfy Annuity.

A testator devised his real estate and bequeathed his residuary personal estate on trust, in the first place, out of the rents and profits thereof to pay his widow the clear annual sum of 300l. during her life, and to pay the remainder of such rents and profits to his sister during her life, and after her decease, as to the trust estate, in trust for all the children of his said sister as tenants-in-common. The rents and profits were insufficient to pay in full the annuity to the widow:—Held (reversing the decision of FRY, J.), that the widow was not entitled to a continuing charge upon the rents and profits after her own death until the arrears of her annuity should be satisfied, but only to the rents and profits during her life.

This was an appeal from the decision of Fry, J., fully reported *Ante*, p. 482.

Mr. Glasse and Mr. Nalder, for the appellants, the trustees of the will, submitted that the case was undistinguishable from

Stelfox v. Sugden, Johns. 234.

Mr. Bardswell (Mr. J. Pearson with him), for the annuitant, referred to

Forbes v. Richardson, 11 Hare, 354;

Wroughton v. Colquhoun, 1 De Gex & S. 36,

and submitted that the annuity was a continuing charge on the rents and profits.

JESSEL, M.R., said—On these questions of construction of wills Judges will differ. The question is, What is to be attributed to this testator as his complete intention when the will contains only an imperfectly expressed intention? The scheme of the will is that the widow is to take an annuity out of the income, and the sister is to take the remainder of

(2) 1 Ves. jun. 366.

(3) 35 Law J. Rep. Chanc. 679; Law Rep. 2 Eq. 404.

Wormald v. Muzsen, App.

the income. But it turns out that the income is insufficient to satisfy even the annuity given to the widow. It appears to me that the testator by giving the remainder of the income to his sister obviously contemplated a surplus. Therefore the arrears of the annuity are not a charge upon the *corpus*, for it evidently never occurred to the testator that it would be wanted. That seems to me to be the fair construction of this will, and I decline to go into decided cases. The very fact of other cases being very similar, though not in identical terms, is more likely to mislead the Court than not.

JAMES, L.J., and LUSH, L.J., concurred.

Appeal accordingly allowed.

Solicitors—Collyer-Bristow, Withers & Russell, agents for J. D. Whitehead, Pickering, for appellants, the trustees; Burton, Yeates & Hart, agents for L. White, Driffield, for plaintiff.

FRY, J. }
1881. } MIDDLEWICK v. DEARSLBY.
June 30. }

Practice—Costs—Jurisdiction—Contribution.

There is no jurisdiction to enforce contribution in respect of costs between defendants to an action in a separate action.

This was an action, brought by a tenant against his landlord, to set aside his lease, and for damages in respect of a sum he had paid the outgoing tenant, on the ground of misrepresentation. The present plaintiff and defendant had been co-defendants in an action to restrain the carrying on of the business of a beer-shop on the premises the subject of the lease. In that action an injunction had been granted, and the defendants ordered to pay the costs. These were all paid by the present defendant. In this action he made a counter-claim for rent and also for contribution in respect of the costs of the former action. At the trial judg-

ment was given on the claim in favour of the plaintiff.

Mr. J. Pearson (Mr. Hull with him), for the defendant, said that the defendant had no other means of getting the proportion of costs the plaintiff ought to have paid except by bringing an independent action, or, what was the same thing, a counter-claim, for the purpose, and the Court would not allow a right to be without a remedy for its enforcement.

Mr. North (Mr. Everitt with him) said that there was no authority for such a proceeding; the costs of an action could only be dealt with in the same action, and it had been laid down by the Lords Justices in

Wilmott v. Barber (not yet reported) that even in a counter-claim to an action the costs of the action could not be dealt with.

Mr. Pearson replied.

Pitt v. Bonner, 5 Sim. 577;

Fletcher v. Green, 33 Beav. 513;

Baynard v. Woolley, 20 ibid. 583;

Wilson v. Thomson, 44 Law J. Rep.

Chanc. 527; Law Rep. 20 Eq. 459,

were also referred to.

FRY, J., said—Two questions in respect of costs of a former action are mooted—first, whether, without regard to special circumstances or equities between the parties, a right of contribution for such costs can be enforced in a separate action. It is admitted that no case of an action to enforce such contribution can be found, and Mr. North informs me that in a recent case it was laid down by the Court of Appeal that there is no jurisdiction in respect of the costs of a different action. I accept that statement of the law. His Lordship then held there were no special circumstances to give jurisdiction, and dismissed so much of the counter-claim as related to costs.

Solicitors—Roger & Chave, for plaintiff; George Brown & Son, for defendant.

MALINS, V.C.

1880.

July 31.

1881.

Jan. 29.

In re ALLAN.
HAVELOCK v. HAVELOCK.

Will—Accumulation Clause—Tenant-for-Life—Infant Tenant-for-Life in Remainder—Allowance for Benefit of Infant.

*A testator devised real estate of considerable value to trustees, upon trust to accumulate the rents for twenty-one years, and to lay out the same in the purchase of lands. And, at the expiration of twenty-one years, the real estates then subject to the trusts of the will to be held upon trust for Sir H. Havelock for life, with remainder to H. (his eldest son), an infant, for life, with remainder to H.'s first and other sons in tail, with a similar trust for A. (Sir H. Havelock's second son) and his children, with divers remainders over. Sir H. Havelock's income was insufficient to maintain and educate his two sons in a manner suitable to their future prospects. Upon an application by the two sons that a sum of 2,700*l.* per annum should be paid to their father for their maintenance, —Held, that, under the circumstances, it was for the benefit of the infants that such an allowance should be made, and application granted.*

Adjourned summons.

The above action was brought by Henry S. Havelock and Allan Havelock, the two infant sons of the defendant Sir Henry M. Havelock-Allan, against their father, Arthur Lucas, Edward Hutchinson and Elizabeth Allan, widow, and (by amendment) against Henry Havelock (then an infant under the age of twenty-one years), for the administration of the estate of the late Robert Henry Allan.

The testator by his will, dated the 8th of January, 1879, after giving various specific and pecuniary legacies, devised his mansion called Blackwell Hall, where he then resided, and the land surrounding the same, to his wife (the defendant), Elizabeth Allan, during her life; and he devised his freehold estate called Grisby to his brother, George Thomas Allan, during his life; and, subject to the devises thereinbefore contained, he gave and devised all his real and leasehold estates, which, "with

his personal estate thereby bequeathed, amounted in value, according to a reasonable calculation, to not less than 500,000*l.*," for the benefit of his cousin, Sir Henry M. Havelock, and his issue and relations in manner thereafter mentioned. He devised his mansion called Blackwell Hall and the land devised to his wife for her life as aforesaid to Sir Henry M. Havelock during his life, he keeping the same in good repair and condition. He devised his mansion called Blackwell Grange and the lands surrounding the same, containing about eighty-one acres, in the event of the death of his brother, George Thomas Allan, without issue male, to the use of Sir Henry M. Havelock during his life; and he also devised his Newton Grange estate to the use of Sir Henry M. Havelock during his life.

And, subject to the devises thereinbefore contained, he devised the whole of his real and leasehold estates unto and to the use of his trustees (the defendants), Sir Henry M. Havelock, Arthur Lucas, and Edward Hutchinson, and their heirs, executors, administrators and assigns, upon trust to receive the rents and profits for twenty-one years from the time of his decease, and to lay out and invest the same in the purchase of freehold, copyhold or leasehold lands and hereditaments in the county of Durham, or in the North Riding of the county of York, to be held upon the trusts expressed concerning the real and leasehold estates thereby devised. And, after the expiration of the twenty-one years, upon trust to permit Sir Henry M. Havelock to receive the rents and profits of the real and leasehold estates for the time being subject to the trusts of his will during his life; and, subject to the trusts thereinbefore declared, the real and leasehold estates should be upon trust for (the plaintiff) Henry S. Havelock, the eldest son of Sir Henry M. Havelock, for life, and, after his decease, upon trust for the first and every other son of Henry S. Havelock in tail male; and, for default of such issue, upon trust for Allan Havelock, the second son of Sir Henry M. Havelock, for life, and, after his decease, upon trust for his first and every other son in tail male; and, for default of such issue, upon trust for the third and every other son of

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Sir Henry M. Havelock in tail male; and, for default of such issue, upon trust for the first and other sons of the late Joshua Havelock in tail male; and, for default of such issue, upon trust for the right heirs of the late Lieutenant-Colonel William Havelock.

And the testator bequeathed all the residue of his personal estate to his trustees upon trust to convert the same into money, and to invest the moneys to arise therefrom in the purchase of freehold, copyhold or leasehold lands and hereditaments situate in the county of Durham or the North Riding of the county of York, to be held upon the trusts therein-before expressed concerning his real and leasehold estates devised to them as aforesaid.

And the testator directed that every person who for the time being should be entitled to an estate for life, or an estate tail in possession under his will, should use and bear the surname and arms of Allan; and, upon failure to comply with this injunction, should forfeit the estate to which he would be entitled. And the testator appointed (the defendants) his wife Elizabeth Allan, Sir Henry M. Havelock, Arthur Lucas and Edward Hutchinson, executrix and executors of his will.

By a codicil, dated the 26th of April, 1879, the testator imposed a condition of forfeiture on any beneficiary under his will who should dispute the validity thereof or of any condition therein contained, or should be a party to any proceeding by means whereof any interest would be attainable by such beneficiary of larger extent or value than was by the will intended for him.

The testator died on the 28th of October, 1879. The present annual income of the real and personal estate was upwards of 10,000*l*.

The testator's widow, Elizabeth Allan, was still alive. His brother, George Thomas Allan, was still alive, but of the age of seventy-five years, and he had no issue.

The plaintiff Henry S. Havelock was born on the 30th of January, 1872. His younger brother, the plaintiff Allan Havelock, was born on the 29th of March, 1874. The defendant Henry Havelock

(the eldest son of the late Joshua Havelock) was born on the 15th of January, 1860, and attained his age of twenty-one years on the 15th of January, 1881. The defendant Sir Henry M. Havelock had recently complied with the direction contained in the will as to assuming the surname and arms of Allan.

This was an application, on the part of the plaintiffs, that the sum of 2,700*l*. per annum might be allowed for their maintenance from the death of the testator, and for the time to come during their respective minorities, or until further order; and that this allowance might be paid to their father, the defendant Sir Henry M. Havelock-Allan.

There was an affidavit by Sir Henry M. Havelock-Allan, in support of the application, saying that his present income was totally inadequate to maintain and educate his two sons in a manner suitable to their future prospects; and stating that the testator had been misinformed as to the amount of his income.

Mr. John Pearson and Mr. Vaughan Hawkins, for the plaintiffs.—Henry Havelock, the present tenant-in-tail in remainder, came of age on the 15th of January, and assents to this application. It is most desirable that a suitable allowance should be made to Sir Henry Havelock-Allan, sufficient to enable him to educate his children in a proper manner, having regard to their future expectations. The testator must have had in view "the benefit" of the tenant-for-life, as well as the other objects of his bounty. Here the estates are unincumbered, and the object of the accumulation clause is simply to add land to land. Where it is the primary object of a testator to have the rents applied in paying off incumbrances, the Court will direct an enquiry as to what portion of the rents should be so applied, and will make, out of the residue, a proper allowance to the tenant-for-life—

Bennett v. Wyndham, 23 Beav. 521 —and will increase the allowance as occasion may require—

Bennett v. Wyndham (on appeal), 4 De Gex, F. & J. 259.

"It is perfectly clear that the heir-at-

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law, not otherwise provided for, is, as against the remainderman, entitled to a provision"—

Burges v. Mawbey, 1. Turn. & R. 167;

Revel v. Watkinson, 1 Ves. sen. 93.

Mr. Bristowe and Mr. Romer, for Sir Henry Havelock-Allan.—The real object of this application is not to obtain any personal benefit for the father, but simply to enable him to give his children an education suitable to their future position in life. In such a case as this, the Court will "judge that it is for the benefit of the children" that a proper sum should be allowed for maintenance—

Greenwell v. Greenwell, 5 Ves. 194.

There is no distinction, in principle, between a direction to accumulate for paying off charges (as in

Bennett v. Wyndham (*ubi supra*), where maintenance was allowed) and (as here) a direction to accumulate in order to acquire other landed property.

They also referred to

Aveline v. Melhuish, 10 Jur. N.S. 788.

Mr. Locock Webb and Mr. Stallard, for Henry Havelock, the eldest son of Joshua Havelock, consented to the application.

Mr. Whitehorne, for the trustees.

MALINS, V.C.—This case involves important principles; but it is, I think, in its particular circumstances entirely novel.

The testator by his will, dated January, 1879, after making certain provisions for his widow and members of his family, which it is not necessary now to enter on, gives all his real estate and his personal estate to trustees, upon trust to accumulate for twenty-one years from the day of his death—which is the utmost period the law will permit—and he then gives his real estate, and all the estates which are to be acquired under the accumulation, to the present Sir Henry Havelock for life, with remainder to the eldest son of Sir Henry Havelock for life, with remainder to his issue in tail by purchase, with remainder to the second son of Sir Henry Havelock (who was also living at the date of the will) for life, with remainder to his issue by purchase, with remainder to the future born sons of Sir

Henry Havelock in tail, with remainder to the eldest son of Joshua Havelock in tail.

The matter stands thus: Sir Henry Havelock is, I understand, of the age of about fifty-one. Therefore, if the period of twenty-one years had now expired, he would be tenant-for-life in possession of these estates, which are of the value of about 10,200*l.* a year, without any accumulations. The only persons *in esse* under the limitations are Sir Henry Havelock himself, and his two sons, and the eldest son of Joshua Havelock; all other persons who may become interested are unborn. Sir Henry Havelock is a major-general in the army, and he has the income of a soldier of his rank. His income altogether is of a very moderate amount, having reference to his position in life, and with the expectation that either he or his children, at all events, will, in all human probability, come into possession of these estates. He is also in parliament, which necessitates further expenses.

Under these circumstances, am I at liberty to act upon what I consider for the benefit of the family—not only for Sir Henry Havelock himself, but for the benefit of his children, on whose behalf this application is made? If I am to decide this question on what is best for the interests of the infants, I should have no hesitation whatever in coming to the conclusion that it is much more for their benefit that the father should have the means he asks, in order to educate them properly, and to keep up the family residence in a manner suitable for their condition and rank in life, than that he should be living in comparative poverty—I do not mean absolute want, but comparative poverty. It appears that the testator was under the impression that Sir Henry Havelock had a considerable fortune. I have no doubt of it, for it is the only way you can account for his making his will in the terms he did; therefore I believe it would have been the intention of the testator, if he had known the true state of the facts, to have done what I am asked to do. I am perfectly satisfied that it is for the interests of the family that it should be done, and I am glad to find that the

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first tenant-in-tail, the eldest son of Joshua Havelock, being now of full age (having attained his majority on the 15th of this month), has expressed his approval of what I am about to do. The persons immediately affected will be the sons of Sir Henry Havelock. They are my wards; and I think, therefore, I am warranted in doing what I think best for their benefit, particularly as it is sanctioned by their guardian, sanctioned by their solicitor and sanctioned by their counsel. Therefore I have everything here I can have to induce me to do that which I am satisfied is for the benefit of the infants and all parties concerned.

However, I am bound to take the law as it is; and if I found myself bound by the decisions to hold that these dry accumulations of property, directed by testators, must go on, happen what may, although those who are ultimately to enjoy the property may be left destitute in the interval, I should have been bound to refuse the present application. But I find that is not the current of decisions. On the former occasion, when the matter was before me, on the 31st of July last, the case of *Bennett v. Wyndham* was referred to, not so fully as to-day, because Mr. Pearson has now handed up a complete account of all the proceedings in that case. What was done was this: Mr. Bennett, the testator, had been in possession of large estates, and there were heavy mortgages upon them. After his death these incumbrances, by the employment of his personal estate, were reduced to 38,000*l.* The gross income was about 6,000*l.* a year; and, under these circumstances, "he devised his residuary real estate to trustees, in fee, upon trust, by and out of the rents, issues and profits thereof, to pay the annuities of 300*l.* and 186*l.* to his daughters (from the payment of which he exonerated his personal estate), and by the same ways and means or by such other ways and means (except a sale or sales) as they might think proper," to raise such sums of money as should be sufficient, with his residuary personal estate, to pay off the mortgages. Therefore it was not until these mortgages were paid off, and subject thereto, that the property was given (subject to an estate

which determined) to the plaintiff Vere Fane Bennett for life. Now there was no provision for his maintenance. But for the trust for accumulation he would have been tenant-for-life in possession of the estates. An application was made to the Court, and the result was, notwithstanding this direction, a direction to apply all the rents and profits in reducing the mortgages—which is virtually a direction to accumulate; the Master of the Rolls (Lord Romilly) made an order to allow a certain sum for maintenance; and his Lordship, on the 13th of March, 1857, directed an enquiry what part of the rents should be applied to pay off the charges, and what part of the residue should be allowed to the tenant-for-life; and then, by an order made in chambers on the 7th of July, 1858, it was ordered that 1,190*l.* should be allowed to Arthur Fane, the plaintiff's father, for his past maintenance to the 29th of April, 1857, and 580*l.* annually from that time during minority, or until further order. Therefore there was taken out of this fund directed to be accumulated—or, what is precisely the same thing, to be applied in paying off mortgages—1,190*l.* for past maintenance, and 580*l.* for future maintenance. The amount is immaterial, because, if the trust to accumulate is to be observed literally, you can no more take 1*l.* than 1,000*l.*: directly you do that you trench on the accumulated fund. But it did not stop there, because the matter came before the Court again, in July, 1859, on further consideration, and the Master of the Rolls then decided that the plaintiff was entitled to timber on the estates. In 1860 the plaintiff came of age. Now, although he came of age, his position was no better, because it was not until the mortgages were paid off that he was entitled to possession. And on a petition being presented, an order was made (by the Lords Justices) in July, 1862 (1), directing an annual payment to him of 1,300*l.* a year; and, on the 7th of December, 1867, being about to marry Miss Stanford, in order that he might not be dependent on her, as he otherwise might have been if no allowance were made, an order was made that

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the allowance be increased to 1,800*l.* a year, with leave to reside at Pythouse.

Now is that a case like the present? This is a direction to accumulate, and out of the accumulations to buy more land. That was a direction to accumulate to relieve the existing state of incumbrances, which incumbrances must at last have been paid out of the *corpus* of the estate, if it had not been for this direction. In that case it was to prevent a diminution of the estate, and in this case it is to increase the estate. Now, between a trust to prevent the diminution of an estate and a trust to increase an estate there is, in my opinion, no difference in principle; and, therefore, what was done in *Bennett v. Wyndham* is, I think, a precedent for what may be done in the present case.

But it does not rest merely on that authority; for the other authorities cited to-day go upon the same principle, and particularly the case before Lord Hardwicke of *Revel v. Watkinson*, where there was a trust out of the rents and profits to raise enough to pay what the personal estate should be deficient to pay, and, subject thereto, in trust for a daughter in strict settlement; and the interest of the incumbrances exhausted the whole income. What was to be done under these circumstances? If the direction in the will was strictly adhered to, the daughter, who was to come into possession of the estate, was left unprovided for, without any income. Lord Hardwicke, in giving judgment, says (2), "But then the daughter must be allowed a maintenance out of this trust estate during the mother's life; for she stands entirely in the light of a child unprovided for during that time, and at the mother's pleasure; and the Court will not, in favour of a remainderman, suffer all the surplus profits to be exhausted to discharge the interest in exoneration of the estate, and leave a daughter and heir-at-law to starve; for which I can cite a stronger case—that of *Butler of Woodhall*, before Lord Harcourt—where, though it was in the case of a nephew, and all the profits of the estate devised subject to the trust for payment of debts, yet

the Court held the uncle could not intend his nephew should starve, and directed a reasonable maintenance to be paid him out of the profits; it appearing the creditors were safe or submitting to it." I do not think, as I have already pointed out, that Sir Henry Havelock has an income sufficient for the duties imposed upon him. Now suppose his father had left him nothing, and he had married a lady without fortune, and he had nothing but his pay as major-general, then the observation of Lord Hardwicke in that case would be applicable to this—"Yet the Court held the uncle could not intend his nephew should starve, and directed a reasonable maintenance to be paid him out of the profits." I am quite certain this testator could not have intended that Sir Henry Havelock should lead a life, for twenty years after the testator's death, of comparative penury for the sake of accumulating larger estates, and of benefiting he knew not whom.

I do not think there is any other case that goes directly to the point; but what has been said in the other cases favours the view I take. There is a case of *Greenwell v. Greenwell*, in which Lord Loughborough says (3), "The order of Lord Thurlow in that case (*Fendall v. Nash*) is exactly to the same effect, and under the same circumstances as in *Oven-dish v. Mercer* (4); taking the consent of the persons who would be ultimately entitled in the event of the death of all the children. I think myself sufficiently warranted to make the decree you pray, and there is no occasion for a reference. I judge that it is for the benefit of the children. I must direct the Master to settle what is proper to be allowed for maintenance for the time past since the death of the testator, and for the time to come." Then there is the passage in *Burges v. Mawbey*, in which Sir Thomas Plumer seems to act on the same principle, and in which he says (5), "Generally speaking, therefore, it is perfectly clear that the tenant-for-life is bound to keep down the interest;" and further on he says, "It is perfectly clear that the

(3) 5 Ves. 199.

(4) 5 Ves. 195 *æ*.

(5) 1 Turn. & R. 174.

(2) 1 Ves. sen. 95.

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heir-at-law not otherwise provided for is, as against the remainderman, entitled to a provision; but it is not stated in any part of the pleadings that Sir Joseph Mawbey, the son, was unprovided for, nor is there the least shadow of a ground even for an enquiry as to that point." I think there is no other case, except *Aveline v. Melhuish*, going to the point. In that case there was a direction to accumulate for the benefit of the daughters who should attain twenty-one, there being several daughters; and if any one attained twenty-one, the whole fund to be vested. The trustee had, without express authority, applied a large portion of the income for maintenance; and the question was, on taking the accounts, whether he was to be charged with the sum he so applied; and it was decided by the Court of Appeal that, under the circumstances, he was not to be charged.

All these cases proceed, it seems to me, on the same principle; and although the particular case I have now before me of taking a portion of the fund directed to be accumulated for twenty-one years has not before occurred, I consider that it has, in substance, been involved in these cases, and particularly in the case of *Bennett v. Wyndham*. And it being, in my opinion, for the very best interests of Sir Henry Havelock-Allan, and greatly for the benefit of his children, present and future, and greatly for the benefit of all who may come into possession of these estates, I without any difficulty or hesitation accede to the application that there shall be paid to Sir Henry Havelock-Allan until further order the annual sum of 2,700*l.* I believe that is all that is asked. I will also add liberty to apply for an increased allowance if and when it may be necessary; as the children grow they will probably require a larger expenditure. The costs of all parties, as between solicitor and client, to be paid by the trustees out of the rents.

Solicitors—Farrer, Ouvry & Co., for the plaintiffs, and for defendant Sir Henry Havelock-Allan; R. T. Jarvis, for the trustees, other than Sir Henry Havelock-Allan; Duncan, Warren & Gardner, for defendant Henry Havelock.

BACON, V.C.

1881.

Jan. 19–21,

25–27;

Feb. 5.

OUTRAM v. MAUDE.

Prescription — Watercourse — Yearly Tenant—Unity of Possession—Prescription Act, 1833 (2 & 3 Will. 4. c. 71), s. 2.

In 1791 the owner of the *H. Close* demised part thereof to *O.* to make a goit through the *H. Close* to carry water from his mill. In 1836 it was agreed that the demise of 1791 should be void, and that a new goit in a different course through the *H. Close* should be substituted for the old goit, which new goit was accordingly made. In 1836 *O.* became yearly tenant of the *H. Close*, which tenancy was determined in 1867. The plaintiffs (who were successors in title to *O.*) adduced evidence that from 1836 to 1880 the old goit had, notwithstanding the agreement of 1836, been used for the discharge of foul water from the mill; and they claimed a prescriptive right to use the old goit for that purpose:—Held, that from 1836 to 1867, *O.*, being yearly tenant of the land, could not prescribe for the easement against his landlord, and that therefore no sufficient user had been shown.

By deed dated the 1st of January, 1791, William Walker demised to Benjamin Outram, his executors, administrators and assigns, a strip of the *Holme Close*, with liberty to make a cut or drain to conduct water from a mill proposed to be built on land of Benjamin Outram contiguous to the *Holme Close*, for and during such term as the rent thereafter reserved should be well and truly paid, yielding yearly during the said term unto William Walker, his heirs and assigns, the yearly rent of 2*l.* 2*s.*

The mill (which was a fulling mill) was built, and a covered drain called the "old goit" cut and made. In the year 1836 Benjamin Outram became yearly tenant of the *Holme Close* to Ann Walker, who was successor in title to William Walker; and it being desired to make a larger drain to carry off the mill water, by an agreement under seal dated the 8th of July, 1836, it was agreed that the indenture of the 1st of January, 1791,

Outram v. Maude.

should be void and of no effect, and that in consideration of a yearly rent of 2*l.* 2*s.* Benjamin Outram should have liberty to change the line of the course of the old goit through Holme Close as therein mentioned; and it was thereby agreed that the soil and freehold of the close through which the new drain was to be cut was to continue the property of Ann Walker. A new drain was accordingly cut and made. By deed dated the 2nd of March, 1867, the Holme Close was granted to the defendants subject to the rights of Benjamin Outram to maintain the goit created by the agreement of the 8th of July, 1836. In 1867, Benjamin Outram's yearly tenancy of the Holme Close was determined by the defendants, and in 1880 the defendants stopped up the old goit. Thereupon the plaintiffs (who were the successors in title to Benjamin Outram) brought this action to establish their right to the use of the old goit.

The plaintiffs alleged, and adduced evidence to prove, that the tailwater from the waterwheel of the mill was discharged down the new goit after its construction; but that the foul water had been discharged down the old goit; that this had been done openly and as of right ever since 1836; and claimed a prescriptive right to discharge the foul water down the old goit. There was a conflict of evidence on this subject, which, however, in the view the Court took of the law, became immaterial.

Sir H. Jackson, Mr. Nalder and Mr. Lockwood, for the plaintiffs.—Under the agreement of 1836 the demise of 1791 came to an end, and Outram and the plaintiffs used the old goit continually for forty-three years, and have an indefeasible title to the easement under the Prescription Act, s. 2. It is true that Outram was tenant from year to year of the Holme Close, but the landlord could, consistently with the recognition of that tenancy, have stopped him using the old goit. After 1836 Outram ceased to be tenant of the old goit and was a mere trespasser in using it—a user which was quite distinct from the yearly tenancy of the surface. There was, therefore, no such unity of possession as to

prevent Outram from acquiring the easement.

They cited

Ladyman v. Grave, Law Rep. 6 Chanc. 763;

and referred to section 8 of the Prescription Act.

Mr. Kay and Mr. Maclean, for the defendants.—A tenant cannot acquire an easement against his landlord. An easement is a privilege or liberty in the land of another—

Howlins v. Shipham, 5 B. & C. 221; 7 Dowl. & Ry. 783; 4 Law J. Rep. (o.s.) K.B. 241.

The period from 1836 to 1867, during which there was unity of possession, must be excluded in computing the time of enjoyment.

They cited

Clay v. Thackrah, 9 Car. & P. 47; *Bright v. Walker*, 1 Cr. M. & R. 211; 4 Tyrw. 502; 3 Law J. Rep. Exch. 250;

Olney v. Gardiner, 4 Mes. & W. 496; 8 Law J. Rep. Exch. 102;

Daniel v. North, 11 East, 372;

Harbidge v. Warwick, 3 Exch. Rep. 552; 18 Law J. Rep. Exch. 245;

Gayford v. Moffatt, Law Rep. 4 Chanc. 133.

Sir H. Jackson, in reply.

BACON, V.C., stated the provisions of the deed of 1791 and the agreement of 1836, and said that the latter totally abrogated the former; and having examined the oral evidence at length, continued: Now these being the facts which have been brought forward in the evidence which has been adduced, the result is that the question to be decided is one which is wholly independent of that evidence, so far as it is undisputed, and wholly unaffected by the contradictions which occur in the course of that evidence. It has been argued on behalf of the plaintiffs, that the possession and user by them and their predecessors of the old cut or drain for a period of more than forty-three years, openly and as of right, without any objection or interruption by the defendant or his predecessors in title, has conferred upon the plaintiffs a right to continue such user and enjoyment. And in support

Outram v. Maude.

of this contention the plaintiffs rely upon the provisions of the Prescription Act. They rely further upon the construction of the deed of 1836, and not disputing that that instrument put an end to the right which had been enjoyed under the deed of 1791, they insist that, their former right having come to an end in 1836, they were from that time trespassers as regards the old cut, but that having continued thenceforward in such use and enjoyment without interruption for more than forty years, their trespass has conferred upon them a right which is now absolute under the statute.

It would at least be strange and hardly consonant with any principle of reason or right, if such a contention could be maintained. Nothing is more clearly established than that a person to whom land is demised cannot by its use and enjoyment acquire an easement from the use and enjoyment of such land, against his landlord; and it is further clearly established law that the tenant cannot acquire any such right while a unity of possession in the subject devised and in the easement claimed subsists in the same person. Many cases have been cited in the course of the argument which have no distinct resemblance to the facts here present, but which contain declarations of the principles which, I think, determine the questions of law in issue in this case. And there is no decision to be found, so far as I am aware, in which the principles I have last adverted to are in the slightest degree questioned. On the contrary, those principles are in terms stated and repeated, not only for the purpose of supporting the judgments pronounced, but as the familiar recognition of indisputable rules and axioms of law. To bring the case within the Prescription Act, the alleged enjoyment of the easement must have been an enjoyment "as of right," and proof that there was during such enjoyment unity of possession is as much a denial of that allegation as the occasional asking permission would be—*Olney v. Gardiner*. No action of trespass could have been maintained against the tenant during the demise. No action for an injunction restraining him from the use of this old drain could have been maintained

by the landlord against the tenant during the demise. It is true that the landlord might at any time have determined the demise upon lawful notice, but he was under no obligation to resort to any such or to any other remedy, even if he had known of the unauthorised use of the drain, since he must be taken to have known also that whenever and by whatever means the tenancy was determined, the use of the drain must have determined with it. Nor do I think that the construction of the deed of 1836 is open to any doubt. The tenant under that instrument cannot be entitled to more than the landlord grants to him. All that is granted to him is liberty to change an existing drain—not to make a new drain and keep the old one, but to make a new drain and one which should conduct pure water only. That the drain made under the old grant in 1791 was for the conduct of water from the mill must, I think, be held to mean water only—river water, and not polluted water from whatever might be manufactured in the mill. But even if this were doubtful, as I think it is not, the deed of 1836, which extinguished and put an end to the licence given by the elder grant, and substituted a new licence for it to do a definite thing, is too clear to be questioned. No doubt a tenant may lawfully make the best use he can for his own benefit of the thing demised, but the right to do so must come to an end when his tenancy is determined. The tenant's duty when that period arrives, is to give up the subject demised in its entirety. To hold the contrary would be subversive of all reason and justice. The law is clear that the tenant can in no case and under no circumstances establish such a right as acquired during his tenancy against his landlord, and that no easement can be acquired while unity of possession exists in the thing demised and in the easement claimed. The action, therefore, must be dismissed with costs.

Solicitors—Layton & Jaques, agents for Franklyn & Humphreys, Halifax, for plaintiffs; Ullithorne, Currey & Villiers, agents for Lancaster & Wright, Bradford, for defendants.

[IN THE COURT OF APPEAL.]

JESSEL, M.R. }
 JAMES, L.J. } THE ATTORNEY-GENERAL v.
 LUSH, L.J. } THE BIRMINGHAM, TAME
 1881. } AND REA DISTRICT DRAIN-
 May 18. } AGE BOARD.

Nuisance—Perpetual Injunction against Local Authority—Right to enforce Injunction against Successors in Title to the Local Authority—The Public Health Act, 1875, s. 275.

In 1875 a perpetual injunction was obtained against a sanitary authority, restraining them from polluting a river with sewage. In 1877 a provisional order of the Local Government Board was made under the Public Health Act, 1875, constituting a new and larger district drainage board. In an action by the persons who had obtained the injunction in 1875 against the district drainage board, claiming a declaration that they were entitled as against the district drainage board to the same benefit of the injunction as if such board had been defendants to the former action,—Held, that the injunction did not run with the land; that the liability was not a liability constituted under the Act, and therefore the plaintiffs were not entitled to such a declaration.

This was an appeal from a decision of Bacon, V.C.

In 1858 a suit of *The Attorney-General v. The Corporation of Birmingham* was commenced at the relation of Sir Charles Adderley (now Lord Norton) and others against the corporation of Birmingham, who were the sanitary authority for that town, to restrain them from polluting the river Tame with sewage; and on the 16th of April, 1875, a perpetual injunction was granted restraining the council of the borough of Birmingham, their servants, workmen and agents, from causing or permitting the main sewers in the bill mentioned, or any additional sewers since constructed or which might thereafter be constructed, to be discharged into the river Tame, so as to create or continue the nuisance complained of.

Under and by virtue of a provisional order, dated the 5th of June, 1877, of

the Local Government Board, made pursuant to the 279th section of the Public Health Act, 1875, and of a private Act of Parliament, the sanitary powers and drainage works of the corporation of Birmingham became and were now vested in a new district drainage board, called the Birmingham, Tame and Rea District Drainage Board.

The plaintiffs in the former action now brought this action against the new district drainage board, claiming a declaration that the plaintiffs were entitled as against the defendants in the present action to have the same benefit of the decree in the old suit as if such decree had been made as well against the defendants in the present action as against the said council; and that, if necessary, the present action might be taken to be a supplemental action to the old suit.

The statement of claim set out the above facts in detail, and stated that since the defendants had taken over the drainage works of the corporation they had maintained the same under the same powers, and had also constructed further works in connection therewith, and that, through the works so taken over and constructed, the sewage of the borough of Birmingham had, since the time of such taking over, drained or passed into the river Tame; but did not allege a continuance or recurrence of the former nuisance.

The Vice-Chancellor having overruled the defendants' demurrer to the statement of claim, the defendants appealed.

Sir Farrer Herschell (Solicitor-General), Mr. Horton Smith and Mr. Cozens-Hardy, for the appellants, contended that the defendants were not the successors of the old defendants, but an independent sanitary authority, and that the injunction did not run with the land.

Mr. Davey, Mr. Edgar Rodwell and Mr. Carson, for the respondents, argued *contra*, that, by virtue of the 275th section of the Public Health Act, 1875 (1), the defen-

(1) The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 275, enacts: "Every order made by the Local Government Board under this part of the Act shall specify a day on which such order shall come into operation (in this Act referred to as the

Attorney-General v. Birmingham, Tame and Rea District Drainage Board, App.

dants were saddled with the liabilities of their predecessors in title, and were bound by the old decree.

JESSEL, M.R.—With great respect to the Vice-Chancellor, I think this action cannot be maintained. In the first place, it is clearly an action of first impression. Nobody ever heard of such a thing before. There is nothing like it, so far as I am aware of, in the old practice in the Court of Chancery.

This action was originally an action against the town council of Birmingham, who were the local sanitary authority, to restrain them from committing a nuisance which was both a public and a private nuisance. In that action a perpetual injunction was granted, which restrained the council, their servants, workmen and agents, from causing or permitting certain sewers then made, or certain additional sewers, carrying the drainage of the borough into the river Tame, so as to create or continue a nuisance. It then appears that after the date of that order, under the provisions of the Public Health Act of 1875, a new district was formed, including a large area near to the borough of Birmingham, as well as the borough itself. That new district had, of course, a joint board, which governed it, and which was the sanitary authority of the district. The new board took over or purchased the outfall and intercepting works which formerly belonged to the Birmingham town council, and it has constructed some further works. But it is not alleged that since the date of the appointment of the new district any nuisance has been committed or allowed by the defendants, the new sanitary authority. Under the present action the plaintiffs seek a declaration, and nothing more, that the new

commencement of the order); and from and after the commencement of the order all the powers, rights, duties, capacities, liabilities, obligations and property which under this Act are exercisable by or attaching to or vested in the local authority having, under this Act, jurisdiction in any district or part of a district which is by such order included in some other district, shall (so far as the same relate to the district or part of a district so included) pass to and vest in the local authority of such other district."

body is bound by the old decree, except as to certain damages and costs, which have been paid, and which is now therefore an injunction, although there is liberty to apply as to further damages.

The first observation to be made is, that in the old Courts there was an injunction to restrain the continuance of a *fort*. It is an injunction merely against the council, their workmen and agents, and cannot be said to run with the land. If they had sold the property to somebody else, there is no injunction against the new owner, and nobody ever heard of the new owner or purchaser being liable to a former decree. If he continues the nuisance, or commits a fresh nuisance, you can bring an action against him; that is all. He has nothing to do with the former proceedings.

That being so, what is the case made by the present respondents? It is said that, although that would be so in an ordinary case, yet as this is a public body which has taken over a portion of the property of the former public body, and to a certain extent succeeded to it, this new body is bound by Act of Parliament by the former decree. Of course, if that were so, an Act of Parliament can do a great many things, and it can certainly make the new body bound by the old decree. Then the only question remaining to be examined is, Has it done so? Now for that purpose we were referred to the 275th section of the Public Health Act, 1875. [His Lordship read the section, and proceeded:] Then the obligations are limited to those obligations attaching under this Act. I need not say the obligation of this decree is not made attaching under this Act, nor has it anything to do with the Act. The result, therefore, is, that there is no Act of Parliament which makes this decree binding on the new body; and therefore that argument appears to me to be entirely unsustainable.

There being no other ground suggested, and no other that I can imagine could be suggested, it appears to me that this demurrer ought not to have been overruled, and that the appeal should be allowed.

JAMES, L.J.—I quite agree with the

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Master of the Rolls. To my mind the action is entirely a novel one. I have never before seen a declaratory action of this kind. It is either wrong or it is unnecessary. It appears to seek a declaration of this character: "If you commit—we do not say that you have done so, or that you are going to do so—but if you do commit a nuisance, or create one hereafter, which would have been the subject of sequestration against the corporation of Birmingham upon a summary application, we desire now to see whether we can take the same summary proceeding against you." If they are liable they are liable, and no bill or action is necessary. If they are liable the plaintiff should have applied for a sequestration, and the declaration of liability would make no difference. But it appears to me to be quite clear that they are not liable, because there is no liability under the decree which in any way attaches upon the present defendants.

LUSH, L.J.—I am of opinion that the statement of claim is defective in two essential particulars, either of which would be fatal.

In the first place, it does not shew any facts which would amount to a breach of the injunction, even supposing the defendants were liable. The injunction was to restrain the council of the borough of Birmingham from permitting the main sewers to discharge sewage into the river Tame, so as to create or continue the nuisance complained of by the bill.

Now the statement is simply that the new body have maintained the outfall works under the former powers, and have constructed further works in connection with the outfall and intercepting works, and that since the time of taking it over from the borough, the sewage has drained or passed into the river Tame. That may be perfectly true, and yet no nuisance whatever created. There is not a word about its being suffered to pass in in such a condition as to be injurious to health, or so as to create a nuisance. It is quite consistent with all that, that it might have been purified so as not to be offensive or injurious at all. If that

stood alone it would be an essential defect in the statement of claim.

The second ground is, that it shews no privity at all between the defendants and the council, against whom the injunction was awarded. Under the Act in force at that time, the town council were the sanitary body. Under the Act of 1875 the present defendants have become the sanitary authority of a larger district. Now the only section in the Act of 1875 which has been appealed to to shew that they take the obligations which belong to the town council is the 275th section; but the meaning of that is obvious when we come to look at the scheme of the Act. The 275th section says in effect that where an order has been made such as this order is—namely, where what was an independent district has been merged into a larger area—all the liabilities, obligations and property attaching to or vested in that former district, which, if it had remained independent, would have belonged to it, shall, so soon as the order is made, pass to—that is, all the obligations and liabilities constituted by the Act shall, so soon as the order is made, pass to—and vest in the larger body. That is all it says. As has been already observed by the Master of the Rolls, the obligation sought to be enforced here is not one created by the Act, and has nothing whatever to do with the Act.

Upon either of these grounds I am of opinion that the statement of claim is bad, and that the demurrer ought to have been allowed.

Appeal accordingly allowed with costs.

Solicitors—Paines, Layton & Pollock, for respondents; Sharpe, Parkers & Co., for appellants.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.

SELBORNE, L.C.

BAGGALLAY, L.J.

LUSH, L.J.

1881.

June 30.

In re CLARKE; *ex parte*
THE EAST AND WEST
INDIA DOCK COMPANY.

Lease — Assignment — Bankruptcy of Assignee — Disclaimer by Trustee — The Bankruptcy Act, 1869, ss. 23 and 24 — The Bankruptcy Rules, 1871, rule 28 — Rights of Lessor.

On an application by a trustee under the 23rd section of the Bankruptcy Act, 1869, for leave to disclaim onerous property of the bankrupt, the Court will alone consider whether the disclaimer will be for the benefit of the bankrupt's estate and those interested in its administration, and will not take into consideration what effect the disclaimer will have on the rights and interests of third parties; neither will it, on allowing the disclaimer, preface the order with any declaration of opinion as to the effect of the disclaimer on the right of such third parties.

Leave to appeal to the House of Lords on a question of discretion will not be granted.

This was an appeal from the decision of Mr. Registrar Murray, acting as Chief Judge.

On the 2nd of December, 1875, the East and West India Dock Company granted to A. Hill a lease of the Brunswick Tap at Blackwall, for a term of twenty-one years from the 25th of March, 1875, at an annual rent of 300*l.* On the same day A. Hill assigned the lease to R. Clarke in consideration of a premium of 1,150*l.*, and R. Clarke covenanted to pay the rent and perform the covenants of the lease, and to indemnify A. Hill against the payment of the rent and the performance of the covenants. On the 3rd of December, 1875, R. Clarke executed an under-lease of the property to Truman & Co., for the residue of the original term, less the last three days, by way of mortgage to secure an advance of 1,000*l.* made by them to him.

On the 10th of February, 1881, R. Clarke filed a liquidation petition, under which a trustee was appointed.

On the 12th of March, A. Hill served the trustee with the usual notice under the 24th section of the Act, requiring him to decide whether he would disclaim the lease or not. The trustee thereupon applied to the Court under the 28th rule of the Bankruptcy Rules, 1871, for leave to disclaim. Notice of the application was served upon the company, upon A. Hill, and upon Truman & Co.

The application was heard by Mr. Registrar Murray, acting as Chief Judge, on the 9th of April, and was opposed by the company on the ground that, as by section 23 of the Bankruptcy Act, 1869, the lease, when disclaimed, was to be deemed to have been surrendered as from the date of the appointment of the trustee, the effect of the disclaimer would be to destroy their remedies under the original lease against A. Hill, their lessee. They offered, however, to undertake not to sue the trustee upon the covenants in the original lease, or to make any claim against Clarke's estate, but they declined to indemnify the trustee or Clarke's estate against any claim by A. Hill under Clarke's covenants to indemnify him. Truman & Co. also opposed the application on the ground that the disclaimer would destroy their security and enable the Dock Company to eject them if they should take possession of the leasehold premises.

Pending the hearing of the application to the Registrar, the decision of the Court of Appeal in

Smalley v. Hardinge, 50 Law J. Rep.

Q.B. 367; Law Rep. 6 Q.B. D.

371,

removed the ground of the objection raised by Truman & Co.

The Registrar gave leave to disclaim and the company appealed.

Mr. Kekewich and Mr. M. W. Latham, for the appellants.—A sub-lease is not affected by a disclaimer—

Smalley v. Hardinge (ubi supra);

but the same arguments do not apply where a lessee has assigned his entire interest. The question is whether the effect of the disclaimer will be to destroy the lease altogether. If so, our right of

In re Clarke; ex parte East and West India Dock Co. (App.), Bankr.

suing the original lessee will be gone, and that will be an injury to us which should not be allowed. Under the 23rd section the Court has a discretion, and must look at all existing equities and do justice between all parties. If the effect of the disclaimer is to destroy our rights against the original lessee, we submit that it ought not to be allowed, or only upon terms such as we have offered, as was done in

In re Wilson, Law Rep. 13 Eq. 186; or that the Court should insert in the order a declaration that leave to disclaim was granted without prejudice to our rights—

Ex parte Paterson, Law Rep. 11 Ch. D. 908.

The intention of the Act is to relieve the bankrupt's estate and the trustee from future but not existing liabilities, and the original lessee will not be damaged, as he can prove for his liability under his covenants as a provable debt.

They also referred to

Smyth v. North, 41 Law J. Rep. Exch. 103; Law Rep. 7 Exch. 242;

O'Farrell v. Stevenson, 4 Ir. Com. Law Rep. 715;

Ex parte Buxton, Law Rep. 15 Ch. D. 287.

Mr. Cookson and Mr. McSwinnery, for Hill, and *Mr. H. Reed*, for the trustee, were not called upon.

Mr. Gregory watched the case for Truman & Co.

THE LORD CHANCELLOR (LORD SELBORNE).—The Court do not think that this order ought to be disturbed. With regard to the 28th rule, which has been referred to, which undoubtedly calls upon this Court to exercise some judgment as to the propriety of disclaiming, it appears clear that that rule was made only under the authority of the 78th section, which says that rules of Court may be made for the effectual execution of this Act, and of the objects thereof, and the regulation of the practice and procedure of bankruptcy petitions, and the proceedings therein. Therefore this rule was evidently made for the effectual execution of the 23rd section of the Act, and of the objects of that section.

What were those objects? It appears to the Court that those objects were to cut short by disclaimer all liability of the bankrupt's estate in the classes of cases which are there referred to, which include beyond all question future liabilities under leases. It was to cut it short by disclaimer, leaving any person injured by the operation of the section to prove, for what he could establish as the value of the injury, under the bankruptcy. On the face of the section it appears to us that the power given by it is to be exercised with a view to the administration in bankruptcy of the bankrupt's estate and for the benefit of all persons interested in that administration. Therefore, if in a particular case it appears clear that looking at that object alone the disclaimer ought to be allowed, the Court will be introducing considerations foreign to the purpose of the Legislature if, for collateral reasons connected with the position of other persons, it should refuse to allow it, and leave on the bankrupt's estate a burden to be worked out which, under that section, might be got rid of by disclaimer, if those collateral considerations did not prevail. Then we must consider how that applies in the present case. In the present case no suggestion has been made that there is any reason for not allowing the disclaimer, which is allowed by the order under appeal, except the interest of the lessor as between himself and, not the bankrupt's estate, but another person by whom the lease was assigned to the bankrupt; and the proposition really comes to this, that the Court ought never to allow a disclaimer under this section where the bankrupt is the assignee of a lease and where the lessor is willing to offer such an undertaking as has now been offered to the Court. Well, that is a startling proposition to be suggested as a matter of law, and if we were to say that the Court is bound to exercise its discretion in that way it comes to laying down a law not only not discoverable from the 23rd section, but, to my mind, very inconsistent with the policy which is expressed on the face of it. For how would it work? The whole application is founded upon the

In re Clarke; ex parte East and West India Dock Co. (App.), Bankr.

apprehension that, notwithstanding the views of the effect of such a disclaimer as this, which were expressed by learned Judges, the majority of the Court in the case of *Smyth v. North*, and by at least one most eminent Judge of this Court—the late Lord Justice James, in the case of *Ex parte Walton* (1)—it may possibly be held in some other jurisdiction, that the effect of such a disclaimer as this is to relieve the original lessee, who has assigned the lease to the bankrupt, from all liabilities upon his covenants with the lessor, exactly in the same way as if there had been an actual surrender accepted by the lessor. The whole application is found upon the suggestion that it may possibly be so held, and we must, therefore, address ourselves to the alternative view: First, that view of the law which was taken by the two judges in *Smyth v. North*, and at least by Lord Justice James in this Court in *Ex parte Walton* (1); and secondly, to the hypothesis, if that view is not right. If the view taken by the majority of the Judges in *Smyth v. North* and Lord Justice James is correct—and I am certainly not going to express or intimate any opinion to the contrary—this appeal is wholly unnecessary, because the consequences apprehended would not follow from the disclaimer. But if, on the other hand, that view is not correct, then we are asked to refuse leave to disclaim solely for the purpose of leaving the bankrupt's estate under the burden of onerous covenants, and so forth, from which it would be relieved according to the express object and policy of the 23rd section if the disclaimer took place. In one view the order made and appealed from is innocuous to the appellant, and therefore ought not to be disturbed. In the other view it would be against the policy of the statute to disturb it. We cannot think that the undertaking offered is either one which the Court is upon any principle bound to be satisfied with, or that it would practically answer the purpose of the sections if the apprehension introduced by the appellant is correct, for it would in that view leave the bankrupt still under

liability to the person who made the assignment to him from which he would be relieved if the disclaimer were allowed. And with regard to the suggestion that was made that we should introduce a declaration as to the effect of a disclaimer, not *quoad* the bankrupt's estate, but as between the lessor and a third party, into our order, as the reason for affirming the order which has been made, I have only to say that, without in the least expressing or implying any opinion as to the propriety or otherwise of any declaration which may have been in any other order, it does not appear to me to be either a necessary or convenient or proper course to make, on this occasion, such a declaration as has been asked. The appeal will be dismissed with costs.

Mr. Kekewich asked for leave to appeal to the House of Lords.

THE LORD CHANCELLOR.—We all think that the appeal to the House of Lords suggested would be an appeal from the discretion of the Court, and not from the decision on a point of law, because the application of the appellant is to our discretion to prevent an order being made which in the terms of the 23rd section, apart from the rule, certainly would be authorised by law. It does not appear to us that we ought to give leave to appeal in any such case.

Solicitors—Freshfields & Williams, for appellants; Rogers & Clarkson, for the trustee; F. L. Soames, for respondent Hill; Hanbury, Hutton & Co., for respondents Truman & Co.

(1) *Ante*, p. 657; Law Rep. 17 Ch. D. 746.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.

JAMES, L.J.

BAGGALLAY, L.J.

LUSH, L.J.

1881.

May 5.

In re THORP; ex parte
TATTON.

Bankruptcy—Production of Documents—Discretion of Court—The Bankruptcy Act, 1869, s. 96.

After an adjudication in bankruptcy the bankrupt and his wife assigned by way of mortgage to N. a policy of assurance on the life of the wife, and alleged to be the separate estate of the wife. N. assigned the mortgage to W., who subsequently purchased and took an assignment of the equity of redemption from the wife. The wife died shortly afterwards. W., who had acted as the solicitor of the wife, on summons by the trustee in bankruptcy under the 96th section of the Bankruptcy Act, 1869, attended before the Court and was examined touching the bankrupt's property, but refused to produce the deeds by which the above transactions had been carried into effect. The Registrar, acting as Chief Judge, having ordered their production,—Held, on appeal, that the power vested in the Court by the 96th section was discretionary, and that the Registrar had rightly exercised such discretion.

This was an appeal from the decision of Mr. Registrar Pepys, acting as Chief Judge.

On the 6th of February, 1873, a policy of assurance for 4,700*l.* on the life of Jane Thorp, the wife of W. Thorp, and which had been effected by her previously to her marriage, was assigned to two trustees upon trust for Mrs. Thorp, her executors, administrators and assigns for her sole and separate use, as part of her separate estate, free from the debts, control and engagements of her then present or any future husband.

On the 1st of August, 1877, W. Thorp was adjudicated bankrupt.

On the 9th of October, 1877, the policy was by a deed (to which Mr. and Mrs. Thorp were parties) assigned by way of mortgage to H. Newsome. On the 24th of June, 1878, H. Newsome assigned the

mortgage to W. Tatton, who was then acting as the solicitor of Mrs. Thorp; and on the 6th of January, 1880, Mrs. Thorp assigned her equity of redemption in the policy to W. Tatton for value. Mrs. Thorp died in October, 1880. The existence of the policy and the fact of its having been mortgaged to H. Newsome having come to the knowledge of the trustee in bankruptcy, he thereupon summoned W. Tatton under section 96 of the Bankruptcy Act, 1869, to attend in the Court of Bankruptcy for examination as to the property of the bankrupt. He attended and was examined, but refused to produce the deeds of the 9th of October, 1877, the 24th of June, 1878, and the 6th of June, 1880.

The Registrar ordered them to be produced.

W. Tatton appealed.

Mr. Winslow and Mr. Dryden, for the appellant.—The mere fact that a bankrupt has executed a deed does not of itself enable the trustee under the 96th section to require its production. He cannot compel its production unless it relates to the bankrupt's trade dealings or property, and the *onus* is on the trustee to make out a *prima facie* case that it does. Here the policy was the separate property of the wife, and no sufficient ground is shown for ordering the production of these deeds, which are the title-deeds of the appellant, who was a purchaser for value. This is an attempt to obtain a fishing investigation of the appellant's title, with the view of picking a hole in it if possible.

Mr. Beddall, for the trustee.—Mrs. Thorp was an infant at the time of her marriage, and at the time she executed the deed of the 6th of February, 1873; and even if the policy was her separate estate, her husband, she being now dead, on taking out administration to her estate, will be entitled to the policy moneys; and, if it was not her separate estate, then, there being no marriage settlement, her husband is entitled to the policy moneys. In either view of the case, it would be property devolving on W. Thorp during his bankruptcy, and, if the deeds in question

In re Thorp; ex parte Tatton (App.), Bankr.

can be set aside, the trustee will be entitled to the policy moneys. I submit therefore that a good *prima facie* case has been made out for investigating the *bona fides* of the transaction under which the appellant claims the policy moneys, and that the Registrar, in exercising his discretion under the 96th section, had sufficient grounds for ordering the production of these deeds, and that this Court will not interfere with his decision.

Mr. Winslow, in reply.

JAMES, L.J., said—The 96th section of the Bankruptcy Act gives the Court jurisdiction, “on the application of the trustee, at any time after an order of adjudication has been made against a bankrupt, to summon before it the bankrupt, or his wife, or any person whatever known or suspected to have in his possession any of the estate and effects belonging to the bankrupt, or supposed to be indebted to the bankrupt, or any person whom the Court may deem capable of giving information respecting the bankrupt, his trade dealings or property, and the Court may require any such person to produce any documents in his custody or power relating to the bankrupt, his dealings or property.” Now no doubt that is a very unusual power, and it should be exercised with discretion. It appears to me that these are deeds which the trustee ought to see, and the production of which will do the appellant no harm. *Prima facie* this policy was at one time the property of the husband, but it is alleged to have been the separate property of the wife, and the question whether or not it now belongs to the trustee in bankruptcy is a question to be raised and decided hereafter. In my opinion the trustee has a right to ask, What are the circumstances under which you allege that this policy has not become the property of the bankrupt? I think that the Registrar exercised his discretion rightly.

BAGGALLAY, L.J., said—I am of the same opinion. The language of the section is wide enough to cover this order, and the circumstances sufficiently justify the Registrar in making it. There is no

ground for saying that the appellant will be prejudiced by production of these deeds.

LUSH, L.J.—I am of the same opinion.

Solicitors—W. Tatton, for appellant; Lumley & Lumley, for the trustee.

N THE COURT OF APPEAL]

JESSEL, M.R.	} WHEELER v. LE MARCHANT.
BRETT, L.J.	
COTTON, L.J.	
1881.	
April 6.	

Practice—Discovery and Production of Documents—Protection.

The principle of protecting confidential communications is of a limited character, and is confined to communications which take place for the purpose of obtaining legal advice from professional persons. That principle is not to be extended to protect communications made by a third party to a solicitor for the purpose of enabling the solicitor to give legal advice to his client in a matter as to which no dispute has arisen and no litigation is pending or contemplated.

Production ordered of letters between the solicitors of the defendants and their surveyor, and between the surveyor and the solicitors, except such (if any) as the defendants should state by affidavit to have been prepared confidentially after dispute had arisen between the plaintiff and the defendants, and for the purpose of obtaining information, evidence or legal advice with reference to litigation existing or contemplated between the parties to the action.

This action was brought to compel the specific performance of a building agreement between the plaintiff, a contractor, and the defendants, owners of an estate at Willeeden, and trustees of the will of a Mr. Brett. His estate was being

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administered in an action of *Brett v. Le Marchant*.

The defendants, in answer to the usual order for production of documents in their possession, filed an affidavit in which they declined to produce the documents contained in the second part of the schedule to the affidavit, "on the ground that many of them consist of [instructions and briefs to counsel, with their opinions, notes and observations and indorsements thereon, and orders and copies and drafts of orders and other documents all in the matter of *In re Brett's Estate; Brett v. Marchant*, in which the estate of our testator, George Arthur Brett, deceased, is being administered under the direction of the Chancery Division of the High Court of Justice; and the remainder of such documents consists of confidential correspondence between ourselves and our former solicitors, Messrs. Bolton, Robins & Busk, and our present solicitors, Messrs. Gregory, Rowcliffes & Co., and our former estate agent and surveyor, Mr. Wilkinson, and his agent, Mr. Kempthorne, and our present agent and surveyor, Mr. Alderman Ellis, and between such solicitors and agents;] and drafts and originals of instructions to counsel and counsel's opinion thereon, accounts and other documents in this action, which were prepared and written for the purpose of our defence to this action, and all of which documents are privileged from production."

The plaintiff took out a summons for the production of such of the documents mentioned above as are comprised within the brackets.

Bacon, V.C., refused the summons with costs.

The plaintiff appealed.

Mr. Davey and *Mr. Seward Brice*, for the appellant.

Mr. Marten and *Mr. Hadley*, for the defendants.

The following authorities were referred to:—

McCormac v. Bell, 45 Law J. Rep. C.P. 329; Law Rep. 1 C.P. D. 471;

Lafone v. The Falkland Islands Com-

pany, 4 Kay & J. 34; 27 Law J. Rep. Chanc. 25;

Herring v. Olobery, 1 Ph. 91; 11 Law J. Rep. Chanc. 149;

Lawrence v. Campbell, 4 Drew. 485; 28 Law J. Rep. Chanc. 780;

Macfarlan v. Rolt, 41 Law J. Rep. Chanc. 649; Law Rep. 14 Eq. 580;

Wilson v. The Northampton and Banbury Junction Railway Company, Law Rep. 14 Eq. 477;

Minet v. Morgan, 42 Law J. Rep. Chanc. 627; Law Rep. 8 Chanc. 361;

Walsham v. Stainton, 2 Hem. & M. 1;

Coesey v. The London, Brighton and South Coast Railway Company, 39 Law J. Rep. C.P. 174; Law Rep. 5 C.P. 146;

Friend v. The London, Chatham and Dover Railway Company, 46 Law J. Rep. Exch. 696; Law Rep. 2 Ex. D. 439;

Lord Walsingham v. Goodricke, 3 Hare, 122;

Manser v. Diaz, 1 Kay & J. 451; 24 Law J. Rep. Chanc. 497;

Mostyn v. The West Mostyn Coal and Iron Company, 34 Law Times, N.S. 531;

The Southwark and Vauxhall Water Company v. Quick, 47 Law J. Rep. Q.B. 258; Law Rep. 3 Q.B. D. 315;

Hooper v. Gumm, 2 Jo. & H. 602;

Ross v. Gibbs, 39 Law J. Rep. Chanc. 61; Law Rep. 8 Eq. 522;

Turton v. Barber, 43 Law J. Rep. Chanc. 468; Law Rep. 17 Eq. 329.

JESSEL, M.R.—As regards the main question in dispute this appears to me an attempt on the part of the present respondents to extend the rule as to protection from discovery.

It was fairly admitted by the counsel for the respondents that no decided case could be produced which would carry the rule to the extent they wished it carried; but they said that, as a matter of principle, it should be so extended. What

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they said was this, that documents communicated to the solicitors of the defendants by third parties, but not communicated by such third parties as agents of clients seeking advice, should be protected, because those documents contained information required or asked for by the solicitors, for the purpose of enabling them the better to advise the clients. The cases, no doubt, go so far as to protect such documents, where they have come into existence after litigation commenced or threatened, or in contemplation, and when they have been made with a view to such litigation, either for the purpose of actually obtaining evidence to be used in such litigation, or of obtaining information which might lead to the discovery or obtaining of such evidence; but it has never hitherto been decided that documents produced by a third party merely in answer to an enquiry by the solicitor, as in this case by a surveyor or estate agent, are privileged from production.

It does not appear to me to be necessary either upon the true consideration of the principle which regulates this privilege, or for the purpose of the convenience of mankind, so to extend the rule. In the first place, what is called the principle is of a very limited character. It does not protect all confidential communications which a man must necessarily make in order to obtain advice, even when necessary for the protection of his life or of his honour, to say nothing of his fortune. There are many communications which must be made, because without them the ordinary business of life cannot be carried on, and yet they are not protected. As I have said in the course of the argument, the communication made to a medical man, whose advice is sought by a patient, with respect to the probable origin of the disease as to which he is consulted, and which must necessarily be made in order to enable the medical man to advise or to prescribe for the patient, is not protected. Communications made to the priest in the confessional, on matters perhaps considered by the penitent to be more important even than the care of his life or his fortune, are not

protected. Communications made to a friend with respect to matters of the most delicate nature, on which advice is sought with respect to a man's honour or reputation, are not protected. Therefore it must not be supposed that there is any principle which says that every confidential communication which, in order to carry on the ordinary business of life, must necessarily be made, is protected. The protection is of a very limited character. It is a protection in this country restricted to the obtaining the assistance of lawyers, as regards the conduct of litigation or the rights to property. It has never gone beyond the obtaining legal advice and assistance; and all things reasonably necessary in the shape of communication to the legal advisers are protected from production or discovery, in order that that legal advice may be obtained safely and sufficiently.

Now, keeping that in view, what has been done is this. The actual communication to the solicitor by the client is, of course, protected, and it is equally protected whether that communication is made by the client in person or by an agent on behalf of the client, and whether made to the solicitor in person or to a clerk or subordinate of the solicitor, who acts in his place and under his direction. Again, with the same view, the evidence obtained by the solicitor, or by his direction, or at his instance, even if obtained by the client, is protected if obtained after litigation has been commenced or threatened, or with a view to the defence or prosecution of such litigation. So, again, it does not matter whether the advice is obtained from the solicitor as to a dealing which is not the subject of litigation. What is protected is the communication necessary to obtain legal advice. It must be a communication made to the solicitor in that character and for that purpose. But what we are asked to protect here is this: The solicitor being consulted in a matter as to which no dispute has arisen, thinks he would like to know some further facts before giving his advice, and applies to a surveyor to tell him what the state of a given property is, or information of that

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character, and it is said that information given in answer to such application ought to be protected because it is desired or required by the solicitor in order to enable him the better to give legal advice. It appears to me that is not only extending the rule beyond what has been previously laid down, but beyond what necessity warrants. It has never yet been found in practice—and the rule as to protection is now very old—that these documents require protection. The idea that these documents require protection is one which has been started, if I may say so, for the first time to-day; and I think the best proof that the necessities of mankind have not been supposed to require this protection is that it has never been asked. It seems to me that we ought not to carry the rule any further than it has been carried. It is a rule invented and maintained only for the purpose of enabling a man to obtain legal advice with safety. That rule does not, in my opinion, require to be carried further, and therefore I think this appeal ought to be allowed.

BRETT, L.J.—The proposition laid before us for approval is, that where one of the parties to an action has in his possession or control documents which passed between his solicitor and third parties, and which contain either information or advice, those documents are protected in his hands from inspection on the ground that they are documents which passed between the solicitor and the third party for the purpose of enabling the solicitor to give legal advice to his client, although such information and advice was obtained by the solicitor for that purpose at a time when there was no litigation pending between the parties nor any litigation contemplated. It seems to me that that proposition cannot be acceded to. It is beyond any rule which has ever been laid down by the Court, and it seems to me that it is beyond the principle of the rules which have been laid down. The rule as to the non-production of communications between solicitor and client is a rule which has been determined upon as a matter of general or public policy. It is confined

entirely to communications which take place with a view to obtaining legal advice from professional persons. It is so confined in terms, it seems to me it is so confined in principle, and it does not extend to the suggested case.

It was said, however, that there were two cases which gave colour to, although they were not absolute decisions in favour of, the proposition. One was the case of *Mostyn v. The West Mostyn Coal Company*. When that is looked at it gives no colour at all to the present suggestion. The other case was the case of *Wilson v. The Northampton and Banbury Junction Company*, before Vice-Chancellor Malins. I think that, probably inadvertently, some documents were shut out from production in that case, which were of such a character that, if the decision really intended to shut them out, it might give colour to the proposition now contended for. But if that is so in that case, with deference, I think that case was wrong.

There is no authority and there is no principle which obliges us to extend the doctrine to the extent now contended for.

COTTON, L.J.—The only contest here is whether the plaintiff can compel the defendants to produce certain communications which took place between the solicitor of the defendants and their surveyor, and between the surveyor and the solicitor. We are asked to do so.

Now I must confess myself that there is a little difficulty in my mind in dealing with the matter, because we do not know, there being no decided case admittedly on the point, in what way the defendants intend to put their claim for protection. We have not an affidavit by them, stating the exact circumstances under which these communications passed, or on what ground they seek to protect them. It is put, as I understand, in two ways. It is said, communications between a client and his legal advisers, for obtaining legal advice, are privileged; and therefore any communication between the representatives of the client and the solicitor must be also privileged. That is a fallacious use of the word "representatives." If the representative is a person employed as an agent on the part of the

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client to obtain the legal advice of the solicitor, of course he stands in exactly the same position, as regards protection, as the client, and his communications with the solicitors stand in the same position as the communications of the principal with his solicitor. But these persons were not representatives in that sense. They were representatives in this sense, that they were employed on behalf of the clients, the defendants, to do certain work, but that work was not the communicating with the solicitors to obtain legal advice. So their communications cannot be protected on the ground that they are communications between the client by his representatives and the solicitor.

In fact, the proposition of the defendants comes to this, that all communications between a solicitor and a third person, in the course of his advising his client, are to be protected.

It was conceded that there was no case that went that length, and the question is, whether we ought, in fully developing the principle, with all reasonable consequences, to protect such documents. Hitherto such communications have been protected only when they have been made in contemplation of some litigation, or for the purpose of giving advice or obtaining evidence with reference to it. And that is reasonable, because then the solicitor is preparing for the defence, or for bringing the action and all communications he makes for that purpose, and the communications made to him for the purpose of giving him the information are, in fact, the brief in the action, and ought to be protected.

But here we are asked to extend the principle to a very different class of cases, and it is not necessary, in order to enable persons freely to communicate with their solicitors and obtain their legal advice, which is the foundation of the rule, that any privilege should be extended to communications such as these, even assuming they are, and the defendants could so state on oath, communications between the solicitor and third parties (for they must be treated as third parties), whilst he was advising his client, and with a view to the matter on which he had to advise his client.

In my opinion, the plaintiff is entitled to have production of these documents, as to which the contest has arisen.

The order made was as follows :—

Order for production of the documents of which the plaintiff claims production, except such (if any) as the defendants shall state by affidavit to have been prepared confidentially after dispute had arisen between the plaintiff and defendants, and for the purpose of obtaining information, evidence or legal advice with reference to litigation existing or contemplated between the parties to this action.

Solicitors—Boxall & Boxall, for appellant;
Gregory, Rowcliffes & Co., for respondents.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.
SELBORNE, L.C. }
BRETT, L.J. }
COTTON, L.J. }
1881.

*In re BANNISTER ;
ex parte VALE.*

July 15, 16, 29.)

Judgment Creditor—Elegit—Notice of Act of Bankruptcy after Seizure but before Inquisition — Protected Transaction — Act of Bankruptcy — The Bankruptcy Act, 1869, ss. 6 (sub-s. 5), 87, 95 (sub-s. 3).

A delivery of goods seized by the sheriff under an elegit, to the execution creditor at the value appraised by the jury, is a sale within the meaning of sub-section 3 of section 95 of the Bankruptcy Act, 1869; and such a seizure and sale, when perfected, without notice of any act of bankruptcy committed prior to the seizure, is a protected transaction.

This was an appeal from the decision of Mr. Registrar Murray, acting as Chief Judge in Bankruptcy.

On the 29th of December, 1880, a petition in bankruptcy was presented against G. Bannister, a trader, grounded on an

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act of bankruptcy committed by him on the previous 15th of December, and the hearing of the petition was adjourned to the 25th of January.

In the meantime the Retford and Bas-setlaw Loan and Investment Company brought an action and recovered judgment on the 21st of January, 1881, against G. Bannister for 300*l.* and costs.

On the 22nd of January the company issued a writ of *elegit*, under which the sheriff on the 24th of January seized goods of Bannister.

On the 25th of January the hearing of the bankruptcy petition was again adjourned to the 15th of February, when adjudication took place.

On the 2nd of February G. Bannister filed a liquidation petition.

On the 10th of February the sheriff held an inquisition under the writ of *elegit*, and the goods that had been seized were delivered at their appraised value to the company in satisfaction *pro tanto* of their judgment debt and costs.

At the time of the seizure and inquisition the company had no notice of the act of bankruptcy committed on the 15th of December, nor of the proceedings under the bankruptcy petition; but they had notice of the liquidation petition, on the 5th of February.

The trustee in bankruptcy claimed the goods that had been delivered to the company under the writ of *elegit*, on the ground that the transaction was not protected by the 95th section (sub-section 3) of the Bankruptcy Act, 1869.

The Registrar held that the transaction was protected. The trustee appealed.

Mr. E. O. Willis and *Mr. J. A. B. McConnell*, for the appellant.—Assuming that the judgment creditor had no notice of any act of bankruptcy when the inquisition took place under the *elegit*, still it was not a protected transaction, because it was not an execution perfected by seizure and sale within the meaning of the 95th section. The same words occur in the 87th section, and have been held not to apply to a writ of *elegit*—

Ex parte Abbott, Ante, p. 80; *Law Rep.* 15 Ch. D. 447.

That decision governs this case. Further, the delivery of goods by the sheriff under the *elegit* to the execution creditor at the value appraised by the jury is not "a sale" within the meaning of the 3rd sub-section of the 95th section. The word "sale" in that sub-section means such a sale as is contemplated by the 87th section, namely, when money is paid to the sheriff as the price of the goods. The mere delivery of the goods in satisfaction of the debt is not a sale. Lastly, even if proceedings under an *elegit* are equivalent to a sale, yet the creditor had notice of the liquidation petition before the inquisition took place. It is true that in

Ex parte Schulte, *Law Rep.* 9 Chanc. 409,

Mellish, L.J., held that the act of bankruptcy intended by the 95th section was an act of bankruptcy committed prior to the seizure. But the section says "any act of bankruptcy." We submit, therefore, that that *dictum* of *Mellish, L.J.*, is wrong, and must be overruled.

Mr. Channell, for the judgment creditor.—The 87th section does not apply at all, and it differs from the 95th section in this, that under the 87th section the sale must be one by which the proceeds come into the hands of the sheriff, but under the 95th section the sale need not be one in which money must come into the hands of the sheriff. The question is, whether what was done under the *elegit* was a "seizure and sale" within the 95th section. I submit it was. The inquisition was a sale. What the sheriff has to do is to "deliver the goods to the creditor at a reasonable price." That is the usual form of the writ. Then the jury assess the price, and thereupon the goods become the proper goods of the creditor, but the price is not paid to the sheriff, but is assessed in money, and is set off in account in settlement and payment of the debt. I submit that such a proceeding is undoubtedly a sale. *Blackstone's* definition of a sale is "a transmutation of property in consideration of some price." Those words apply to this transaction. Then, as to what act of bank-

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ruptcy will defeat the title thus acquired by an execution creditor, the guiding words of the section are "any prior act of bankruptcy," and mean any act of bankruptcy committed prior to the seizure under the *elegit*, and available for adjudication, and not any act of bankruptcy committed subsequent to the seizure—

Ex parte Villars, 43 Law J. Rep. Bankr. 76; Law Rep. 9 Chanc. 432;

Ex parte Rock, 40 Law J. Rep. Bankr. 70; Law Rep. 6 Chanc. 795;

Ex parte Schulte (ubi supra).

Mr. E. O. Willis, in reply.—The whole point is this, that the word "sale," which occurs in the 6th section (sub-section 5), the 87th section, and the 95th section (sub-section 3) of the Bankruptcy Act, 1869, means a sale under which money is handed over to the sheriff. A seizure under an *elegit* is perfected by an inquisition and handing over of goods, and has never been held to be an act of bankruptcy. I submit that an *elegit* was not in the contemplation of the Legislature when the Act was passed.

Our. adv. vult.

The judgment of the Court was (on July 29) delivered by

THE LORD CHANCELLOR.—The question in this case is, whether an execution creditor, to whom goods of the bankrupt were appraised, and delivered by the sheriff under a writ of *elegit*, issued subsequently to the act of bankruptcy on which the adjudication was founded, but before the adjudication, is protected by the 95th section of the Bankruptcy Act of 1869 (sub-section 3), against the title by relation of the trustee in bankruptcy. The decision of the Registrar was in favour of the execution creditor, and the appeal is by the trustee against that decision. The 95th section does not protect the creditor unless the execution had been "executed in good faith by seizure and sale before the date of the order of adjudication," nor if the creditor "had at the time of the execution being exe-

cuted by seizure and sale notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication." The title of a creditor to whom at his election goods seized at an *elegit* are appraised and delivered by the sheriff is by the statute 13 Edward 1. c. 18, and not by contract. But the effect of the delivery is to transfer the ownership of the goods from the debtor to the creditor, at a price ascertained by the appraisement, so that, if substance is regarded, it is equivalent to a sale to the creditor under a *fiery facias* or sequestration. In *Ex parte Abbott* it was held that such a delivery of goods under an *elegit* was not a sale within the meaning of section 87 of the Act of 1869. The introductory words of that section, "where the goods of any trader have been taken in execution in respect of a judgment for a sum exceeding 50*l.* and sold," were held to be limited by the subsequent context to sales under which the sheriff (or the proper officer of a County Court) would be entitled to receive the proceeds of sale. If there had been no section in the Act material to this question except the 87th and the 95th (the latter of which is expressly made subject to the provisions of the former) I should have doubted whether the word "sale" in the latter section ought to be extended to any mode of transferring the property in goods under an execution or attachment which was not within the word "sold," as used in the former, especially as a statutory transfer by *elegit* is not, either in the statute from which its effect is derived, nor (as far as I know) in the technical language described as a sale. But this Act of Parliament also contains the 6th section, defining as one of the acts of bankruptcy on which a petition for adjudication may be founded, "execution issued against the debtor on any legal process, for the purpose of obtaining payment of not less than 50*l.*," if "levied" (in the case of a trader) "by seizure and sale of his goods." I think that the meaning of these words in the 95th and the 6th sections must be the same, and I am not prepared to put so limited and technical a construction upon

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the 6th section as the appellant's argument requires. Upon this point, therefore, I do not differ from the opinion of the Court below. The other point as to notice arises in this way. The creditor in this case had notice before the sale (assuming the delivery under the *elegit* to have been a sale), though not before the seizure under that writ, of an "act of bankruptcy committed by the bankrupt and available against him for adjudication," not, indeed, of that act of bankruptcy (prior to the seizure) on which the adjudication proceeded, but of a later act of bankruptcy—namely, the presentation of a petition for liquidation, which, at the time of the (assumed) sale, was available against the debtor for adjudication. If this point had been free from authority I should have felt much difficulty in limiting by construction words which, in their natural sense, seem to comprehend notice at any time before seizure has been followed by sale of any act of bankruptcy "committed by the bankrupt and available against him for adjudication." This notice would not deprive the execution creditor of any right which he would have had otherwise than by the protection conditionally given to him by this 95th section. If, without that protection, the adjudication would not have overreached his title, it would not overreach it by reason of his having had such notice. That the Legislature might have intended to leave the adjudication to have its ordinary legal effect if, at any time before the execution was perfected by sale, the creditor had notice of any act of bankruptcy available against the debtor for adjudication (whenever committed), would not have seemed to me more improbable or less reasonable than the express provisions of the 87th section, to which (in the case of a trader) the 95th section is subject. But the point is not, in fact, free from authority. Under the earlier statute (12 & 13 Vict. c. 106. s. 133) it was decided in *Edwards v. Scarsbrook* (1) that the creditor was not deprived of the protection thereby given by notice

before sale under a *fi. fa.* of an act of bankruptcy committed by the debtor after the goods were in the hands of the sheriff, on which act of bankruptcy a petition (resulting in adjudication) was presented after the sale. The section there construed differed in several respects (which do not seem to me to be unimportant) from the 3rd sub-section of section 95 in the Act of 1869. But in *Ex parte Rock* Lord Hatherley and Lord Justice Mellish appear to have considered those differences immaterial. The circumstances of that case did not require the point to be determined. But it again arose in *Ex parte Schulte*, and Lord Justice Mellish, while deciding against the execution creditor upon another ground, held that the notice mentioned in the 3rd sub-section of section 95 in the Act of 1869 was only notice of an act of bankruptcy prior to the seizure, relying for that purpose rather upon what he inferred (upon grounds which he thought probable and reasonable) to be the intention of the Legislature than upon any direct examination or criticism of the words of the statute. In the state of authority, it is the opinion of my learned brothers (in which I, not without some hesitation, acquiesce) that, if the construction of the statute adopted by Lord Justice Mellish in *Ex parte Schulte* is wrong, it is for a higher tribunal, and not for this Court, to say so. The present appeal, therefore, must be dismissed, and the costs will follow the event.

Leave to appeal to the House of Lords was granted.

Solicitors—G. B. B. Norman, for respondent;
Allen & Son, agents for Newton, Jones & Champion, East Retford, for appellant.

JESSEL, M.R. }
1881.
Jan. 18, 25. }

FREME v. CLEMENT.

Settlement—Power of Appointment—Appointment by Will—Wills Act (1 Vict. c. 26)—Power Created before, Executed after, Wills Act—Residuary Appointment embracing previous Void Appointment—Meaning of word “Devise” in Wills Act.

Any deed or will executing a special or general power of appointment will be construed, as to its execution and otherwise, according to the rules for the time being applicable to an ordinary deed or will disposing of property, and this rule will apply although the power may have been created before, but the deed or will executing the same may have been executed after a change in the law relating to the construction and execution of instruments exercising powers of appointment.

Thus, where a power to appoint by will was created before the Wills Act, but exercised subsequently to the passing of that Act,—

Held, that the instrument exercising the same must be executed and construed according to the rules applicable under that Act relating to the execution and construction of an ordinary will.

The word “devise” in the Wills Act will include a devise by way of appointment under a special or general power to appoint real estate by will.

Thus, where a testator made a will in execution of a special power of appointment, a devise of real estate by way of appointment which was void was held, by reason of section 25 of the Act, to fall into the residuary devise in the will to an object of the power.

Under an indenture of release of the 15th of May, 1822, being a post-nuptial settlement, executed in pursuance of an ante-nuptial agreement on the marriage of William Purser Freme and Anna Tryphosa Freme, certain real estate belonging to Mrs. Freme was conveyed to trustees upon trust after the death of the survivor of William Purser Freme and Anna Tryphosa Freme for all or any of the children, grandchildren or other issue of the marriage, for such estate and

estates, interest and interests, and generally in such manner as William Purser Freme should by deed or by will appoint; and, in default thereof, in trust for the child, if only one, or, if more than one, in trust for all the children of the marriage equally, living at the death of the survivor of the husband and wife, and the issue of any of them who might be dead, such issue standing *in loco parentis*, and to become vested as therein mentioned.

Anna Tryphosa Freme predeceased William Purser Freme, who died in September, 1878.

They had four children, namely, John Rowden Freme, who died in the lifetime of his father without issue; the plaintiff James Freme; the defendant Anna Tryphosa Dobb Clement, and Mary Julia O'Grady, who died in the lifetime of William Purser Freme, leaving two children, the defendants Anne Helenor Hall and Ellen Elizabeth Lloyd.

William Purser Freme commenced his will, dated the 27th of February, 1877, as follows: “This is the last will and testament of me, William Purser Freme, . . . and which will I declare shall be an exercise of any power of appointment vested in me, and shall be subject to the trusts of my marriage settlement.” The testator then devised certain hereditaments—being part of the real estate subject to the above settlement—to his son, James Freme, for life, with remainder to the children of the said James Freme as he the said James Freme should by deed or will appoint, and, in default of such appointment, amongst all the children of the said James Freme who, being a son, should attain the age of twenty-one years, or, being a daughter, should attain that age or marry under that age, equally between them; and after other gifts he devised “all his real and personal estate not thereinbefore disposed to the said James Freme absolutely.”

The testator was entitled to other real estate besides that comprised in the settlement.

An action was commenced by James Freme against the said A. T. D. Clement, Anna Helenor Hall and Ellen

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Elizabeth Lloyd, and their husbands, the plaintiff's infant children, and the trustees of the settlement and W. P. Freme's will, for a declaration (*inter alia*) that the will of W. P. Freme was an execution of the above powers of appointment, and to have the rights of the parties ascertained.

The action now came on upon motion for judgment, and the first question argued was one of construction of the will—whether the testator had indicated an intention that his will should operate as an exercise of the testamentary power of appointment in the settlement of 1822; and on this question his Lordship held that the will, including the residuary devise, was an intended exercise of the power and was valid as such, except as to the devise in remainder in favour of James Freme's children, which he held to be, and which was admitted at the bar to be, a void appointment as too remote.

The question was then argued whether the subject of the void appointment in remainder passed under the residuary devise or appointment to the plaintiff James Freme, or whether it passed as in default of appointment under the settlement—that is, in thirds to the plaintiff, his sister, the defendant A. T. D. Clement, and the children of his deceased sister.

Mr. Davey and *Mr. C. Stewart*, for the plaintiff.—There does not appear to be any authority on the point, but we submit, on principle, that a will executing a power should be construed in precisely the same way as an ordinary will, irrespective of its being an appointment, and according to the rules of construction applicable to a will—

Sugden on Powers (8th ed.), p. 442;

The Duke of Marlborough v. Lord Godolphin, 2 Ves. sen. 61.

According to that view the provisions of the Wills Act in operation at the time of the will being executed, though not when the settlement was executed, must be considered. By section 51 of that Act (1 Vict. c. 26), the word "will" "shall extend to an appointment by will or by writing in the nature of a will in exercise of a power"; so that we submit

that the present "appointment by will" must be read as a will, and as such subject to the rules of construction in the Act.

By section 24 the will is to speak from the death, and in

Stillman v. Weedon, 16 Sim. 26;

18 Law J. Rep. Chanc. 46,

by reason of the 24th and 27th sections, a residuary bequest to the testator's children was held to be a good execution of a power of appointment among children, and there the will was made before the creation of the power.

Section 25 provides that, unless a contrary intention appears, real estate comprised in a devise "which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise." If "devise" includes an appointment, that section clearly applies to the present case.

The words of section 28, we submit, also shew that a general devise will include an appointment by will under a power.

It has been held that section 33 applies to a testamentary appointment—

Eccles v. Cheyne, 2 Kay & J. 676.

That case is opposed to

Griffiths v. Gale, 12 Sim. 354; 13

Law J. Rep. Chanc. 286;

but the latter case Lord St. Leonards—

Sugden on Powers (8th ed.), p. 463—considers wrongly decided.

As to personal estate, it has been held that if a legacy is appointed under a limited power and the appointment fails, the legacy falls into the residuary gift if the residue is given to the objects of the power, and there is an intention to dispose of the fund subject to the power—

Falkner v. Butler, Amb. 514;

Oke v. Heath, 1 Ves. sen. 135;

In re Harries's Trust, John. 199;

In re Meredith's Trusts, Law Rep.

3 Ch. D. 757;

and

Champney v. Davy, 48 Law J. Rep.

Chanc. 268; Law Rep. 11 Ch. D.

949;

where Hall, V.C., considered that a will executing either a special or general

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power ought to be construed in the same way as a will operating by way of devise or bequest. We submit there is nothing as regards the exercise of powers to shew there should be any difference in construing them as between real and personal estate—

In re Van Hagen, Ante, p. 1; Law Rep. 16 Ch. D. 18.

We submit on the whole that the will shews an intention to appoint all the property subject to the power, and accordingly that the residuary devise or appointment, in accordance with the ordinary rule applicable to a will, will pass any property comprised in a prior gift or appointment which has failed.

Mr. Macnaghten and *Mr. J. H. Redman*, for the defendant *Mrs. Clement*, the plaintiff's sister.—We submit that although by force of the Wills Act a general devise or bequest will operate as an exercise of a general power of appointment, it is otherwise as to a limited power. This is the opinion of Lord St. Leonards—see

Sugden's Real Property Statutes (2nd. ed.), p. 378.

We also submit that the will is not an exercise of the power, as it must be construed in accordance with the law at the time the power was created, and the will is not executed according to the law in force at that time.

Mr. W. Barber, for the defendants, the children of the plaintiff's deceased sister.

Mr. Northmore Lawrence, for the trustees of the settlement.

Mr. L. Field, for the trustees of *W. P. Freme's* will.

THE MASTER OF THE ROLLS.—The case before me appears, as far as I know, and as far as the researches of counsel—who have assisted me to the utmost of their ability upon the present occasion—have gone, to raise an entirely new point. Therefore, according to my mode of dealing with a novel question, I must decide it upon principle—that is, on principle to be extracted from former decisions, from the general rules of the Court, and from the nature of the law.

I will first of all consider what the nature of a power of appointment is; for,

oddly enough, in deciding what the principle governing this case is, we come back to first principles. A power of appointment is a power of disposition given to a person, over property not his own, by some one else, who directs the mode in which that power shall be exercised by a particular instrument. I consider that the donor of the power must mean it to be exercised according to the law governing that particular instrument. If therefore it is a power to be exercised by deed or will, in my opinion it must be exercised, if by deed, by an instrument executed in the mode in which the law requires a deed to be executed—that is, signed, sealed and delivered; and it must also, when executed, be subject to the law which governs the construction of a deed. It must be in all respects a deed, and be treated in all respects as a deed; so that if there were a power to appoint a freehold estate by deed, and a person exercising the power simply appointed it to A B, without the necessary words of limitation superadded, A B would take for life only. If, on the other hand, the power was exercisable by will, and assuming for this purpose the power to have been created after the passing of the Wills Act, then the appointment in the same words would give the fee-simple. I state that by way of an illustration. I think, therefore, that the instrument exercising the power is to be dealt with in all respects precisely in the same way as if it were an ordinary instrument disposing of the appointor's own property. That makes the whole thing intelligible, and is exactly in accordance with the view expressed by a very eminent Lord Chancellor—namely, that where the appointor intends the property to be appointed by a given instrument, he means the whole law applicable to that instrument to apply. If that is so, this will follow, that in construing the instrument of appointment all the rules applicable to limitations by a similar kind of instrument will apply.

Now to take another illustration—not to multiply them; a gift even under the old law to A and his issue by deed would not create an estate tail. I am speaking, of course, of freehold estate.

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If the power was to appoint by deed or will, and the donee of the power executed a deed appointing to A and his issue, A would not take an estate tail; whereas, if he executed a will appointing in the same words, A would. They are the same words in both cases, but occur in different instruments, so that I think it may be taken to be a general rule of law that the law governing the instrument, both as to execution and construction, will govern it when it is an appointment.

Taking, then, that as a general principle, I now come to the very curious point which arises in this case. Supposing the instrument creating the power is dated before an alteration in the law as to the construction or mode of execution of instruments exercising powers, as in this particular instance, the instrument creating the power being dated a great many years before the passing of the Wills Act, and the power being exercisable by deed or will, what would be the effect of an alteration of the law on the mode of execution or construction of the instrument exercising the power? I will first take the execution. Suppose the law were altered, as it has in fact been altered, as to execution of the instrument when testamentary. A will of real estate formerly required three witnesses, but now requires two. Suppose the power was to be exercised by will, could it have been said that a will executed as a will was required to be executed—that is, attested by two witnesses—was not a will? What does the word “will” mean? Must it not mean a will according to the law in force at the time of the appointment? I think that is the meaning of it. A man who gives a power to appoint by deed or to appoint by will must mean a deed or will according to law, if he says no more, and provides no particular means of execution or attestation of such an instrument. And it seems to me that if the law changes, the law to be applied must be the law of execution at the time of the exercise of the power, for that is the period which is pointed out by the settlor. The appointment is to be by deed or will—that is, appointed by an instrument answering the description at the time the appointment is made. For

instance, there may be wills, as, in fact, there were, of personal estate not requiring attestation, and which would yet be capable of passing property subject to a power of appointment, but then the law may change and require attestation. Supposing, then, a man purports to make an appointment by an unattested will after the change in the law, the question is, Is it a will? The answer is, It is not a will at the time of the appointment, and therefore an unattested instrument will not operate as an appointment. That appears to me to get rid of what at first sight seemed to be a difficulty in the present case.

Then, is there any difference between the rules applicable to construction and the rules applicable to execution? I think not. If a change takes place in the law—supposing I am right in my general view that an instrument executing a power is to be an instrument executed according to the existing law affecting instruments of a like nature—the same rule would apply to an instrument executed after the change of the law as regards its construction which applies as regards its execution. It seems to me, therefore, that, according to principle, the proper mode of dealing with an instrument executing a power is to construe it exactly like an instrument of the same character disposing of the property. If that is so, then it follows that the Act of Parliament which now makes a void devise fall into the residue applies whether the power be a special power or a general power, provided one can find, as I have found in this will, an intention to execute the power by the gift in the residuary clause.

But then arises another question—namely, whether the Act of Parliament has itself altered the law as regards appointments, independently of those considerations, because those considerations assume that the Act of Parliament has merely altered the law as regards the execution and attestation of wills disposing of the testator's own property, and is entirely silent as to the exercise of a power of appointment. It appears to me that this second question as to whether the Act of Parliament provides for the matter or not is one of very great

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difficulty, and I am free to confess that it has presented more difficulty to my mind than the first question. On the whole, after having read the Act of Parliament very carefully, and having heard the comments of counsel upon it, my opinion is that the Act does itself effect such an alteration in the law. I agree that the Act is not as well framed as it might have been, and there are difficulties in every possible mode of construction; still there are guides that often help one in arriving at a conclusion as to the effect of an Act of Parliament, namely, general principles.

In the first place, this is an Act for the amendment of the law with regard to wills—that is, all wills; as much wills made in the exercise of a power of appointment as any other wills. That is quite plain from the 1st section, which says, “The word ‘will’ shall extend to a testament and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power.” Therefore there is no doubt that the words actually amend the law generally.

We have found that the Act certainly applies to testamentary appointments, as well as to what I call by distinction wills, although they are both wills—for a will in exercise of a power is as much a proper will as any other will; and seeing that the Act applies to both, the next question to be considered is this: What could the intention of the Legislature have been? They provide an amendment of the law as regards execution and construction. Can it be supposed for a moment that it was not intended that the same rules of execution and construction should apply to a will in exercise of a power as to a will not in exercise of a power? Is it reasonable to imagine that the Legislature enacted one set of rules for the construction of the same instrument when it operates as a disposition of the testator's own property, and another set of rules when it operates as the exercise of a power? Take the simple instance I have mentioned as an illustration. Is it to be supposed that the Legislature, knowing that the word “heirs” or similar words of limitation were constantly omitted from wills, al-

though the testator intended the object of his bounty to take the fee-simple of the freehold estate, and having, therefore, provided that in future a gift without words of limitation of the testator's own freehold property should pass the whole fee-simple if he had it, should have left a different rule to be applied as to the exercise of a power of appointment, the same slip occurring in a will in exercise of a power as habitually and frequently as in a proper will? It is hardly conceivable that such could have been the deliberate intention of the Legislature, and therefore, if this has really happened, according to the true construction of the Act of Parliament, it is clearly a case omitted by mistake or misadventure. But, as I have very frequently said, if we can fairly construe an Act so as to carry out what, from the nature of the case, must obviously have been the intentions of the Legislature, although the words may be a little difficult to deal with, and although they may possibly admit of more than one interpretation, we ought to adopt that interpretation which will make the law uniform and will remedy the evil which prevailed in all the cases to which the law can be fully applied.

There is another observation to be made, and that is this: I have said at other times, and in another place, that it is not desirable at the present day to multiply the artificial distinctions between real and personal estate, and the Act of Parliament in question is exactly framed with that view—it does diminish the distinction. It does so in the very case I have mentioned—the absence of words of limitation—and in very many other cases. The Act does, therefore, to a certain extent, proceed to establish uniformity of law, and that is a consideration not to be overlooked.

That being so, I shall now look at various sections of the Act to see whether or not the word “devise” and the word “devised” are in this Act of Parliament used in reference not merely to what I will call property devised—I mean a devise of a man's own property—but also a devise by any appointment of other people's property. The word “devise” has no special meaning that is not appro-

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priated to that which is the man's own property any more than the word "bequeath" has. You may well call that a bequest which is a gift by will in exercise of a power of appointment of personal estate, or you may call that a "devise" which is a gift by will in exercise of a power of appointment of real estate; and indeed the words "devise" and "bequest" are not strictly limited to either real or personal estate. They may be both used for both kinds of estate.

That being so, we have, first of all, some sections which I must not overlook, in which, undoubtedly, both terms are used. The first section that I will consider is the 15th, which enacts that "If any person shall attest the execution of any will, to whom, or to whose wife or husband, any beneficial devise, legacy, estate, interest, gift or appointment of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts) shall be thereby given or made," &c. No doubt there we have not only the word "devise," but also the word "appointment;" but the answer is, the section contains words which are superfluous. It cannot be argued that a "devise" would not have included an appointment had the word "appointment" not been used, for there are the words "estate, interest, gift," which will include everything. Therefore the mere fact that the draftsman has used six words where two would have sufficed does not shew that all the six words are distinct; and it appears to me to be plain that this section cannot be used to shew that "devise" may not include "appointment."

The next section which has some little bearing on this point, though not much, is the 24th: "Every will shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." That certainly applies to an appointment, for the word "comprised" does properly include anything that passes by the instrument.

The next section—the 25th—is the

most important: "Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will." That is the question which I have really first to consider. The words are, "comprised in any devise in such will contained." I think I shall be able to shew presently that the word "devise," as used in other sections, comprises a devise by way of appointment as well as a devise by way of disposition of the testator's own property.

Assuming for a moment that that is the fair construction of the word, or even a fairly possible construction of it, what was the object of the section? The object was to treat the testator as intending to dispose of all he had power to dispose of—that is, whether by reason of it being his own property, or by reason of it being subject to a power given by another person. It must be remembered that, after all, every will is in exercise of a power not technically but generally. It is a power given by the Legislature to a man to direct what shall become of his property after his death. It is a mere power; and, indeed, so much is it a power according to the English law, that there was a time when a man did not possess that power. It was given to him by statute. It is really a power of disposition, and it is a power of disposition which by this very statute is extended; for when the 3rd section is looked at, it will be found that a power of disposal is given of property over which the man had no power of disposal by will before the statute was passed. So late as 1837 there was some property which could not be disposed of by will: for instance, certain kinds of copyholds, and so forth. So the power really was given for the first time by this Act. When we speak of a "devise," we mean a devise which is the exercise of a power of disposition given to a man either by the

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Act of Parliament or by some person. Why should we restrict the meaning of the word if we find an intention to dispose of the property? The evil that the Act of Parliament meant to remedy was this: the law was that a general residuary devise was, in effect, a specific disposition of such real estate only as the testator then had and had not left to anyone else; the consequence was, that if any person to whom real estate was devised died in the lifetime of the testator, the residuary devisee had no claim to the real estate the gift of which had so failed; but it descended to the heir-at-law. It was considered, however, that where a man gave the residue of his own property, he did not intend his heir-at-law, or his next-of-kin, in case of personal estate, to take anything; and it was therefore made a rule of construction by this Act that the gift of residue should include lapsed and void devises. It had already been the rule as to personal estate, and the Act extended the rule to real estate, in accordance with the presumed intention. That was the meaning of the Act. If the presumed intention had been the other way, the Act would have cut down the effect of the residuary bequest as regards personal estate; but it was to effect the intention that this enactment was made. If a man, having a power of appointment not given by statute, but given by some settlor over property which did not belong to him, gave the residue of the property over which he had the power of appointment, such gift did before the Act, as regards personalty, include lapsed and void appointments. The rule as to a gift of personalty being by the Act extended to realty, why should it not apply to the exercise of a power of appointment over realty? One of the two rules was to prevail. Which rule? The rule as to personalty—that is, that lapsed and void gifts are to fall into the residue. Therefore, we should expect that where the testator had a power of devising property subject to a special or general power of appointment conferred by another, and he gave all that which he had not “hereinbefore disposed of,” or all the residue subject to that power, he would prefer his residuary

appointee to the persons taking in default of appointment, on the same principle as in the other case he preferred his residuary legatee to his next-of-kin. If the words admit of it, that is the proper interpretation, because it carries out the intention. I do not think there is any difficulty in the first words. I shall shew that in the other sections of the Act the word “devise” must be read as including appointment. The other words of the section are “included in the residuary devise (if any) contained in such will.” I admit that those words create very great difficulty, and that opinions may differ as to the meaning of them. First of all, the words are “the residuary devise,” apparently pointing to only one; and, in the next place, it may be said to throw unappointed property, or property which becomes unappointed by reason of lapse or by reason of invalidity of appointment, into the residuary devise proper. I think that is too narrow a construction, although I say it with some hesitation. Why cannot the words, “the residuary devise (if any),” be read as including appointment as well as devise? Then we have the residuary devise, whether of the testator's own property or of property over which he has the power of appointment.

As I have said before, I have come to this conclusion with some hesitation. No doubt it is very difficult to construe the section in the way I have construed it, unless you assume that the word “devise” includes a devise either of a man's own property, or by way of appointment. That it does so in other sections I think is tolerably plain. The 26th section is so difficult to deal with, that I pass over it.

The 27th section applies to a general devise, including estates over which the testator had a general power of appointment. Just consider for a moment what the other construction, as applied to this 27th section, would lead us to. The words are, “A general devise of the real estate of the testator, or of the real estate of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to

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include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will." Suppose a testator gives Blackacre, over which he has a general power of appointment, to A, and all other his real estate to B: is it to be held that if A dies in his lifetime B is not to take Blackacre under the latter gift? It would be a remarkable result. Suppose, again, he gives Blackacre, over which he has a general power of appointment, to A, and all other his residuary estate, over which he has a general power of appointment, to B: again one cannot help asking the question, Would not it be a most remarkable result that the death of A in the lifetime of the testator should create an intestacy as to Blackacre, instead of throwing it into the residue?

Now the next section is the 28th: "Where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee-simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate." There the word "devise" appears to me plainly to include the property over which the testator had a power of appointment, because the section says, such devise shall include not merely the fee-simple but the whole estate which the testator had power to dispose of by will. The section does not say, "the whole estate or interest which the testator was entitled to," but that which he "had power to dispose of by will;" and it clearly includes, therefore, in those words what he had a power to dispose of by appointment by will.

Now how could that work at all unless the previous words "devise" and "devised" included property over which he had a power of appointment? Again, look at the effect given to a devise made without words of limitation. The section says, such a devise shall pass the fee-simple, because that is the ordinary intention of people who devise without words of limitation. It would be a most extra-

ordinary result if a gift to A, when the testator had a power to dispose of the fee-simple, would not pass the fee-simple, because it was a gift under a special or a general power conferred by an individual, when it would pass it if it was the exercise of a power given by the Legislature to dispose of his own property after his death. I think that shews that the words "devise" and "devised" include appointment.

Then as to the next section—the 29th—the same observations may be almost repeated. The words are, "In any devise or bequest of real or personal estate, the words 'die without issue,' and so forth, shall be construed in a certain manner. In the first place, this applies to both real and personal estate. The law as to appointments of personal estate was undoubtedly the same as the law as to wills proper of personal estate. Was it intended to make a new law under the word "bequest," so that a "bequest" of a man's own property should have a particular meaning, while an appointment would have no meaning, or a non-intended meaning—if I may coin such a word—because the Legislature has not made an enactment in terms as regards appointments? It seems to me that the words "devised" and "devise or bequest" must include devise or bequest by way of appointment—a devise or bequest under a general power conferred by others as well as over the testator's own property.

Then the 30th section says, "Where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee-simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate." It appears to me that the words "devised" and "devise" must include "devises" by way of appointment under special or general powers, as well as devises of a testator's own property; and, in fact, the same observations I have made as to the preceding sections apply to this section.

The 31st section is probably another drafting of the 30th, and the same observations apply to that. I believe the real history of the two sections is, that they

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are two drafts of the same subject, though both remain in the Act of Parliament. However, they are so similar, and every word I have said on the 30th applies so equally to this section, that I need not repeat my observations.

I now come to the 32nd section, which is this: "Where any person to whom any real estate shall be devised for an estate tail or an estate in *quasi* entail, shall die in the lifetime of the testator, leaving issue who would be inheritable under such entail," and so forth, the estate tail shall take effect. Can anybody suppose that that is not to apply to an appointment—that the same evil which occurs in the one case, and which is intended to be remedied by the Legislature with regard to the testator's own property, is not intended to be remedied in the case of an appointment? There cannot be any reason for such a supposition. The object of the enactment is to carry out the testator's intention, namely, that the estate tail shall go on as long as there is issue inheritable under the limitations; for, by an artificial rule of the law, it was decided contrary to the intention that the gift in tail lapsed. It appears to me that the words are clearly applicable to a devise by way of appointment as well as to a devise by way of disposition of the testator's own property.

The 33rd section is not so clear—in fact it has been held not to apply to an appointment; but I take it that the decisions must be treated as founded really, although they are not so in form, upon the fact of the section not applying where the object of the power is not within it. But the point has yet to be decided whether that section does not apply to powers of appointment (in cases where an appointment would be warranted) such as general powers, and perhaps some special powers. However, at the present moment it is only necessary to say that I am not at liberty to draw any special conclusion from the use of the words "devise" and "bequest" in the section.

I have gone through, I believe, every section which has any bearing on the question before me, and I have come to this conclusion—that, having regard to all

these sections, the word "devise" in this Act of Parliament does include, unless a contrary intention appear by the will, a devise by way of appointment under a special or general power conferred on the testator as to property not his own, and consequently it is so to be read in the 25th section; and for the reasons I have already mentioned, the difficulty of construing that section is not great enough to prevent me from giving effect to what I conceive to be the intention of the Legislature as manifested in the Act. I think, upon both the points I have discussed, my decision should be in favour of the void devise passing under the residuary clause in this will, and I do so decide.

His Lordship made a declaration that the will of W. P. Freme operated as an execution of the power of appointment amongst the children contained in the settlement of 1822, and that the residuary devise and bequest in the will operated as an appointment under the power. Also that the gift after the plaintiff's death was a void appointment, and that the property comprised in such gift fell into and passed to the plaintiff by the residuary gift or appointment.

Solicitors—Field, Roscoe & Co., for plaintiff and for defendant Logan; Dean & Taylor, agents for Longueville, Jones & Co., Oswestry; Brownlow & Howe, agents for Palin, Wade & Thomas, Shrewsbury, and R. M. & F. Lowe, agents for Eaton & Son, Liverpool, for other defendants.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.

JAMES, L.J.

LUSH, L.J.

1881.

May 20, 24.

DICKS v. YATES.

Practice—Appeal for Costs—Declaration of Title—Express or Implied—Judicature Act, 1873, s. 49—Copyright in Title of Book—Trade-Mark—Infringement of—Periodical—Registration—Copyright Act, 1842 (5 & 6 Vict. c. 45), ss. 16, 17, 18.

Where in an action a Judge makes no other order than "that the defendant do pay the costs of the action," an appeal

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against that order is not an appeal "for costs only," within section 49 of the Judicature Act, 1873. It is not necessary that there should be an actual declaration in the order of the plaintiff's title.

D. brought an action for an injunction restraining Y. from using the words "Splendid Misery" as the title of a novel, on the ground that D. was the registered proprietor of the copyright in that title. The same title had been used for a novel published in 1801. There was no evidence that the author of the story, in the title of which D. claimed the copyright, had invented the title, or that he had not himself copied it from the earlier novel:—

Held (reversing BACON, V.C.), that there was no copyright in the words "Splendid Misery," neither the combination itself, nor yet the adoption of that combination as the title of a novel, being new or original; and that, independently of these grounds, the want of evidence of invention on the part of the author of the plaintiff's story would have disentitled the plaintiff to relief. To entitle a work to the protection of copyright it must be original.

Per JESSEL, M.R., and JAMES, L.J.: "There can be in general no copyright in the title or name of a book." There may be a trade-mark in a title, and an action for fraud will lie against a person using the title of a book already published for the purpose of passing off such book as that of a former author.

Weldon v. Dicks (48 Law J. Rep. Chanc. 201; Law Rep. 10 Ch. D. 147) observed upon.

Copyright and trade-mark distinguished.

D. was, on the 8th of June, 1869, registered at Stationers' Hall as the proprietor and publisher of a periodical called "Every Week." The date of the first publication of "Every Week" was the 8th of July, 1869. D. published the story, "Splendid Misery," in "Every Week," in six parts, the first part being published in the weekly issue of the 30th of December, 1874, and the last part in that of the 5th of February, 1875. On the 25th of September, 1879, D. registered himself as the proprietor and publisher of the copyright in a novel or work called "Splendid Misery; or East End and West End;" and gave the 30th of December, 1874, as the date of first publica-

tion:—Held, that the first registration was void, being made before the first publication of the serial, but that the second was sufficient to protect the copyright (if any) in the title of D.'s story.

A registration of the first part of a story is not less a registration of such first part because the subsequent parts have been published.

The notice of objection required to be given by section 16 of 5 & 6 Vict. c. 45, is sufficiently given if given on the pleadings.

The plaintiff was the proprietor of the copyright in, and the publisher of, a weekly halfpenny periodical called *Every Week*, and was duly entered as such in the registry of the Stationers' Company on the 8th of June, 1869. The date of the first publication of the paper was the 8th of July, 1869.

The defendant was the proprietor of the weekly newspaper known as the *World*, sold at sixpence.

On the 19th of September, 1874, the plaintiff purchased from Colin H. Haslewood all his copyright and interest in a novel written by him, under the title of "Splendid Misery; or East End and West End." This novel he subsequently published in six parts in his paper, the first part being published in the weekly issue of the 30th of December, 1874, and the sixth and last in the weekly issue of the 3rd of February, 1875.

He afterwards published the issues of *Every Week* containing the novel, bound up in one volume, and was intending to publish the story as a separate volume.

The defendant in June, 1879, announced the publication in the *World* of a novel, under the title of "Splendid Misery," by the author of "Lady Audley's Secret," "Vixen," &c. It appeared from the evidence that the defendant, in choosing the title "Splendid Misery," from several submitted to him by Miss Braddon, was ignorant of the existence of *Every Week*, or the plaintiff's novel.

The plaintiff, on discovering this, on the 25th of September, 1879, called at the defendant's office, and requested the defendant to discontinue the user of the title, and on his request not being complied with, on the 27th of September

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issued the writ in this action, claiming an injunction restraining the defendant from printing, publishing or selling, either in the *World* or otherwise, any story or publication with the words "Splendid Misery," or with any title whereof those words formed part, and from in any way using the words as a title or description of any book or publication whatsoever; and damages for infringement of the plaintiff's copyright in the book "Splendid Misery," and the title.

The plaintiff had, on the 25th of September, 1879, registered himself as the proprietor and publisher of the copyright of a novel or work called "Splendid Misery; or East End and West End," giving the 30th of December, 1874, as the date of the first publication.

On the 8th of October, 1879, the motion for injunction was heard, and on the defendant's undertaking till the hearing not to use the title, the costs of the motion were reserved, and the motion ordered to stand over till the hearing.

The defendant, after the 8th of October, changed the title of his novel, which was completed under the name of "The Story of Barbara: her Splendid Misery and her Gilded Cage."

The plaintiff, on the 22nd of January, 1880, delivered his statement of claim, alleging that the title was a material part of his work, and was and had, since its publication, been well known to the trade and the public by that name; and that his work, "Splendid Misery," was of considerable value, and that the user of the title thereof by another person would damage the plaintiff.

The defendant by his statement of defence denied that Hazlewood ever had any copyright of, or right or interest in, the above-mentioned work, and stated that the title "Splendid Misery," far from being original, was the title of a novel in three volumes written by Surr, and published in London by T. Hurst in 1801, which had been extensively sold since the date of its publication, and was still on sale. He then denied the existence of any copyright in the title, and after several statements to the effect above mentioned, stated the facts as to the completion of his novel under the new name, and that

he had no intention of using the said title "Splendid Misery"; and denied any loss or injury by the plaintiff.

The plaintiff gave no evidence of damage, nor did he prove that Hazlewood (who had since died) had invented the title or had not copied it from Surr's.

The defendant proved the publication in 1801 of Surr's book, and there was evidence that that novel was mentioned as still on sale in catalogues of second-hand books.

The action came on for trial before Bacon, V.C., on the 9th of November, 1880, when he came to the conclusion that the whole copyright of "Splendid Misery" was vested in the plaintiff, and that it had been invaded by the defendant, but that as the defendant had discontinued the user of the title, an injunction was unnecessary; and made the following order: This action coming on for trial, &c., and the defendant, by his statement of defence, having discontinued the use of the title "Splendid Misery," this Court doth order that the defendant do pay to the plaintiff his costs of this action, including the costs of the motion for injunction reserved to the hearing, such costs to be taxed.

The defendant appealed.

Upon the opening of the appeal,

Mr. Whitehorne (Mr. Higgins with him) raised the preliminary objection that the appeal was for costs—

Ashworth v. Outram, Law Rep. 5 Ch. D. 943;

In re Hoskins' Trusts, 46 Law J. Rep. Chanc. 817; Law Rep. 6 Ch. D. 281.

Mr. Hemming and Mr. Levett, for the appellant.—The appeal here is not for costs. The only ground on which the defendant can be bound to pay costs, is that the plaintiff has a title to the copyright, but the Vice-Chancellor has decided that he has not by dismissing the action. We say that the action was begun by the plaintiff without title, and we were entitled to have it dismissed with costs.

Our case is governed by

Witt v. Corcoran, 45 Law J. Rep. Chanc. 603; Law Rep. 2 Ch. D. 69, and it can make no difference that there

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is no declaration in the order, for here there is an implied declaration that we have infringed the plaintiff's right.

[JESSEL, M.R.—Can the mere fact that there is no declaration of title in the order prevent an appeal being brought against that order? Is there any case in which, the plaintiff having no right, the Court has discretion to make the defendant pay costs?]

Mr. Whitehorne, in reply cited

Harris v. Aaron, 46 Law J. Rep. Chanc. 488; Law Rep. 4 Ch. D. 749.

The Court must have the power of directing the way in which such cases are to be carried on. The Court can surely punish a party who may be successful for his conduct in the cause.

The Court may protect itself against useless litigation. Here the further hearing is rendered unnecessary by the conduct of the defendant, and the Court has jurisdiction to deal with the costs as it pleases.

JESSEL, M.R.—The preliminary objection cannot prevail. This order directs the costs—the whole costs—to be paid by the defendant to the plaintiff. The defendant says that the plaintiff had no title to sue, and brings this appeal asking that the action may be dismissed with costs.

Are costs so given costs left by law to the discretion of the Court if the plaintiff has no title, so that the Court can give the whole of them to the plaintiff? It cannot be so. No one ever heard of such an order being made. The Vice-Chancellor did not make such an order, because he in fact decided that the plaintiff had a title; and that is a ground of appeal. It can make no difference that there is no express declaration in the order that the plaintiff had a title, because it is a necessary inference from the direction that the defendant do pay the costs. It is the same thing. It is a decision that the plaintiff was entitled to bring the action; therefore this is not a mere appeal for costs. I wish not to be misunderstood, for I think that the Court has a discretion to deprive a defendant of costs, even though he may succeed in the action, and to order him to pay

costs, perhaps the greater part of the costs, in the case of issues when he fails, or if he has been guilty of misconduct in the prosecution of the action. But a judgment like this for the whole costs of the action cannot be supported except upon the express or implied decision that the plaintiff was entitled to bring the action.

JAMES, L.J.—I am of the same opinion. It must be borne in mind that there is a difference between the plaintiff and defendant: a plaintiff may succeed in getting a decree, and still have to pay all the costs of the action, but the defendant is dragged into Court, and cannot be made liable to pay the whole costs of the action if the plaintiff had no right to bring him there.

LUSH, L.J., concurred.

Mr. Hemming and *Mr. Levett*, for the appellant, argued that the plaintiff had no copyright in the title "Splendid Misery," and that if there could be any copyright in a title, it was vested in Surr, or had become public property. For the purpose of acquiring copyright in a work originality was indispensable. There was no evidence or allegation that Hazlewood had invented the title. They referred to

Copinger on Copyright, c. ii. p. 20,

for his Definition of Copyright:

"The sole exclusive liberty of multiplying copies of an original work or composition."

The registration was not such as entitled the plaintiff to sue, because the registration of the periodical preceded its publication—

Maxwell v. Hogg, 36 Law J. Rep.

Chanc. 433; Law Rep. 2 Chanc. 307;

Henderson v. Maxwell, 46 Law J.

Rep. Chanc. 891; Law Rep. 5 Ch. D. 892;

and the registration of the novel on the 25th of September, 1879, was useless, as by that time the second and subsequent parts had been published.

They referred to

5 & 6 Vict. c. 45. ss. 18 and 19,

as to the protection of serials.

Mr. N. Higgins and *Mr. Whitehorne*, for

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the respondent, contended that there could be a copyright in the title of a book, as being the material part of the book, and cited

Weldon v. Dicks, 48 Law J. Rep. Chanc. 201; Law Rep. 10 Ch. D. 147;

Mack v. Petter, 41 Law J. Rep. Chanc. 781; Law Rep. 14 Eq. 431;

Metzler v. Wood, 47 Law J. Rep. Chanc. 625; Law Rep. 6 Ch. D. 606;

Kelly v. Byles, 49 Law J. Rep. Chanc. 181; Law Rep. 13 Ch. D. 682.

[JESSEL, M.R., observed that the cases cited were cases of injunction against infringement of a trade-mark, not copyright, but that the plaintiff had not alleged that the act of the defendant was calculated to deceive.]

The respondent was entitled to protection under the Copyright Acts, and he had also a trade-mark, which the defendant was injuring by the user of the title, and it was immaterial that he had taken the title in ignorance. The defendant could not set up that some other than the plaintiff was the author or first publisher of the title of the book, as the defendant has not given notice under

4 & 5 Vict. c. 45. s. 16.

[JESSEL, M.R.—Notice may be given by the pleadings; it is sufficient if the pleader let the plaintiff know what the objection is, and either the author's or the first publisher's name. JAMES, L.J.—The Act means that the defendant is to mention some one who published prior to the plaintiff.]

The value of the title of a work to an author would be seriously diminished if it were held that the Copyright Act gave the plaintiff no protection.

JESSEL, M.R.—This is an appeal from the decision of the Vice-Chancellor, and although the action is a most trumpety action, as the plaintiff could not seriously apprehend damage from the acts of the defendant, yet there are several points of importance connected with the law of copyright arising in the case which have been discussed, and which will have to be decided.

First, as regards the nature of the action. The plaintiff has a serial called *Every Week*, in which he publishes from time to time novels or novelettes, with pictures.

The defendant is the proprietor of a weekly newspaper called the *World*—a publication of totally different character to the plaintiff's; and he publishes from time to time, in addition to various kinds of news, novels or portions of novels in that serial called the *World*.

The suggestion is, that because the plaintiff had published a novel which was completed, called "Splendid Misery; or East End and West End," by C. H. Hazlewood, in his paper *Every Week*, the defendant by publishing in the *World* what is called a *feuilleton*—that is, a chapter of a novel—under the title, "Splendid Misery," by the author of "Lady Audley's Secret," "Vixen," &c., has thereby injured the plaintiff. I cannot believe such a thing to be possible. The publications are of a totally different character, of a different form, and published at totally different prices—one, the plaintiff's, being a halfpenny; the defendant's being sixpence. The plaintiff's serial is a serial collection of novels, the defendant's is a newspaper with a *feuilleton*, or a chapter of a novel, in it. Indeed, two more different publications, addressed to two more different objects, both containing portions of a novel, it would be difficult to discover.

That is the position of the parties as regards the substance. I think there is no substance at all in the action, but it is a bit of temper more than a claim for damages. As regards the legal rights of the parties, there are points no doubt to be considered.

The plaintiff claims copyright in the words "Splendid Misery," as a portion of the title of his novel.

The defendant submits, in the first instance, that there has been no proper registration of the publication. There were, in fact, two registrations. The first registration is a registration of *Every Week*. That registration was bad because it was made before the publication of the serial. But there was a second registration, and that was the registra-

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tion of the first part of "Splendid Misery," and that was in every respect correct, except that it is said it could not be properly registered, because at the time the first part was registered the second and subsequent parts had been published.

I cannot accede to that suggestion. The registration informs the public of everything the public could have any desire or right to know. It cannot be less a registration of the first part because the other parts had then been published. Each part may be registered separately, and each part was actually published separately, and each part is, according to the definition of the Act of Parliament, a book. It appears to me there can be no objection to the second registration.

Then can there be copyright at all in these words? I think not. They are two common English words, and the combination of them is, I should have said, a hackneyed one. There has been no evidence in the case of that, but there is actual evidence that this combination was used as the title of a novel so far back as 1801. It does not appear to me that there was any invention in the combination of "Splendid Misery," any more than in the words "miserable sinner." The adoption of the words as a title is not new; but if it were, that would not make an invention. It might constitute a trade-mark, and enable the owner to say, "You cannot sell another novel under the exact title, without any difference, so that somebody buying the *World* may think he is buying my novel, when he is actually buying yours." That is a trade-mark, and that is intelligible. That would apply to newspapers and serials in general. But it has no application to this case, because when we look at the circumstances, the titles of the papers are *Every Week* and the *World*. No one would ask, as I understand it, for "Splendid Misery," but he would ask for the *World* or *Every Week*.

But besides that, when you look at the titles there is a remarkable difference as regards trade-mark. One is "Splendid Misery; or East End and West End," by C. H. Hazlewood; the other is "Splendid

Misery," by the author of "Lady Audley's Secret," "Vixen," &c. They are different titles. No doubt there are the words "Splendid Misery" in common, but there is a great difference between the titles, and, in fact, the case has not been seriously argued upon the question of "trade-mark."

Now I come to another point. Assuming there could be copyright—I do not say there could not be copyright in a title, or that you could not have a page of title or something of that kind, shewing invention, and so forth, that might be covered by copyright—what is copyright? It is the right of multiplying copies of an original work. If you complain that a part of a work has been pirated you must shew that that part was original. The respondent's argument in this case appears to be met by a very simple answer. If this title was not original, there is no copyright. How can it be said that the title is original when the very same words, for the same purpose, were used in 1801? The suggested answer to that is, that people have forgotten that old novel. But that is not the point. Has it become public property? If you go by the analogy of the Patent Law, it is very strong against the plaintiff, because complete prior publication of the invention in England destroys the claim for novelty on the part of the patentee. I say "complete" because there have been cases where it has been held that a general description was not sufficiently complete and specific to prevent a title in the second inventor. But there is another circumstance. Even in the case of patentees, where there is a question of originality, you must prove the invention by the man who claims the patent. In this case, Mr. Hazlewood being dead, and it having been shewn that the term "Splendid Misery" was known many years ago, nobody being called to prove that Mr. Hazlewood invented the title at all, or that he did not take it, as he might have done, from a copy of the old novel, it is evident that, even assuming that you could establish that as original merely because it was re-invented, you have no evidence of the re-invention, and you have evidence of prior publication.

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It seems to me, therefore, on that ground also, that the action must be dismissed. It is unnecessary to refer at greater length to the cases than to say that there seems to be a certain amount of confusion in the minds of some counsel, and perhaps of some Judges, between copyright and trade-mark. The two things are totally different, and it does appear to me that no authority which is binding on us has been produced to shew that there can be copyright in a title such as this. On every ground I am of opinion that this appeal must be allowed, and the action dismissed, and, it follows from what I have said, with costs both here and below.

JAMES, L.J.—Literary property is liable to invasion in three modes, and, as I believe, in three modes only.

The first is, where there is an open and avowed trespass, where a publisher in this country publishes an unauthorised edition of a work in which copyright exists, or where a man introduces and sells in this country a reprint made abroad. That is open piracy. Secondly, another mode is, when a man, pretending to be the author of a book, illegitimately appropriates the fruit of previous authors' literary labour. That is literary larceny. Against these two offences the Copyright Acts afford protection. Thirdly, there is another mode which, to my mind, is wholly irrespective of and anterior to any copyright legislation, and that is where a man is selling a work under the name or title of another man or another man's work. That is not invasion of copyright. It is a common law fraud. It is to be redressed, and is capable of being redressed, by ordinary common law remedies, wholly irrespective of any of the conditions or restrictions imposed by the Copyright Acts. Suppose a man were to publish a book of cookery, calling it as "*Soyer's Cookery Book*," which it is not; or of arithmetic, as "*Colenso's Arithmetic*," which it is not; or "*Hemy's Pianoforte Tutor*" (as in the case of *Metzler v. Wood*, before the Court of Appeal), which it is not;—that is a common law fraud. That has nothing to do with the

Copyright Acts. It is not subject to the conditions of the Acts as to registration or anything of the kind. But it must be one of these three things before a man has a right to complain. It is idle to suggest that this novel is open piracy. It is equally idle to suggest that it is a literary larceny, and equally idle to suggest that it is a commercial fraud. And as it is not one of these three, the plaintiff never had, according to my mind, the slightest ground or colour of pretence for the action he has brought; therefore this appeal must be allowed, with costs.

LUSH, L.J.—It is necessary to bear in mind what is the precise question which is brought before us for our decision in this case. This is not an action for pirating a trade-mark, nor is it an action for fraudulently using the title of a serial which the plaintiff had published in order that the defendant might pass off his serial as the production of the plaintiff. That would be a common law fraud. Nor is the question whether there can be copyright in the title of a work. The sole question before us is whether there can be copyright in the two words, "*Splendid Misery*," which have been used by the plaintiff as the title, or rather as part of the title, of his serial—because the whole of the plaintiff's title is "*Splendid Misery*; or the East End and West End." Before I pass on to consider the two words, I notice a decision which has been pressed on us of *Weldon v. Dicks*, decided by Vice-Chancellor Malins, and which, it is alleged, is precisely in point, and an authority in favour of the plaintiff. There a series of books had been published by the plaintiff; one book in that series was entitled "*Trial and Triumph*." The defendant published in two magazines, and afterwards in a separate volume, an entirely different book, but with the same title—"*Trial and Triumph*." The plaintiff brought an action and claimed an injunction. In his statement of claim he alleged that the defendant had published, and continued to publish, his work with the intention of inducing the public to believe, and he had, in fact, induced

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persons to believe, that the book so published by him was identical with that about to be republished by the plaintiff. That alleges a common law fraud, and although the Vice-Chancellor did not explicitly put his judgment on that allegation, I think that his mind was influenced by it from beginning to end, and that he did not distinguish between that form of proceeding which claims damages for a violation of a common law right, and a claim for infringement of copyright itself. But I observe that he says towards the end of his judgment, "All the witnesses agree that the title of a book is a material part of the book—it is a valuable part of it; and the case is illustrated by a reference to Mr. Thackeray's work of 'Vanity Fair.' Would anyone be entitled to publish a book called 'Vanity Fair,' leaving out the author's name? A person buying a cheap edition would expect to get Thackeray's work; and what a fraud it would be if he had got some spurious thing which was not worth reading." I cannot help thinking that that paragraph is the key to the whole of the judgment: and that what the Vice-Chancellor had in his mind was that the allegation was proved, that the defendant's book was brought out for the very purpose of inducing persons to believe that it was the same book which belonged to the plaintiff; and that is the real ground of the Vice-Chancellor's decision. If that be so, the case is no authority whatever on the present point, which involves the simple question whether there can be copyright in these two words. It is not necessary to consider whether, if there could have been, the defendant has infringed it by taking only those two words, because I am clearly of opinion, with my learned colleagues, that there is no such thing as copyright in that particular title. I take it to be established law, that to be the subject of copyright the matter must be original. It must be the composition of the author, something which has grown up in his mind, and something which, if it were applied to patent rights would be called invention. Nothing short of that can entitle a man to copyright in any matter of writing or print. How can it

be said that there is anything original in these two words? I suppose there is hardly a person who has grown up to maturity in this country who has not read them hundreds of times, and heard them spoken hundreds of times. To my mind it is a hackneyed phrase, and we know that about eighty years ago a novel was printed under that very title—"Splendid Misery." Though that is out of print, we know from the evidence here that second-hand copies are about up to this day, and I suppose may be found on second-hand bookstalls. So that, even if we were to go no further back than that, the title has been a common thing at least for eighty years. I cannot help thinking that the phrase originated years and years before that. There is nothing original about the title, nothing in it which indicates any intellectual effort. It is merely the taking up a phrase which had been in public use before, and had become public property; and it is impossible that a person can appropriate that and claim a copyright in it. On these grounds I perfectly agree with the judgment of my learned colleagues, that the appeal ought to be allowed, with costs.

JAMES, L.J.—I desire to add, that in my opinion, and in that of the Master of the Rolls, there can be in general no copyright in the title or name of a book.

LUSH, L.J.—I do not dissent from that, but I only wish to guard myself. In order to decide the question which we have to decide, I wish to exclude all others from our minds.

Solicitors—Lewis & Lewis, for appellant; Meaghen, Scott & Baker, for respondent.

JFSSEL, M.R. }
1881. }
July 28. } *In re* GREAVES. BRAY v.
TOFIELD.

*Executor's Action for Administration—
Claim by Creditor—Statute of Limita-
tions* (21 Jac. 1. c. 16).

A simple contract debt was incurred in November, 1873. In 1878 the executor of the debtor, who had died meanwhile, began an action for the administration of his estate, and the judgment usual in such an action was given in December, 1879. Soon afterwards the simple contract creditor carried in a claim for the amount of his debt:—Held, that the claim was inadmissible, being barred by the Statute of Limitations.

Sterndale v. Hankinson (1 Sim. 393) explained.

J. Greaves, deceased, was at the time of his death indebted to the Midland Banking Company in the sum of 300l., for which he had given them his promissory note, dated the 11th of November, 1873. He died in 1878, and in December of that year one of his executors commenced an action against the other executor for the administration of Greaves's estate. The usual administration judgment in an executor's action was pronounced in December, 1879, and shortly afterwards the Midland Banking Company sought to prove in the administration action for the amount due to them on the promissory note. The Chief Clerk certified that he had disallowed their claim, and this was an adjourned summons to vary his certificate.

Mr. Chitty and Mr. Bonser, for the company.—This action was commenced within six years from the date of the promissory note; it was for the benefit of all the creditors, each of whom had an inchoate interest in it from the time when the action began—

Sterndale v. Hankinson (*ubi supra*).

This decision was approved of by Lord St. Leonards in

Birmingham v. Burke, 2 Jo. & La. 699.

It makes no difference, therefore, that judgment was not pronounced until more

than six years after the date of the note. The Statute of Limitations ceased to run immediately the writ was issued.

They cited also

Berrington v. Evans, 1 You. & C. Exch. 434;

Watson v. Birch, 16 Law J. Rep. Chanc. 188; 15 Sim. 523;

and

Manby v. Manby, Law Rep. 3 Ch. D. 101.

Mr. Romer and Mr. Wiglesworth, for the plaintiff, and *Mr. Curtis Price*, for the defendant, were not called upon.

THE MASTER OF THE ROLLS.—I am of opinion that this claim is barred by the Statute of Limitations, and that it was properly rejected.

The debt on which the claim is made was incurred on the 11th of November, 1873. The writ in this action was issued on the 30th of December, 1878, and judgment was given on the 8th of December, 1879. This claim was brought in some time after the judgment. It is quite plain, therefore, unless the action for administration saved the claim from the operation of the statute, that the claim is barred by the statute. It is a claim which can only be enforced by action, and is within the very words of the statute of James. The suggestion is that this action saved the claim. First of all, this is an action by one executor against the other, and is not at all an action on behalf of the creditors. It is an administration action, but not on behalf of the creditors, though the judgment would have saved this claim had it been pronounced before the expiration of six years from the time the debt was incurred. There is no pretence for saying that this action was brought on behalf of the present claimants, and there is no reason in the world, that I can conceive, for getting rid of the operation of the statute on that account. Reliance was placed on the case of *Sterndale v. Hankinson*, which was decided so long ago as 1827, which is far too long ago for me to interfere with it now, even if it had not been approved of by Lord St. Leonards. But I wish to point out, first of all, that that case has no application

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at all to the action before me; and secondly, that creditors had better not rely upon that decision for the future. In the first place, Vice-Chancellor Sir Anthony Hart put it in this way: "The other fallacy is that the statute bars the suit in equity, which it does not. But as Courts of equity will not entertain stale demands, they have thought proper to adopt the limit of six years in analogy to the statute, and pleas of the statute are admitted in these Courts by analogy only. When the circumstances of a case are such as to make it against conscience to apply the rule framed upon this analogy, the Court will not enforce it. It has been said that if a creditor files a bill on behalf of himself and others, and permits it to be dismissed before decree, the statute would apply. I dissent from that proposition, for I think that the Court would protect a creditor against any accident of that kind. I have no doubt that if a creditor files a bill, and it appears that the rule adopted by analogy to the statute would affect his demand, but that a bill had been before filed by another creditor, and that the plaintiff in the second suit had, in confidence that the former suit would be prosecuted, abstained from filing his bill, the Court would not apply its rule. Every creditor has to a certain extent an inchoate interest in a suit instituted by one on behalf of himself and the rest; and it would be attended with mischievous consequences to estates of deceased debtors if the Court were to lay down a rule by which every creditor would be bound either to file his bill or bring his action. Suits have been instituted in which creditors, in consequence of the death of parties and a variety of other circumstances, have been unable to obtain a decree for two or three years, although every reasonable diligence may have been used; and if the schedule to most of the reports made in suits of this nature were looked through, it would be found by comparison of dates that two-thirds of the creditors might have been shut out by a strict application of the rule. The principle of convenience does not apply, for the adoption of the rule in all cases where the six years had run

before the decree would not, for the reasons I have before stated, be a protection to the estates of debtors in the aggregate."

That was the line of Mr. Shadwell's argument in that case, and that is the unceremonious way in which Sir Anthony Hart treated the argument.

The decision, therefore, depended upon a variety of circumstances, as stated by the Vice-Chancellor, of which, I may say, none now exist. In the first place, the Statute of Limitations did not affect Courts of equity, because it only applied to what were called common law actions. If any action is properly described by the statute of James, that statute now applies to the action whether before this Court or another, and the statute is consequently binding upon this branch of the High Court in every case to which it applies. In the next place, it is no longer the practice, as far as personal estate is concerned, to bring an action by one creditor on behalf of others. It is no longer necessary, because there is a provision in the Act of 1852 that any creditor might have a decree for the administration of personal estate, and since the passing of that statute—now nearly thirty years ago—the practice has been abandoned of suing by one creditor on behalf of all, excepting in the case of real estate, as to which the section of the statute does not apply unless it has been ordered to be sold, or there is a trust or a power of sale. Therefore there are no longer any suits brought by a creditor against the personal estate except for payment of his own debts; and you may always stop such a suit by payment of the debt. Again, the reason for the decision no longer applies. You can get a decree in two days by a summons. You ought always to get it within a few days. If it is unopposed it can be taken at once by summons in chambers; but however bitterly opposed it may be, if there is a debt at all you can get a decree within a very few days, and consequently the reason for the Court of equity exercising its discretion in favour of the creditor to prevent the estate being torn to pieces by a multiplicity of suits no longer applies; and the rule *cessante*

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ratione legis cessat ipsa lex applies also, and therefore there is no reason in the world why this company should not have taken out a summons and got a judgment long ago. It would not have hurt the estate at all, because the first certificate would stop all the others; and it must be recollected that it is only in cases where the action is nearly barred at the death of the testator that the creditor cannot wait. In that case, if he has been negligent too long, it behoves him to use due diligence the moment the man dies; so that what the Vice-Chancellor said about the rule of convenience and the protection of debtors' estates requiring the Court to exercise the discretion which it then possessed in favour of the creditor, no longer applies. It seems to me that the safest and plainest rule is to say that this being, as it is, a mere action for debt, it is within the very words of the statute, and the claim is barred. The summons is therefore dismissed with costs.

Solicitors—Ridsdale & Son, agents for Weddall & Parker, Selby, for plaintiff; Pilgrim & Phillips, agents for Smith, Smith & Elliott, Sheffield, for defendant; and Ashurst, Morris, Crisp & Co., agents for William Smith & Son, Sheffield, for the Midland Banking Company; H. A. Maude, agent for W. H. Stacey, Sheffield, for defendants Tasker & Smith.

FRY, J. }
1881. } WALTERS v. WALTERS.
May 14, 16. }

Administration—Executor—Retainer.

An estate administered by the Court was deficient; the personal estate was insufficient to pay specialty debts. After the specialty debts had been paid the proceeds of personality came into Court. A claim on behalf of the estate of a deceased executor to be paid a simple contract debt in full out of such proceeds was disallowed.

This was a suit to administer the estate of a testator, Ralph Walters, which was deficient. The testator had appointed George Walters, Robert Walters and Elizabeth Walters executors. Robert Walters renounced probate.

The personal estate of Ralph Walters realised 43,688*l.* 13*s.* 1*d.*, including income; there was no devise for payment of debts. Under an order made in the suit in August, 1876, the specialty debts, which amounted to 51,660*l.* 1*s.* 3*d.*, were paid out of the assets then realised, including proceeds of the real estate. There was now in Court a sum applicable towards the payment of simple contract debts, part of which was the produce of personal estate realised since the order of August, 1876.

This was an application by summons, on behalf of the plaintiffs in an action to administer the estate of George Walters, to be paid out of the personal estate in Court, in full, a debt due from the estate of the testator in this suit to that of the deceased executor, George Walters.

The original plaintiff in this action was George Walters, the executor of Ralph Walters. The original defendant was Elizabeth Walters, the executrix of Ralph Walters. George Walters died in the lifetime of Elizabeth Walters, and Catherine Walters, his executrix, had revived this action. Elizabeth Walters died subsequently to August 1876, and her executor, Seagram, was the present representative of the testator and defendant to the action.

Mr. J. Pearson and *Mr. W. Barber*, for the plaintiff, took no part in the argument.

Mr. Chapman Barber (*Mr. North* with him), for the summons, and *Mr. Glasse* and *Mr. Oswald*, for persons in the same interest, argued that as the specialty debts had in fact been paid out of the proceeds of realty the executrix of Catherine had a right of retainer; and that the money in question having come into Court representing strictly legal assets, at a time when it had become distributable among simple contract debtors, the executrix of George had a right to retain—

Campbell v. Campbell, Law Rep. 16 Ch. D. 198;

Morris v. Morris, 44 Law J. Rep. Chanc. 178; Law Rep. 19 Eq. 21;

Richmond v. White, 48 Law J. Rep. Chanc. 798; Law Rep. 12 Ch. D. 361;

Walters v. Walters.

Langton v. Higgs, 5 Sim. 228; 1 Law J. Rep. Chanc. 150;

Kent v. Pickering, 2 Keen, 1; 6 Law J. Rep. Chanc. 375;

Nunn v. Barlow, 1 Sim. & S. 588.

The executor of an executor stood on the same footing as the executor himself—

Thomson v. Grant, 1 Russ. 540n;

Hopton v. Dryden, Prec. Chanc. 180.

Mr. Cookson, Mr. Stevens and Mr. Fellows, for Seagram, contended that the executor had no right of retainer in respect of anything but legal assets. The reason why he was allowed that right did not apply to assets made such by the statute, for he was in no different position from other creditors.

The statute gave him no such right; on the contrary it contemplated an equitable and equal distribution, and the Court would not allow the mere accident of the order of distribution to affect his rights—

Kinderley v. Jervis, 22 Beav. 1; 25

Law J. Rep. Chanc. 538;

Cummins v. Cummins, 3 Jo. & La. 64;

Williams on Executors, (8th ed.) 1045;

Baily v. Ploughman, Mosely, 95;

Chambers v. Harvest, Ibid. 123;

Hall v. Kendall, Ibid. 328;

Talbot v. Frere, Law Rep. 9 Ch. D. 568;

Bain v. Sadler, 40 Law J. Rep. Chanc. 791; Law Rep. 12 Eq. 570.

Mr. North, in reply, referred to

Burge v. Brutton, 2 Hare, 373; 12 Law J. Rep. Chanc. 368.

FRY, J., stated the facts and said—In respect of legal assets it is perfectly plain that an executor has a right of retainer against creditors, but of course he has the right only against creditors of equal degree; it is one exercised *in paribus* and no further. Therefore, if the funds over which he claims the right had been applied in payment of specialty debts, he never could have asserted it. And if he can succeed it is merely by the accident of the order in which payment was made.

In respect of the statutory assets, it appears equally plain that he had no right of retainer for several reasons. In the first

place, the statute makes the assets distributable in equity, and we all know that the principle of distribution that governs a Court of equity is that equality is equity. In the next place, a right of retainer applies only *ex necessitate* to things which come into the hands of an executor, but such items never could come into the hands of the executor. Again, the reason for the existence of the right is the incapacity of the executor to pursue a remedy at law which other creditors have against the assets; but the other creditors could not sue at law against these assets. For all those reasons it is apparent that no right of retainer exists under the statute.

The question then simply is, whether it does arise by the fact that the legal assets were got in at a date later than the payment of the specialty debts. I will consider the question in two ways: in the first place, supposing an outside creditor to obtain judgment, the Court would not give that creditor any priority in respect of these assets, for the simple reason that in administering the assets on further consideration it would adjust the rights irrespective of the mere accident of time at which the assets had come into the suit, and the order of payment—in other words, it would marshal them so as to give effect to the respective rights of the parties. But, further, it is to be borne in mind that it is an executor who is asserting the right, and if there is one person in the world who is bound by the principles that legal assets are the first fund for payment of debts, that person is an executor. I will read a passage from Mr. Justice Williams's work on Executors. He says (1), "It is a well-known rule that as between the real and personal representatives of all persons deceased, the personal estate in the hands of the executor or administrator is the primary and natural fund which must be resorted to in the first instance for the payment of debts of every description contracted by the testator or intestate. But it is clear that this principle can only regulate the equitable administration of assets, and does not extend to the legal

(1) Williams on Executors (8th ed.), 1699.

Walters v. Walters.

control of the creditor of the deceased; for it is discretionary with him, if his debt is of a nature to bind both the real and personal estate in the hands of the executor; or to the real estate descended or devised. Hence, if the obligee of a bond bring an action of debt against the heir he cannot plead that there is an executor who has assets."

So here it appears to me that the order of December, 1876, proceeds on that footing, and never could have intended to alter the rights of the parties.

I dismiss the summons with costs.

Solicitors—Currie, Williams & Williams, for the plaintiffs; Geare & Son; Webb, Stock & Burt; Stibbard, Gibson & Co., agents for Gibson & Co., Newcastle, for other parties interested.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.

SELBORNE, L.C.

BRETT, L.J.

COTTON, L.J.

1881.

July 7, 8.

Ex parte BARROW;
in re ANDREWS.

Bankruptcy—Resolutions for Composition—Agreement to pay one Creditor in full—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 126.

When resolutions for composition have been passed in manner required by the Bankruptcy Act, one of the creditors who is bound by the composition can not behind the backs of the other creditors who are also bound thereby, enter into an arrangement with the debtor whereby he is to be paid his own particular debt in full, nor can the fact that the creditor agrees on his part to supply the debtor with goods on credit at all validate the arrangement.

Jakeman v. Cook (48 Law J. Rep. Exch. 165; Law Rep. 4 Ex. D. 26) distinguished.

On the 2nd of April, 1879, Andrews filed a liquidation petition in the Northampton County Court. Resolutions for a composition of 5s. in the pound payable by three instalments of 2s., 1s. 6d., 1s. 6d.

at two, four and six months respectively, from the date of the registration of the resolution, were passed by the creditors in manner required by the Act. These resolutions were registered on the 9th of July, 1879.

Barrow, who was a leather merchant, and a creditor to the amount of 187l. 7s. 9d., was one of the creditors who was bound by the resolution.

In August, 1879, before the date fixed for payment of the first instalment, Barrow entered into an arrangement with Andrews without the knowledge of the other creditors, whereby he agreed to continue to supply Andrews with goods on credit in consideration of being repaid his whole debt. He received the first instalment in September, 1879, but it was disputed whether he received the further instalments when they became due. The Court came to the conclusion on the evidence that if the subsequent instalments were not in fact paid, such payments were dispensed with by arrangement between the particular parties, but that Barrow could not be allowed to say that such non-payment constituted such default on the part of Andrews as to have the effect of reviving the original debt.

On the 10th of July, 1880, Andrews accepted bills drawn by Barrow for the unpaid balance of 187l. 7s. 9d. After this Andrews filed a second liquidation petition, and Barrow claimed to prove in that liquidation for the amount of the bills.

The Court were of opinion that the bills were so accepted by Andrews in pursuance of the arrangement of August, 1879.

The trustee rejected the proof. His decision was affirmed by the County Court Judge, and the decision of the County Court Judge was affirmed by the Chief Judge.

Barrow appealed.

Mr. E. Cooper Willis, for the appellant, contended that the case fell within

Jakeman v. Cook (*ubi supra*), and that an agreement by the debtor in consideration of the creditor continuing to supply him with goods on credit was a valid agreement; that there was no difference as to this between composition

Ex parte Barrow; in re Andrews (App.), Bankr.

and liquidation; and further submitted that the debtor having failed to pay the subsequent instalments the original debt revived.

Mr. Bigham and Mr. H. W. Andrew, for the respondent, submitted that the agreement, having been entered into before the date of the first instalment, was a fraud on the bankruptcy law; that there was a difference between composition and liquidation, the debtor in the former retaining all his property while in the latter he handed it all over to his creditor. In the case of

Jakeman v. Cook (ubi supra) the debtor had actually obtained his discharge.

In the present case the arrangement made behind the backs of the other creditors might have the effect of sweeping off for the payment of the one creditor's debt the whole of the assets which by virtue of the composition remained in the debtor's power for the payment of all his creditors.

Mr. Willis, in reply, cited

In re Robinson; ex parte Burrell, 45 Law J. Rep. Bankr. 68; Law Rep. 1 Ch. D. 537.

LORD SELBORNE, L.C.—This is a question of a proof tendered in the bankruptcy and rejected by the trustee. The creditor who tendered it was a party to resolutions for composition which were passed by the creditors in April, 1879, and registered on the 9th of July, and under which a composition of 5s. in the pound on their debts then existing was to be paid in certain instalments to the creditors, who were bound by the resolutions in satisfaction of their debts.

The appellant was one of the creditors who were bound. He was a creditor of the bankrupt at that time for 187l. 7s. 9d. What is the nature of this proceeding? This was a statutory composition under section 126 of the Bankruptcy Act, 1869. Under that section, if at two successive meetings there are certain majorities in number and value of the creditors present in favour of a composition, that composition is absolutely binding not only on those who assent but on those who dissent, provided that their names and addresses,

and the debts due to them, are inserted in the statement of his affairs, produced by the debtor at the meetings.

By the express words of the statute such a composition so accepted is to operate as a satisfaction of the debts due to the creditors, and binding on all the creditors whose names, addresses and debts are mentioned in the debtor's statement, and is not to be varied or added to except by subsequent resolutions passed at a subsequent meeting in the manner provided by the statute.

The present claim is to prove under a subsequent bankruptcy of the debtor for 111l. 15s. for bills to that amount which were avowedly given for an agreed balance of 187l. 7s. 9d., after allowing for the instalments of the composition. These bills were given in July, 1880; the first instalment of the composition had been received by the appellant in the preceding September, amounting to 18l. 14s., and the whole amount of the instalment was 46l. Now bills given for debts which are satisfied are *prima facie* without consideration. That has been determined, if it is necessary to cite authority for the proposition, in the case of *Jones v. Phelps* (1) and *Heather v. Webb* (2).

But it has been argued here that when the bills were given the original debt had been revived because the terms of the composition had not been fulfilled; whether such non-fulfilment consisted in the non-delivery of the promissory notes for the instalments, or in the non-payment of instalments, is not for the present purpose clear or material.

Now the question to be decided is one partly of law and partly of fact—the question whether there was, in any such sense as to have the effect of reviving the debt, any default on the part of the debtor towards this creditor. The County Court Judge and the Chief Judge thought that there was no sufficient evidence to satisfy them that there had been default. They considered, as I understand, that it was an admitted fact that these bills were taken for the admitted balance after pay-

(1) 20 W.R. 92.

(2) 46 Law J. Rep. C.P. 89; Law Rep. 2 C.P. D. 1.

Ex parte Barrow; in re Andrews (App.), Bankr.

ment of the instalment, and that that would throw on the creditor this burden of proving to the satisfaction of the Court that there was such default on the debtor's part as to revive the debt. I agree with them that the appellant has not satisfactorily discharged the burden of making that point out. I cannot discover in his evidence any sufficient account of the material transactions between him and the bankrupt between July, 1879, and July, 1880, when these bills were given.

As I have said, the amount for which they were given is 111*l.* 15*s.* That is stated to be the balance due in July, 1880, of the original debt of 187*l.* 10*s.*, but how that is made out is not shewn, at least to my satisfaction. [His Lordship went through the evidence, and stated that he was inclined to believe that, as between Barrow and Andrews, the payment of the instalments was dispensed with by arrangement, but that it was utterly impossible that anything so dispensed with could have, in point of law, the effect of reviving the original debt as by default, and concluded that the bills of July, 1880, were in consequence and on the footing of the arrangement of August, 1879, and proceeded.] Some part of the argument was addressed to the hypothesis, and *Jakeman v. Cook* was referred to, as shewing that in a case, not of composition, but of liquidation by arrangement, after the bankrupt had obtained his discharge, he was at liberty to enter into a new contract, one of the terms of which was that he should repay the original debt in full under a private arrangement with a particular creditor behind the backs of the other creditors.

That case, in my opinion, has no bearing on the present. The present is a case of a statutory composition, and a case in which the arrangement was made not only before the statutory composition was exhausted by the fulfilment of the terms, but before even the first instalment had become due to the creditors who were bound. It may be that, after a composition has been fully and finally worked out, and all the instalments paid, the position of the debtor may be the same as that of a discharged debtor in the case of a bank-

ruptcy or liquidation by arrangement, and that an agreement like that in *Jakeman v. Cook* may be supported. But in this case everything that was done with regard to this arrangement was done before the first instalment was payable to any creditor.

By the section of the Act it is expressly provided that no addition to or alteration of the provisions of the composition shall be binding on the parties to the original composition, except by an extraordinary resolution of the creditors; and if no alteration can be made for the benefit of all the creditors except with such a resolution, how can an alteration made for the benefit of one behind the backs of the others, and without any communication to them, be allowed to stand. It is impossible that a composition for the benefit of all, and a secret agreement like this for the benefit of a particular creditor, can stand together.

I am confirmed in that view by considering the consequences which would arise from a contrary conclusion. The validity of the arrangement cannot depend upon the *quantum* of debt. If the agreement that a particular creditor shall be paid in full, provided he goes on dealing with the debtor, be valid in this case, it would be equally valid even if that creditor's debt were one of so large an amount that the composition would be forced on the creditors by virtue of his debt and by his vote alone. And if an agreement made at such a time and of such a character can be good, I cannot see what would prevent money being paid down before any instalment paid to creditors, and the whole body of assets being swept away by the one creditor. I am confirmed by the view of the Court of Appeal in *Ex parte Sydney* (3), a case which, though not similar in circumstances, depends upon a similar principle.

I must add that there is a strong objection, long established at law and in equity, against underhand arrangements for the benefit of particular creditors. It appears to me that this principle is applicable to such a case as this. It was said that new credit was given here, and that

(3) 44 Law J. Rep. Bankr. 21; Law Rep. 10 Chanc. 208.

Ex parte Barrow; in re Andrews (App.), Bankr.

constitutes a consideration. It may be that such a consideration would be good in a case like *Jakeman v. Cook*, and where there is no question of good faith with the other creditors, and no question of compliance or non-compliance with the terms of composition resolutions. But no consideration can support a contract inconsistent with good faith towards the other creditors, and with the spirit of section 126.

The appeal must be dismissed with costs.

BRETT, L.J., and COTTON, L.J., concurred.

Solicitors—H. Montagu, agent for A. Andrew, Northampton, for appellant; C. C. Becke, Northampton, for respondent.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.

JAMES, L.J.

BAGGALLAY, L.J.

LUSH, L.J.

1881.

May 12.

Ex parte YOUNG;
in re KITCHIN.

Bankruptcy — Principal and Surety — Liability of Surety on Judgment against Principal — Proof of Liability.

A judgment in an action against the principal debtor, or an award in an arbitration against such debtor, is not binding on the debtor's surety or evidence against him in an action against him by the creditor of the principal debtor, unless the surety shall in the clearest terms have agreed to be bound by such judgment or award. In any other case his liability must be proved in the same way as it would have to be proved against the principal debtor.

Appeal by the trustee in liquidation of Joseph Kitchin, from a decision of the Registrar, sitting as Chief Judge.

Joseph Kitchin and Alphonse de Martelly, carrying on business as wine merchants in London, as A. de Martelly & Co., and the Pelican Bottling Company,

entered into an agreement dated the 22nd of January, 1877, with Messrs. Cantor, under which Martelly & Co. engaged to take all German wines to the average amount of at least 2,000*l.* per annum during the pendency of the agreement from Messrs. Cantor, at their wholesale price list. There were certain provisions as to the mode of payment and the sending of travellers, and the following arbitration clause: "Should any dispute arise between these contracting parties, the same is to be arranged by arbitration; and if the arbitrators do not agree they are to call in an umpire, whose decision shall be final for all parties concerned; such arbitrators and umpire to be exclusive of the legal profession; and this to be made a rule of Court of any of the divisions of the High Court of Justice upon the application of either of the contracting parties."

In December, 1877, Joseph Kitchin retired from the firm, and his son, Walter Kitchin, succeeded him as partner. To induce Messrs. Cantor to continue supplying wines to the new firm, Joseph Kitchin consented to guarantee the fulfilment by the new firm of the agreement of January, 1877, and in July, 1878, wrote a letter to Messrs. Cantor requesting them to consent to treat the agreement of 1877 "as made between the Pelican Bottling Company, now consisting of my son Walter Kitchin and A. de Martelly on one side, and yourselves on the other side; and in consideration thereof I undertake and guarantee that all wines supplied to them by you shall be duly paid for, and that the said agreement shall be otherwise duly performed in all respects on their part." On the faith of this undertaking Messrs. Cantor continued to supply wines, and to deal on the terms of the old agreement.

Disputes having arisen, Messrs. Cantor claimed a reference to arbitration under the agreement of 1877, and an umpire was appointed who, on the 6th of March, 1880, made his award declaring that the Pelican Bottling Company (consisting of W. Kitchin and A. de Martelly) had broken the agreement of the 22nd of January, 1877, and had failed to take the quantity of wine they contracted by it to take, and awarding 1,250*l.* to be due to Messrs. Cantor from the Pelican Bottling Com-

Ex parte Young ; in re Kitchin (App.), Bankr.

pany as damages for such breach of agreement.

On the 21st of April, 1880, the agreement of January, 1877, and the appointment of arbitrators and umpire were made a rule of the Common Pleas Division.

Judgment was signed against Martelly & Co. on the award, but was not satisfied.

Messrs. Cantor claimed to prove in the liquidation of Joseph Kitchin (who had on the 3rd of July, 1879, filed a liquidation petition) upon his guarantee for the amount of the award. The Registrar admitted the proof for the whole sum. The trustee now appealed.

Mr. Winslow and Mr. Arthur Powell, for the appellant. The Court of Bankruptcy is not bound by a judgment.

[JAMES, L.J.—Does bankruptcy revoke a submission to arbitration?]

It does not revoke it, but it does not bind the assignees in bankruptcy or the bankrupt's estate unless they adopt it—

Dod v. Herring, 3 Sim. 143, 1 Russ. & M. 153;

Marsh v. Wood, 9 B. & C. 659; 4 Moo. & R. 504; 7 Law J. Rep. K.B. 327;

Robson v. —, 2 Rose, 50;

Russell on Arbitration (5th ed.), pp. 32, 156.

A judgment signed by a creditor in an action against his principal debtor for a particular sum is not conclusive evidence as against the surety. If it is desired to bind the surety he must be made a defendant. This has been expressly decided by the American case of

Douglass v. Howland, 24 Wendell, 35.

There is no English authority on this particular point. The principal cannot call on the surety by a third party notice under the Judicature Act, having no right of indemnity against the surety.

Mr. De Gez and Mr. J. E. Linklater, for the respondents. — The guarantor here distinctly contracts that he will pay whatever shall be found due, and the performance by the new firm of the terms of the original agreement, one of these terms being that the amount due shall be ascertained by arbitration. The guarantee amounts, therefore, to an agreement to

pay what shall be found due by the arbitrators.

There has been a complete novation, the agreement having been acted upon by both the parties, and the wine having been supplied.

[JAMES, L.J.—Can there be a parol agreement for submission to arbitration?]

A person can agree to anything unless prevented by some statute. In a mercantile contract words will be implied—

Shepherd v. Harrison, 40 Law J. Rep. Q.B. 148; Law Rep. 5 E. & I. App. 116.

JAMES, L.J.—It appears to me that the real question in this case is, what is the true intent and meaning of the guarantee; and it must be treated as if Kitchin the guarantor had been an entire stranger. The reason why he gave the guarantee, or his motive, cannot have any effect in the construction of the words. The continuing partners are to pay for the wines supplied, but he will pay for the wines if they do not, or will make good what they do not pay.

There are a great number of things which by the agreement the partners are bound to do, and he guarantees that they will do these things. If they do not then he is liable in an action against him by Messrs. Cantor for any damage which can be shown by legal evidence to have been sustained by them by reason of that default. That is his agreement. But it has been argued that he is liable to pay any amount which an arbitrator shall say is the amount of the damages. The guarantee would require to be expressed in the very clearest terms before I could assent to a construction which might lead to much injustice. In an action against a surety the amount of the damage cannot be proved by the admissions of the principal. No act of the principal can enlarge the guarantee or fix the guarantor with any liability other than that which he has really contracted to bear. If a surety chooses to be so foolish as to make himself liable to pay whatever sum any person may say is the loss which the creditor has sustained, of course he may do so, and will be bound thereby. But it would be a strong thing

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to say that he has done so unless he has said so in so many words. The arbitration is a proceeding to which he is no party, but between the creditor and the person who is alleged to have broken his contract; and if the surety is to be bound by it, then every letter which the principal debtor has written and every expression used, or any step taken by him in the arbitration, would be binding upon the surety.

The principal debtor might have made admissions which would be binding as against him, but would not in the absence of agreement be binding as against the surety. It would be a monstrous thing to say that a man who is not bound by the admission of his principal should be bound by the way in which his principal chooses to defend an action, and by an agreement between the principal and his creditor as to the mode in which the liability should be ascertained. That is enough to dispose of the case.

But the arbitration was a mutual clause between the old English firm and the suppliers of the wine, and it is of the essence of that clause that the award shall be made a rule of Court so as to give the Court absolute jurisdiction over it, in case of any misconduct or miscarriage or error on the part of the arbitrator. Now an award can only be made a rule of Court by a submission in writing, and there is no submission in writing, as between Messrs. Cantor and the new firm, which can be made a rule of Court. The clause, therefore, is utterly inapplicable to the new state of things.

BAGGALLAY, L.J.—I am of the same opinion, and have very little to add. It needs only that the facts should be stated to shew that this claim of Messrs. Cantor cannot be supported. [His Lordship stated the facts.] It is now said that Messrs. Cantor & Co. are entitled to receive or prove for the amount which shall be ascertained on an arbitration between them and the new firm. All that Mr. Kitchin has guaranteed is the performance of the original agreement by Martelly & Co. If they have not performed the agreement Mr. Kitchin must pay the damages, but the amount of those damages must be ascertained in the usual way.

LUSH, L.J.—The question before us is not whether Mr. Kitchin is liable on his guarantee, or whether Messrs. Cantor are entitled to prove against his estate. The question is for what amount they are entitled to prove. Messrs. Cantor say that there has been an arbitration between them and the new firm, and they claim to prove for the amount awarded in that arbitration, to which Mr. Kitchin was no party. Now I agree with Mr. Linklater that if the words of the guarantee can fairly bear this meaning—"I undertake to pay the amount which the arbitrator shall find due from them and to you for damages"—a proof might be made for that amount. But I do not think any of us ever saw a guarantee in such a form, and to my mind this guarantee has not, and was never intended to have, such an effect. There is not a word in it as to the amount which the surety will pay. It is not usual to say that, and there is not a word about it here. He undertakes that all wines supplied shall be paid for. Suppose the dispute between the parties to have been whether a given amount was due for wines; suppose the creditors had brought an action against the debtors, and had proved before a jury and had got a verdict for a given amount as being the debt due to them, and they had then brought an action against the surety upon this guarantee, that verdict would have been no evidence against the surety of the amount due for wines. The amount due must have been proved over again as against the surety; the verdict would have been no evidence at all, except to shew the amount of the verdict—no evidence of the surety's liability to pay that amount.

Then we come to the next clause—"that the agreement shall be otherwise duly performed in all respects." That is all. There is not one word about paying anything. That is left to the proper legal conclusion. He undertakes to pay damages for the breach of the agreement by the new firm. How are those damages to be assessed? In the same way as the debt would have to be ascertained if the claim were for wine supplied. You must find explicit words to make a man liable to pay an amount which may be awarded

Ex parte Young; in re Kitchen (App.), Bankr.

against a third party, whether it be by a jury, a judge or an arbitrator. That is not the natural construction of the words of this guarantee nor the usual form. What the guarantor really says is, I will be answerable for any debt the firm may owe for wines, and I will be answerable for any damages which you may sustain by the breach of any other of the provisions of the agreement. The amount of the debt in the one case, and of the damages in the other, must, if the surety insists, be proved against him, just as it would have to be proved if the action were against the principal. For these reasons I hold that the creditors are not entitled to prove for the amount found due by the award. If they cannot agree with the surety as to the amount due, the amount must be ascertained in the same way as it would be if they had brought an action against the surety.

Solicitors—Hindson, Miller & Vernon, for trustee; Stibbard, Gibson & Co., for creditors.

BACON, V.C. } *In re THE EXCHANGE BANK-*
1881. } *ING COMPANY (LIMITED).*
July 22. } *RAMWELL'S CASE.*

Winding-up — Contributory — Forfeited Shares resold—The Companies Act, 1867, s. 25—Set-off—Prepayment of Call—Fraudulent Preference—The Companies Act, 1862, s. 164.

Original shares that have been forfeited by the company for non-payment of calls can be resold by the directors for less than the nominal value without a contract registered in accordance with the Companies Act, 1867, s. 25.

Calls due from a shareholder who is also the solicitor of the company may be set off against his bill of costs.

Directors with power to accept payment in advance of calls authorised their solicitor R., who was a shareholder, to pay the claims of three pressing creditors, amounting to 250l. R. paid these creditors and took from the directors a receipt for the amount "in prepayment of calls." These creditors were paid when the insolvency of the company was admitted but before the presentation of

the winding-up petition. The official liquidator having made a call which amounted in R.'s case to 320l.,—

Held, that the 250l. was a valid payment pro tanto, in advance of calls, and was not a fraudulent preference, and that R. was only liable for the balance.

Adjourned summons.

This was an application by the official liquidator for a balance order against Mr. Ramwell, a contributory, for non-payment of a call of 8l. made in the winding-up of this company. The company was registered in 1872. By its articles of association the directors were empowered "to accept payment in advance of calls and to determine the terms on which such payment shall be accepted;" it was also provided that "every share which shall be forfeited shall thereupon be the property of the company, and may be sold, re-allotted or otherwise disposed of, either to the original holder thereof or to any other person, upon such conditions and in such manner as the board think fit."

Ramwell, Pennington & Co. were solicitors to the company, and Ramwell had been a director till January, 1879, when he resigned. He held forty shares in the company. On the 11th of January, at a board meeting at which Ramwell, as solicitor to the company, was present, the insolvency of the company was admitted, and it was resolved to summon an extraordinary general meeting for the 28th of January, at which resolutions for a voluntary winding-up were to be submitted to the shareholders. At a subsequent board meeting on the 14th of January it was resolved—first, "that the sum of 250l. be accepted from Mr. Ramwell in prepayment of his calls, and that that sum bear interest at five per cent.;" and, second, "that the following deposits be paid, namely, Elizabeth Brown, 100l.; Betty Ormerod, 50l.; Alice Shaw, 100l.;" third, "that the following bills be paid—Messrs. Ramwell & Co." These amounted to 109l. 10s. 7d.

The three depositors named in the second resolution were at this time pressing for payment, and they were paid by Ramwell in accordance with the resolu-

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tions on the 14th of January, and thereupon the directors gave him a receipt for 250*l.* "for prepaid calls."

The bills due to Messrs. Ramwell & Co. were on the same day paid by writing off 49*l.* 10*s.* 7*d.* arrears of call due from Ramwell to the company, and 60*l.* due from his partner Pennington. These arrears were due on a call of 2*l.* per share made in November, 1880.

On the 20th of January a petition was presented by a creditor, and on the 29th of January a compulsory winding-up order was made.

On the 9th of May Ramwell was settled on the list of contributories as the holder of forty shares.

On the 23rd of May a call of 8*l.* per share was made.

Ramwell offered to pay 70*l.* of the 320*l.* claimed by the liquidator, but insisted that the 250*l.* paid by him to the creditors of the company as aforesaid ought to be deducted as being duly made in prepayment of calls.

The liquidator alleged that Ramwell was in arrears for previous calls at the time of this payment, as the directors had no power to set off calls against bills, and consequently that they had no power to accept money in advance of calls from him, and further that Ramwell owed the company 70*l.* for discount allowed to him when he purchased his shares. Ramwell in his evidence stated that it was the usual practice of the board to write off the amounts due by the company for bills of costs against the amounts due from him or his partner for calls; that the shares he held were not originally allotted to him, but were forfeited shares which he had purchased from the company at the fair market price. To this the liquidator replied that the agreement for purchase at less than the *par* value ought to have been registered. It was admitted that there was no such agreement in writing.

Mr. Higgins and *Mr. Norton*, for the official liquidator.—Anything which in the case of an individual trader would be deemed, in the event of bankruptcy, an undue and fraudulent preference of his creditors, will be so deemed in the case of

a winding-up, and will be invalid accordingly—

The Companies Act, 1862, s. 164.

This 250*l.* was not paid to the company at all, nor for the purposes of the company. By means of this payment these three creditors have been unduly and fraudulently preferred; and it cannot, therefore, be taken as a *bona fide* payment in anticipation of calls—

In re The European Central Railway Company. Sykes's Case, 41 Law J. Rep. Chanc. 251; Law Rep. 13 Eq. 255,

where there was power to accept money in advance of calls just as there is here. These creditors were paid by Ramwell when the insolvency of the company was perfectly well known to him; that of itself is sufficient to upset this transaction—

The Gaslight Improvement Company v. Torrell, 39 Law J. Rep. Chanc. 725; Law Rep. 10 Eq. 168.

He was in a fiduciary position, and he assisted the directors in committing a breach of trust. The directors had no power to direct Ramwell to make these payments, or to allow him to consider them as made in prepayment of calls. Next, we say that the directors could not accept money in advance for an uncalled liability from a shareholder who was already in arrears for previous calls, because the set-off of 49*l.* 10*s.* 7*d.*, the arrears of the previous call, against his professional bill was illegal. Then he was also in debt to the company for 70*l.*, which he calls discount on the purchase of his shares. The company could not make that allowance to him without an agreement in writing registered under the Companies Act, 1867, s. 25—

Black & Co.'s Case, 42 Law J. Rep. Chanc. 404; Law Rep. 8 Chanc. 254,

in which case there was an actual agreement, though not registered, that instalments due for work done should be set off against calls.

In re The Wincham Shipbuilding Company. Poole, Jackson & Whyte's Case, 48 Law J. Rep. Chanc. 48; Law Rep. 9 Ch. D. 322,

is distinguishable, for there the money

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was paid to the company, whereas here the company has never received one shilling.

Mr. Warrington, for *Ramwell*.—Under the articles of association the directors had power to accept payment in advance of calls, and therefore could authorise the payment in advance of this 250*l*. The money was not applied in making preferential or undue payments, for these creditors were clamorous, and there is clear evidence of pressure. This case is much stronger than

Poole, Jackson & Whyte's Case (*ubi supra*),

on which I rely; for *Ramwell* is not a director, and, further, he does not derive any collateral advantage from this prepayment as the directors did in that case. No authority has been cited shewing that the directors had no power to accept calls in advance while previous arrears or debts were owing from *Ramwell*. Besides, at the time the directors accepted this money they did not consider that there were any arrears; the payment of the bills of costs by crediting *Ramwell* with the amount of the November call was a perfectly valid transaction—

Ferrace's Case, 43 Law J. Rep. Chanc.

482; Law Rep. 9 Chanc. 355,

and was equivalent to a cash payment within section 25 of the Companies Act, 1867—

Ex parte Bentley, 49 Law J. Rep.

Chanc. 240; Law Rep. 12 Ch. D. 850.

As to the 70*l*. discount for shares: These shares were not originally allotted to *Ramwell*, they were forfeited shares which the company chose to sell for 70*l*. less than the *par* value—a mere ordinary Stock Exchange transaction, which requires no registration under the Companies Act, 1867, s. 25.

Mr. Higgins replied.

BACON, V.C.—No doubt this question is a very nice one in some respects, but it has been argued with great skill and ability on both sides, so that now it is very easy for me to say that the matter is reduced to very small dimensions. There are three points which have been argued, and the first which I will deal

with is the question of the 70*l*., which the official liquidator says ought not to be allowed to *Mr. Ramwell*, because section 25 of the Companies Act, 1867, requires that any agreement acquiring shares at less than the nominal value should be in writing and registered, and there is no such contract here. As far as the evidence goes, the company had issued shares to certain persons, who had failed to fulfil their duties by paying calls, and the company had consequently exercised their power of cancelling and forfeiting these shares, and these shares became the property of the company again. But they are no longer shares to which the registration clause applies; they are not shares "issued" by the company. The directors had these shares to sell, and they chose to sell them for 70*l*. less than the full price. These shares were chattels in their possession—things they could sell, things they had acquired by reason of the forfeiture. There is no ground for saying that such a transaction ought to be registered, or that it was void for want of registration. Then as to the bills of costs. The solicitor to the company has a bill of costs, which he delivers; at the same time he owes money to the company for calls. Instead of drawing one cheque in favour of the company and receiving another from the company, it is agreed that one debt shall be written off against the other. What is there unreasonable or improper in that, or contrary to the policy of the law, or the interest of the shareholders or the company or the creditors, now that there has come a winding-up? Neither of these points can be maintained. Then there remains the third point, as to which it is said that there was a fraudulent preference on the part of the company; and that *Mr. Ramwell*, being in a fiduciary position, and knowing the condition the company was in, as he must have done, any payment made by him by the direction of the company was so much in his own wrong that he must not ask for repayment. Section 164 of the Companies Act, 1862, imports into a winding-up similar provisions to those of Bankruptcy Acts relating to fraudulent preference. Section 92 of

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the Bankruptcy Act, 1869—the fraudulent preference clause—makes void a payment made by a debtor at a time when he is unable to pay the whole of his debts with his own money; but there is a saving clause to the effect that this section shall not affect the rights of a payee or incumbrancer “in good faith and for valuable consideration.” Now, the payment in this case to these persons was no doubt in good faith and for valuable consideration; and it is proved to have been made under repeated and frequent pressure. That Mr. Ramwell was the instrument of the company in making this payment is unquestionably true; but if this payment was one which, as against the payees, cannot be objected to, what objection can be taken to Mr. Ramwell's having performed the office assigned to him by the direction of the company? He paid the money for the company by their direction. If they had paid it with their own hands, and without fraud and for valuable consideration, it would have been a good payment: why should it not be a good payment when made by Mr. Ramwell? In *Poole, Jackson & Whyte's Case*, which has been cited, the case was different. In that case there was an actual substantial payment of money, in advance of calls, to the company; but the judgment of the Court of Appeal was, that it was a payment made in the ordinary course of business; and the fact that the directors—the persons paying the money—derived a collateral advantage themselves, could not affect the transaction, which in its nature was right. So far only is there any analogy between *Poole, Jackson & Whyte's Case* and the present. In my opinion, therefore, the payment of this 250*l.* was a valid payment in advance of calls; and the order will be that Mr. Ramwell pays only the remaining 70*l.*, with interest until payment. No order as to costs.

Solicitors—Goldring & Mitchell, agents for Ramwell, Pennington & Co., Bolton, for Ramwell; Clarke, Woodcock & Co., for the official liquidator.

JESSEL, M.R. }
1881. } TRUMAN AND COMPANY v.
June 3. } REDGRAVE.

Practice—Mortgage—Business—Legal Mortgage—Receiver and Manager—Injunction.

A legal mortgagee of business premises, as, for instance, an hotel, who cannot take possession of the mortgaged premises by reason of the conduct of the mortgagor, may upon interlocutory application obtain the appointment of a receiver and manager, and also an injunction restraining the mortgagor from interfering with the management of the business or the possession of the premises.

Form of order appointing receiver and manager with such an injunction.

The plaintiffs were a firm of brewers, and legal mortgagees, by demise in 1873, of a leasehold hotel or public-house, No. 7 Bow Street, Covent Garden, called the “Alexandra Hotel,” occupied and carried on by the defendants, who were the mortgagors. The mortgage comprised also the trade fixtures, goodwill and licences.

The adjoining house, No. 8 Bow Street, which was not included in the mortgage, was held by the defendants under a lease granted by a person who was also the freeholder of No. 7, and was used as a lodging-house and restaurant in connection with No. 7, the necessary doorways and communications for the purpose having been made between the two houses.

In April, 1881, the defendants' rent being in arrear, the landlord distrained on No. 7, and on the 12th of May following the plaintiffs purchased the goods on the premises from him at the condemned price, at the same time leaving a man in possession to protect the goods; but a few hours afterwards the defendants forcibly turned him out. On the following day the plaintiffs served the defendants with a demand for immediate payment of the mortgage debt, and the same not being paid, again put their man into possession, who was again, a few hours afterwards, forcibly ejected by the defendants.

The plaintiffs thereupon commenced

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this action for an account of what was due to them on their mortgage, foreclosure or sale on non-payment, an injunction to restrain the defendants from interfering with the management of the business and the possession of the premises, the appointment of a receiver and manager of the hotel and business and possession of the hotel. They now moved for the appointment of one Henry Short, a licensed victualler, as receiver and manager of the hotel, and of the business of a licensed victualler there carried on, until the trial of the action; also for an injunction to restrain the defendants from interfering with the management of the business until the trial; or for such other order as the Court might think fit to make for the protection of the plaintiffs' interests in the business and premises. The notice of motion did not include the adjoining house, No. 8 Bow Street.

The evidence adduced by the plaintiffs in addition to the above facts was to the effect that through want of means the defendants were not in a position to carry on the business in a proper manner, and that, in consequence, the goodwill of the hotel was being depreciated.

The defendants in their evidence alleged that the business was in fact carried on by them in both houses, Nos. 7 and 8, and that it was impossible to sever the two without destroying the business entirely, which would be the result of appointing a receiver and manager of No. 7 alone, as asked by the motion. The plaintiffs, however, denied this and alleged that the business could be carried on at No. 7, altogether independently of No. 8.

The plaintiffs also produced the usual affidavits of fitness in support of their application for the appointment of Short as receiver and manager.

Mr. Romer and *Mr. P. S. Gregory*, for the plaintiffs.

Mr. Yates Lee, for the defendants, objected that the plaintiffs were not entitled to have a receiver and manager of one part of the business only; that the defendants would thereby become personally liable for any offences against the Licensing Acts committed by the receiver; and, moreover, that it was not the practice of

the Court to appoint a receiver and manager upon an interlocutory application in such a case as the present, where the effect of the appointment would be to injure or destroy the business.

THE MASTER OF THE ROLLS.—The plaintiffs are mortgagees of an hotel or public-house, together with the goodwill and licences; and the defendants are the mortgagors. The mortgage-money—that is, the principal and interest—was in arrear; the rent was also in arrear. The landlord distrained, and the mortgagees, to save the chattels comprised in the mortgage, had to buy the goods of the landlord at the condemned price. The mortgagees then attempted to put a man in possession, but the defendants thought fit to take the law into their own hands, and turned him out. Thereupon, the plaintiffs did what was a very wise thing to do—instead of getting a force of navvies to put the man back again—they brought an action and asked for a receiver and manager. An order to that effect appears to me to be a mere matter of course, and it would have been a matter of course even if the defendants had not been guilty of these acts of violence.

[His Lordship then—after observing that the mortgagees could not be compelled to concern themselves in any way with the carrying on business at No. 8, which was not comprised in the mortgage, proceeded:] The other objection was this: it was said that if I appoint a receiver and manager of the hotel, it may be that the person who has the licence will be liable to be summoned for some dereliction of duty on the part of the receiver. As to whether that is possible or probable I will give no opinion; but, even supposing that to be so, it is only one of the unpleasant consequences of a man not being able to pay his debts. The publican or the licensed victualler is liable for the acts of his agent, if he appoints one, in consideration of a large sum of money being paid to him by way of loan. Nor is the receiver less his agent because until he pays off all the money borrowed by him he cannot be free; that is a contingency which he might have anticipated when he took

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the money of the mortgagees. It is rather late, after he has received the money, and when he is unable to repay it, to speak of any consequences which are likely to result to him. The mortgagees, in nominating a person as receiver are probably not more likely to do anything to incur such a risk as is suggested than the defendants themselves.

I therefore make an order for reference to chambers to appoint a receiver and manager, Short being appointed *interim* receiver and manager. There will also be an injunction against the defendants, as asked.

The order was in the following form:—

"Upon motion, &c., this Court doth order that H. Short, of, &c., be hereby appointed, without giving security, *interim* receiver and manager to receive the rents and profits of the 'Alexandra Hotel,' No. 7 Bow Street, in the county of Middlesex, and the business of a licensed victualler carried on thereon, and to manage the same until a receiver and manager of such hotel and business be duly appointed as hereinafter directed; the plaintiffs, by their counsel, undertaking to be answerable for what the said H. Short shall so receive. And it is ordered that the plaintiffs and defendants do deliver over to the said H. Short, as such receiver and manager, all the stock-in-trade and effects of the said business, and all books and papers, and licences relating thereto. And it is ordered that the said H. Short do pass his accounts and pay the balances which shall be certified to be due from him into Court to the credit of this action—*Truman & Co. v. Redgrave* (1881, T. 972). And it is ordered that the defendants be restrained from interfering with the management of the said business and the possession of the aforesaid premises. And it is ordered that a proper person, upon first giving security, be appointed to receive the rents and profits of the said 'Alexandra Hotel,' No. 7 Bow Street aforesaid, in the said writ mentioned, and to manage the business of a licensed victualler carried on thereon. And it is ordered that the said H. Short do deliver to the receiver and manager, when so appointed, all the stock-

in-trade and effects of the said business, and all licences, books and papers relating thereto. And it is ordered that such receiver do from time to time pass his accounts, and pay the balances which shall be certified to be due from him into Court to the credit of this action—*Truman & Co. v. Redgrave* (1881, T. 972)—and that such balances, when so paid in, be invested in Consolidated Three Pounds per Centum Annuities."

Solicitors—Hanbury, Hutton & Whitting, for plaintiffs; J. Holder, for defendants.

[IN THE COURT OF APPEAL.]

SELBORNE, L.J.	} <i>In re</i> BETTS; <i>ex parte</i> HARRISON.
BRETT, L.J.	
COTTON, L.J.	
1881. June 29.	

Mortgage—Attornment Clause—Distress—Right to apply Surplus Proceeds in reduction of Principal.

A mortgage-deed contained the usual attornment clause by the mortgagor, and the rent reserved thereunder coincided with the interest payable on the principal debt. The mortgagor having gone into liquidation, the mortgagees distrained under the attornment clause for arrears of rent, and the distress realised more than the arrears of interest then due:—Held (affirming the decision of BACON, C.J.), that the mortgagees, in the absence of any provision to the contrary in the mortgage-deed, were entitled, as against the trustee in liquidation, to retain the surplus proceeds of the distress in payment pro tanto of the principal due to them under the mortgage.

Quære, whether Hampson v. Fellows (37 Law J. Rep. Chanc. 694; Law Rep. 6 Eq. 575) is sound law.

This was an appeal from the decision of the Chief Judge.

By deed dated the 8th of November, 1873, the debtor mortgaged his freehold estates to trustees to secure 12,500*l.*, with interest. Interest was made pay-

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able on the 8th of May and the 8th of November. The mortgagor, being in possession, attorned tenant to the mortgagees at the yearly rent of 593*l.* 15*s.* (being the amount of the interest), payable half-yearly on the 8th of May and the 8th of November. Afterwards, by a parol agreement, the days of payment of the interest were altered to the 1st of January and the 1st of July, and the interest was duly paid half-yearly on the latter date, down to the 1st of July, 1880.

On the 1st of March, 1880, the mortgagor filed a liquidation petition, under which a trustee was appointed. The trustee having advertised a sale of the stock on the property, the mortgagees, on the 19th of November, 1880, distrained for 296*l.* 17*s.* 6*d.*, being a full half-year's interest as from the previous 8th of May.

The mortgagees claimed to apply the whole of this sum in satisfaction of the principal and interest due to them; but the trustee claimed that so much of the sum as represented the interest between the 8th of May and the 1st of July, which he had already paid, ought to be paid over to him.

The Chief Judge, reversing the decision of the County Court Judge, held that the mortgagees were entitled under the distress to the whole of the sum—first, in payment of interest, and then *pro tanto* in reduction of the principal debt.

The trustee appealed.

Mr. E. O. Willis, for the appellant.—The attornment clause was only intended as a further security for the interest, and so long as the interest is paid regularly, which was done, the mortgagees could not distrain for rent under the attornment clause—

Hampson v. Fellows (ubi supra).

The acceptance of interest on the 1st of January and the 1st of July was a waiver of the right to call in the principal, if there was any breach by non-payment on the days originally fixed for payment of interest.

Mr. Winslow and *Mr. J. T. Humphrey*, for the mortgagees.—The position of the

parties depends on the mortgage-deed, and cannot be affected by any correspondence that has taken place between them. That deed contains a recital that the mortgage is to “secure principal and interest in manner hereinafter appearing.” Those words apply to all the powers and clauses after contained in the deed. On the 1st of June notice was given to pay off the principal, and, although the mortgagees could not sell before the expiration of the notice, they could sue on the covenant to pay, and distrain for rent; and there is nothing in the deed restricting the distress to the amount of interest due. At the time of the distress the whole amount of the principal and some interest was due. The fact that the rent reserved under the attornment clause is the same in amount as the interest payable on the principal, is not conclusive that the attornment is only intended as a further security for the interest.

In re The Stockton Iron Furnace Company, 48 Law J. Rep. Chanc. 417; Law Rep. 10 Ch. D. 335,

shews that a distress may be applied in part payment of principal as well as in keeping down interest.

Hampson v. Fellows (ubi supra) was cited in that case, and is impliedly overruled by what Lord Justice James said in that case.

Mr. E. C. Willis, in reply.—

In re The Stockton Iron Furnace Company (ubi supra)

is totally distinct from this case. There the question was, whether the deed itself was a fraud upon the bankruptcy laws; and the other remarks are mere *dicta* of the Judges.

THE LORD CHANCELLOR (LORD SELBORNE) said—We all think that the order appealed from is right. This large sum of money was lent by the mortgagees to the mortgagor, and there is a recital in the mortgage-deed that the repayment of the principal and interest is to be “secured in manner hereinafter appearing.” Then follows the usual conveyance of the property subject to redemption, and that is accompanied with a power of sale and other usual clauses. Then the attornment

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is stated to be "for the consideration aforesaid"—that is, the original advance of 12,500*l.*—and there is nothing more in the deed to shew what is intended to be secured by the tenancy created by that attornment and the rent reserved under it. The original recital in the deed is that the payment of the principal and interest are "to be secured in manner hereinafter appearing." *Prima facie*, therefore, the attornment clause is a security for the principal and the interest as they become due. There was in point of fact, at the time the distress was levied, the whole of the principal and some interest then presently payable. Why is not the fruit of the distress to be applied towards satisfaction of the whole amount due? The only suggestion to the contrary is that the attornment clause is merely a further security for the interest, because the rent reserved under it coincides with the interest payable on the principal debt, for the payment of which he is allowed thirty days' grace. But there is nothing whatever in the deed to suspend the right to distrain for the rent pending the thirty days' grace. Even if when the distress was levied every shilling of interest then due had been paid, I do not see why the mortgagees could not distrain under the attornment clause for the principal then due. I agree, therefore, with the Chief Judge, that the mortgagees are entitled to apply the surplus proceeds of the distress in payment *pro tanto* of the principal due to them under the mortgage-deed.

BAGGALLAY, L.J., and LUSH, L.J., concurred.

Solicitors—Swann & Co., agents for F. W. Tweed, Horncastle, for the mortgagees; Cole & Jackson, agents for Broadbent, Heelis & Co., Bolton, for appellant.

[IN THE COURT OF APPEAL]

JESSEL, M.R.	} <i>In re</i> MORGAN. PILLGREM v. PILLGREM.
JAMES, L.J.	
LUSH, L.J.	
1881.	
May 25.	

Executor—Renewal of Lease of Business Premises occupied by Testator in his own Name—Additional Property included in new Lease—Deposit to secure Executor's own Debt—Purchaser for Value without Notice—Possession of Title-deeds.

An executor, six years after the death of his testator, surrendered the lease of the premises in which the testator and the executor since the testator's death, under a power in the will, had carried on the business, and took a renewed lease, including additional property, and at an increased rent, in his own name. This lease he subsequently deposited to secure money advanced to him, which he used for his own purposes. The mortgagees did not know, nor had means of knowing, that the executor was not beneficial owner of the lease. An action was brought to administer the testator's estate. Under a consent order the leasehold property was sold and the proceeds paid into Court, the mortgagees, for the purposes of the sale, giving up his deed.

Upon an application by the mortgagees for payment of the proceeds of sale,—

Held (affirming FRY, J.), that the lease formed in equity part of the testator's estate, and that the equitable mortgagees only acquired a title subject to the prior equities of that estate; and that the equitable mortgagees had not been injured by the order to give up the indenture of lease, and had not thereby acquired any right to the proceeds.

This was an appeal from the decision of FRY, J. The case is reported below (*Ante*, p. 654). The only additional facts necessary to be stated are that the renewed lease included other property besides that comprised in the original lease, and also that the leasehold property had been sold under a consent order in the action, Hilliar giving up the lease to facilitate the sale, and the proceeds of sale paid into Court. The order was made without prejudice to any rights.

The execution creditor appealed against

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the decision, so far as the lease was concerned.

Mr. Glasse and *Mr. Methold*, for the appellant, renewed the arguments used below, and contended that the order which had been made for sale, under which the appellant gave up the lease, ought not to prejudice him.

They cited

Ray v. Ray, G. Coop. 264 ;

Heath v. Orcalock, 44 Law J. Rep.

Chanc. 157 ; Law Rep. 10 Chanc. 22.

Mr. J. Pearson, *Mr. Daniel Jones* and *Mr. Stirling*, for the respondents, were not called upon.

JESSEL, M.R., was of opinion that the appeal could not succeed. The executor was appointed by the will of the testator with directions under which he became in effect trustee of the business, which he was to carry on, accounting for the profits thereof to the *cestuis que trust*. The will being proved in September, 1870, the trustee did not sell the property, but continued to carry on the business under the terms of the will, not acting otherwise than as a trustee.

In 1876 he surrendered the lease of the business premises, and took a new lease of the same premises for a longer period, and also of two adjoining cottages, and continued to carry on the business in them.

The first question was, What was the effect of his taking this lease? The renewed lease would not have been granted but for this surrender. It being well settled that a trustee cannot get any personal benefit by dealing with his trust property, it must be held that he was trustee of this new lease. In 1879 he borrowed a sum of money from the appellant, in his own name and for his own use in carrying on the business, and deposited the lease with him. The appellant had no notice that Pillgrem was not the lawful owner of the property comprised in the lease. Had he enquired into the landlord's title, he would have got no notice. He was therefore a purchaser without notice, who did not get the legal title, and therefore he must take

the lease subject to prior equities—that is, to the trust on which it was held. He acquired nothing beyond that, except the right to the parchment. At a later period he issued execution against the chattels of his debtor, and among other chattels the leasehold premises; and, in order to enable the sheriff to seize, the lease was handed over to him. The counsel for the appellant admitted that the sheriff could not seize trust property for the debt of the trustee. The execution therefore gave the creditor no better title than he had before, and therefore he got no title to the lease under the execution, and therefore had no legal title to the property; and as to his equitable interest, he must be postponed to the *cestui que trust*.

Then it was said that the trustee was prejudiced by the order for him to give up the parchment. It was not intended by that order to give the creditor any right to the parchment, because the property was to be sold, and the parchment was to go to the purchaser. He did not acquire thereby a new title—that is, a right to the proceeds of sale. It was suggested that, had he known his own right, he would have stipulated for a share of the proceeds before giving up the deed. If he had refused, there would have been a condition that the purchaser would not be entitled to receive the actual lease, but only a copy, but that the holder of the lease was bound by the order for sale.

A condition like that would have had no injurious effect on the sale. The order did no injury to him; he could have got no benefit from the parchment if he had got it. The truth is, he thought he was entitled to the proceeds of sale, and therefore he wished it to be a good sale, and did not wish to prejudice it.

JAMES, L.J., concurred.

LUSH, L.J., entirely agreed as to the effect of the order of the Court. The matter that pressed upon his Lordship was, whether the surrender of the lease of the testator's property was the sole consideration for the granting of a lease of the new property. The trustee did not pay any money for it, but his personal

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character might be a consideration. His Lordship therefore, without disputing the dictum that the trust affected the whole of the property included in the new lease in the case then before him, declined to accede to the general proposition.

Solicitors—J. P. Murrough, for appellant; Allen & Edwards, for respondents.

BACON, V.C. }
1881. } *In re THE CAMBRIAN MINING*
July 27. } COMPANY (LIMITED); *ex*
Aug. 3. } *parte FELL.*

Company—Mortgagee—Winding-up Petition—Exercise of Power of Sale—Interim Injunction.

Where a mortgagee who was also a shareholder in the company, filed a petition for winding up the company, alleging that if the business were sold as a going concern there would be assets to return a dividend to the shareholders, but that there were at present no assets available for payment of his debt except the lease, plant and machinery, which could not be sold without stopping the business, —Held, that, as mortgagee of the lease, plant and machinery, he ought to be restrained from exercising his power of sale till the hearing of the petition.

This was a motion on behalf of the company to restrain the exercise of his power of sale by a mortgagee until the hearing of a winding-up petition which had been presented by the mortgagee, who was also a shareholder of the company.

The winding-up petition alleged, amongst other things, that if the property of the company were now realised as a going concern, the assets would be sufficient to return a dividend to the members, but that there were at present no assets or moneys available for payment of the petitioner's debt, except the lease, plant and machinery, which could not be sold without stopping the business.

The mortgagee, whose mortgage was on the lease, plant and machinery of

the company, had also given notice that he intended to exercise his power of sale under the provisions of his mortgage-deed. The company now moved to restrain the exercise of the power of sale till the hearing of the petition.

Mr. Marten and Mr. F. B. Palmer, for the motion, contended that, having regard to the allegation in the petition, the exercise of the power of sale ought to be restrained till the petition came on to be heard.

Mr. Higgins and Mr. Grosvenor Woods, for the mortgagee, contended that the Court would not interfere with the exercise of his power of sale by a mortgagee.

They cited

In re David Lloyd & Co., Law Rep. 6 Ch. D. 339.

BACON, V.C.—The question is, whether a man who is a mortgagee and also a shareholder should be allowed to exercise his power of sale, when he has filed a petition for winding-up containing an allegation such as this petition contains. [His Lordship read it and continued:] It is true that as a general rule the Court will not interfere with a mortgagee except under special circumstances, but in the present case I think it would be inconvenient and might be unjust if he were to exercise the power of sale until the petition comes on to be heard. An injunction will be granted accordingly till the hearing of the petition, the company giving its undertaking as to damages.

On the 3rd of August the petition came on to be heard.

Mr. Hemming and Mr. Ingle Joyce appeared for the shareholders.

The petition was ordered to stand over indefinitely, an arrangement being made for the payment of the mortgage debt.

Solicitors—H. Wickens, for the company; C. Gregory, for petitioner.

JESSEL, M.R. } THE CERCLE RESTAURANT
1881. } CASTIGLIONE COMPANY v.
Ang. 4. } LAVERY.

Company—Winding-up Petition—Jurisdiction to restrain Presentation—Solvent Company—Creditor—Disputed Debt—Injunction.

The Court has jurisdiction to restrain by injunction a person claiming to be a creditor of a company from presenting a petition to wind up the company in the case of a bona fide dispute as to the debt, and where the company is proved to be solvent.

The Cercle Restaurant Castiglione Company was incorporated on the 16th of February, 1881, with a capital of 60,000*l.* in 12,000 shares of 5*l.* each. The objects of the company were to carry on the business of a restaurant in Paris, and to take over a contract made the 21st of January, 1881, between the defendant Lavery, the lessee of the premises, of the one part, and the defendant Geldham, as trustee for the intended company. By the contract, Lavery was to grant a lease of the premises to the company, and he was to be paid 2,000*l.* for certain furniture and effects on the premises, by instalments of 1,000*l.* each. By an agreement dated the 16th of February, 1881, the day of the registration of the company, Lavery agreed that in the event of the company finding their capital otherwise subscribed insufficient for working the company satisfactorily, he would pay to the company such sums not exceeding in the whole 2,000*l.* as the directors might deem necessary, taking fully paid-up shares equivalent to the amount paid by him under the contract of the 21st of January, 1881. The company were let into possession of the premises and furniture, and they duly paid Lavery the first instalment of 1,000*l.* When the second instalment became due, Lavery applied for payment thereof, whereupon the company's committee of management, considering that the time had arrived for calling upon him to take up shares under his agreement of the 16th of February, passed a resolution requiring him to take 200 shares, equivalent to 1,000*l.*, such shares to be allotted to him in exchange

for his receipt for the second instalment of 1,000*l.* due to him. Lavery thereupon refused to admit his liability to take the shares and insisted on his right to be paid the instalment in cash. The committee then passed a further resolution requiring him to take 400 shares pursuant to his agreement of the 16th of February, 200 to be handed to him in exchange for his receipt for 1,000*l.* and 200 for cash. Thereupon Lavery, on the 23rd of June, 1881, served upon the company the usual statutory notice for payment, and this notice was followed up on the 21st of July by a letter from his solicitors to the solicitor of the company, which, after referring to the notice, stated that they were instructed to present a petition to wind up the company, and should do so the next day unless the amount due (1,000*l.*) were paid to them before half-past ten in the morning. The company then issued the writ in this action, and moved by special leave for an injunction to restrain Lavery from presenting a petition for the winding-up of the company, or from taking any proceedings against them to recover the 1,000*l.* alleged to be due to him under the contract of the 21st of January.

It appeared from the evidence that the company owed nothing except ordinary debts, and the amount (if anything) due to the defendant Lavery under the contract of the 21st of January. It also appeared that they were perfectly solvent and doing a good business.

Mr. Ince and Mr. Seward Brice, for the plaintiff company, submitted that the Court had jurisdiction to restrain a creditor of a company from presenting a winding-up petition where the debt, in respect of which the petition was presented, was disputed and the company solvent.

They referred to

The Niger Merchants' Company v. Capper, 25 W.R. 365.

Mr. Chitty and Mr. Farwell, for the defendant Lavery.

Mr. Drake, for the defendant Geldham.

THE MASTER OF THE ROLLS said that the conduct of the defendant Lavery was

Cercle Restaurant Castiglione Co. v. Lavery.

wholly unjustifiable, and that he had no right to present a winding-up petition. The company having called upon him to take up and pay 5*l.* per share to the amount of 1,000*l.* under his agreement of the 16th of February, 1881—by which he was clearly bound—he was not entitled, after refusing to do so, to say that the company ought to be wound up for non-payment of their instalment of 1,000*l.*, and he could not take advantage of his own wrong.

His Lordship accordingly granted an injunction until the trial, restraining the defendant Lavery from presenting any petition to wind up the company in respect of any debt then due, or alleged to be due to him, the company undertaking to issue shares to him to the amount of 1,000*l.* His Lordship directed the writ to be amended by making the defendant Geldham a plaintiff.

Solicitors—M. T. Hodding, for plaintiffs; Pritchard, Englefield & Co., for defendant.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.
JESSEL, M.R.
JAMES, L.J.
LUSH, L.J.
1881.
May 26.

Ex parte LADBURY;
in re TURNER.

Bankruptcy — Disclaimer by Trustee — Power of Court to impose Conditions — Bankruptcy Act, 1869, s. 23 — Bankruptcy Rules, 1871, rule 28.

Where a trustee applies, under rule 28, for leave to disclaim a lease, the Court has, under that rule, a judicial discretion as to imposing terms upon which such leave should be granted, not only for the benefit of a third party, who has acquired an interest in the lease under the bankrupt, but also for the benefit of the lessor.

Turner, who was lessee of some stables at Pimlico for a term of twenty-two and three-quarter years from the 24th of

June, 1874, at a yearly rent of 160*l.* per annum for the first five years, and 170*l.* for the remainder of the term, filed a liquidation petition on the 19th of November, 1879.

His trustee continued to occupy the premises, with a view to seeing whether the lease was a beneficial one, and paid the rent up to the 24th of June, 1880. Subsequently, on the 10th of February, 1881, he gave notice to the lessor of his intention to apply to the Court for leave to disclaim the lease, which Mr. Registrar Pepps gave, upon the terms of his paying to the lessor the rent up to the date of disclaimer, and giving up possession of the property.

The trustee appealed.

Mr. Bigham, for the appellant, contended that the trustee's right of disclaimer was, under section 23 of the Bankruptcy Act, 1869, absolute, any injury to the lessor being a liability provable in the bankruptcy; that the Bankruptcy rule 28 of 1871 had no operation as between lessor and trustee, but only where a third party had acquired from the bankrupt an interest in the lease, and could not restrict the right given by statute; in so far as it did it was *ultra vires*. He referred to

Reed v. Harvey, 49 Law J. Rep. Q.B. 295; Law Rep. 5 Q.B. D. 184.

Mr. S. S. Woolf, for the lessor, was not called upon.

JESSEL, M.R.—If the 28th rule is a valid rule, the applicant must submit to its terms. He comes under the rule to ask the leave of the Court to disclaim—a leave which is not required by the Act, and the Court has a discretion to impose such conditions as will do justice. The rule says that such order shall be made “as the Court shall think fit;” that is, the Court has a judicial discretion to do what it thinks fit—in other words, to do justice. The trustee has used the property since his appointment and up to the time of his disclaimer for a proper purpose, namely, to see whether he could use it for the benefit of the debtor's estate. Then when he comes for leave to disclaim, the Registrar says, You have had the use of the property for the benefit

Ex parte Ladbury; in re Turner (App.), Bankr.

of the estate, and have deprived the landlord of the benefit of its possession for that period, and I will give leave only on the terms that you shall not get that benefit at the landlord's expense. It appears to me that his order is not only a right one, but that it is absolutely required by justice. If rule 28 be *intra vires* the order is right; if *ultra vires* the trustee should not have applied to the Court for leave under it.

JAMES, L.J.—I am of the same opinion. The rule was intended to prevent the injustice that might be caused by section 23. It empowers the Court to impose terms, and the Court ought to impose such terms as will meet the justice of the case. Whatever may be the effect of a disclaimer by a trustee without the leave of the Court, I would recommend any trustee to think once, to think twice, and to think thrice before he ventures to disclaim without applying to the Court.

LUSH, L.J., concurred.

Solicitors—E. W. Owles, for appellant; J. Fraser, for the lessor.

[IN THE COURT OF APPEAL]

JESSEL, M.R.
BRETT, L.J.
COTTON, L.J.
1881.
July 4, 5. } PETERS v. THE LEWES AND
EAST GRINSTEAD RAILWAY
COMPANY.

Lands Clauses Consolidation Act, 1845, ss. 7 and 9—Sale by Trustees for Parties absolutely entitled—Appointment of one Trustee as Surveyor under Section 9—Power of Sale, when determining.

A trustee holding property upon trust for a married woman seised in fee for her separate use, and not restrained from anticipation, cannot (unless exercising a power to sell for the purpose of division) sell and convey under the 7th section of the Lands Clauses Consolidation Act, 1845, without the concurrence of his beneficiary.

Where trustees selling to a railway com-

pany under section 7 of the Lands Clauses Consolidation Act, 1845, appointed one of themselves, who was an able practical surveyor, to act as surveyor on their behalf to make the valuation required to be made under section 9 of the Act,—

Held (by the Court of Appeal, affirming the decision of HALL, V.C., Ante, p. 172), that such appointment was a fatal irregularity which invalidated the proceedings.

Trustees may agree to sell at a price to be fixed by two surveyors, afterwards adopting that price.

A testator devised and bequeathed all his residuary estate to trustees upon trust for his wife for life, and after her decease upon trust to pay, transfer, assign or assure the same unto his two daughters, in equal shares for their separate use as tenants in common, with a substitutional gift over in favour of the issue of the daughters in certain events which did not happen; and "for the purposes of division" he thereby empowered his trustees to sell his residuary estate. The two daughters survived the testator and the tenant-for-life. Held (per JESSEL, M.R., affirming the decision of HALL, V.C.—BRETT, L.J., and COTTON, L.J., expressing no opinion), that the property being "at home," the power of sale given to the trustees had determined.

This was an appeal from a decision of Hall, V.C., reported *Ante*, p. 172, where the facts and arguments are fully stated.

Mr. W. Pearson and Mr. J. T. Prior, for the appellants, the railway company, urged the same arguments as in the Court below.

Mr. Kekewich, Mr. Shebbeare and Mr. F. B. Palmer, for the respondents, were not called upon.

JESSEL, M.R.—This appeal from the decision of Vice-Chancellor Hall no doubt raises questions almost as important as could be raised within the compass of so small a case, and I shall express my opinion upon each of the questions, although it is not necessary to decide them all in order to decide the case. The first point which is considered by the Vice-Chancellor is a very curious point indeed: it is as to the time during which a power of sale, given

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by a will, will last. No doubt you cannot have a power of sale to change the nature of people's interests so limited as to exceed the limit of time prescribed by the rule against remoteness or perpetuity. It has long been the habit of conveyancers to frame powers of sale in general terms, and the Courts have had to consider how they are to be limited so as to bring them within the rule, and the Courts have decided that the powers, although framed in general terms, are limited by the nature of the limitations contained in the settlement or will, so that when, by reason of the expiration or cesser of the limitations contained in the settlement, whether made by will or deed, the absolute interests come into existence, then the power is considered to be at an end; and, inasmuch as no settlement can be valid, either by will or deed, under which absolute limitations do not come into existence within the prescribed period, that makes all the powers valid. That is the doctrine which is established, not only by *Lantsbery v. Collier* (1), but by a long line of cases. But that does not appear to me to have any application to a case where the power is to take effect on the coming into existence of the absolute limitations; or, to put it in other words, it does not apply to a power where there is nothing but absolute limitations of interests given in the first instance. Suppose, for instance, a man having a dozen children gives his real and personal estate to trustees upon trust to divide amongst his twelve children, and for the purpose of making the division he empowers the trustees to sell: that is not in my opinion an invalid power. The trustees are bound to make a division within a reasonable time. In fact, as we know, it has been decided that if they postpone very long, without express power to postpone, they are guilty of breach of trust. Therefore the power of sale is also limited in the nature of the case to a reasonable time, and no one would say that twenty-one years was a reasonable time. Therefore it appears to me that the power would be valid. Does it make any difference if there is a preced-

ing life estate? If the limitation is to a person for life, and, after the death of the tenant-for-life, upon trust to divide amongst my twelve children, with power, for the purpose of division, to sell, why should that be void? If a limit of twenty-one years is too long for a reasonable period in one case, it is too long in the other. In the same way it appears to me the power would be valid, having regard to the nature of the settlement, and not the less because all the children might have attained the age of twenty-one years. I agree if all the children, being free from disability, concur in calling upon the trustees to convey, that puts an end to the trust, and of course to the power also. It puts an end to the trust to divide. They might call upon the trustees, instead of dividing it, to convey to a purchaser. But, subject to that, it does not appear to me that there is any objection to the power—that is, that it is limited from the nature of the purposes for which it is used. In my opinion it is as good a limitation of the period within which the power was to be exercised as the limitation of the period ascertained from the nature of the limitations when the power is exercisable during the existence of the limitations. When I look at this will, I think the true view of it is that the power is not to be exercised until after the death of the widow. No doubt it is about as bad a will as you could well have; but, when you look at it, it is this: after the death of the widow, to her two daughters, with a gift over; if either is dead, to her issue at twenty-one. Then, for the purpose of division (and that is all), they have the power of sale. For the purpose of division amongst whom? Between anybody, it seems to me, who is entitled to division, whether they are the two daughters themselves or one daughter and the children of the other. It appears that they are the people to call for division. If it is more convenient to make a division by selling the property and dividing the money than by allotting undivided shares of one property to one and another property to another, it appears to me that the power is exercisable, and there is no objection to it on the ground that it is unlimited. A general power exercisable

(1) 2 Kay & J. 709; 25 Law J. Rep. Chanc. 672.

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at any period, of course, would be bad in law; but it seems to me that this power was good in law, and if the sale had been made for the purpose of division within the power the trustees could have exercised it.

I now come to the next question, Did they exercise it? I am quite clear that they did not. That is a question, again, to be answered by looking at the documents. The first fact which strikes one as against the exercise of the power is that the whole of the transaction began before the power was exercisable. It was in the lifetime of the testator that the first notice was given by the railway company to take the property: it was after the death of the testator but during the lifetime of the widow, the tenant-for-life, that the trustees called upon the railway company to take the whole of the property. Of course all that could not be under the power. Then the action was instituted and the money paid into Court. Then the tenant-for-life died. Now I agree to this, that although the whole thing began not as an exercise of the power, yet if the power came into existence afterwards, the trustees could still make a title under the power if they thought fit so to do. They might say, "We have now got the power of sale; we will give the go-by to all the notices and so on that accrued before, and we will now sell under the power." But they did not do anything of the kind; they professed to act under the powers of the Lands Clauses Act, 1845. I shall have to discuss this presently; but I will assume for the moment that they had properly appointed a surveyor on their side to meet a surveyor appointed by the company to check the price for which the land was to be sold, and when I look at the conveyance there is not a word about the exercise of the power. No doubt there is the word "otherwise" in the witnessing part, but that obviously does not mean the power; and it is quite clear, when you come to look at the words, that what they convey is "and all such estate, right, title and interest in and to the said messuage, lands and hereditaments as they the said parties hereto of the first two parts respectively,

now are, or is, seised, possessed of or entitled to, or are, or is, by the said Acts of Parliament, or any or either of them, or otherwise empowered to convey." It is quite plain they did not mean that. That would have conveyed the minerals. They did not intend to convey anything except under the Act of Parliament. If it had been what they were seised of, or otherwise empowered to convey, they were not acting under the power. Indeed, the Act of Parliament which protects the minerals says that in purchases by the railway company they are not to pass unless mentioned. No doubt trustees are now empowered to contract to sell land reserving the minerals, but it is a very special power given by Act of Parliament, and it must be exercised in those terms. It is obvious that what they meant to convey was what they had power to convey under the Act of Parliament, and nothing else, and that they did not intend to exercise any discretion given to them under the power. Any intention on their part to sell for the purpose of division was out of the question; they simply intended to sell as trustees under the Act of Parliament. The next question, on which I differ to some extent from the Vice-Chancellor, is this: If trustees sell under the Lands Clauses Act, why may they not agree to sell at a price to be fixed by two surveyors, afterwards adopting that price? I so far assent to the Vice-Chancellor's observations that a contract to sell at a price to be fixed by two surveyors is not *per se* enforceable; but if they adopt that which is the ordinary practice, the surveyors fix the price, and then, the price being fixed, they approve of it; it is an exact compliance with the Act of Parliament—that is, they have approved of the price, and they sell for "not less than" the price; it is not a mere arrangement, not enforceable, to sell for what the two surveyors shall fix, because they cannot do it as trustees so as to make it obligatory upon them; it destroys their right of afterwards adopting the price if they think the price of the surveyor is a good price, and in that way it appears to me that the ordinary practice may be supported, without stating that the law as regards contracts stated by the

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Vice-Chancellor is not good law. Upon the next point I not only agree with the Vice-Chancellor, but I take even a somewhat stronger view. The question is whether, under the clause of the Act of Parliament which empowers trustees to convey (clause 7), a trustee for an absolute owner, being a married woman having the property settled to her separate use, can convey without the concurrence of his *cestui que trust*; and instead of treating it in the way the Vice-Chancellor treats it, as being dangerous or doubtful, I think it is not doubtful at all. There is no distinction, to my mind, between a trustee for a married woman absolutely entitled to her separate use, and not restrained from anticipation, and a trustee for a man. Would anybody assert that under the 7th section, because the legal estate was outstanding in a trustee for a man, that trustee could sell and make a title to bind his *cestui que trust*? No one would suggest such a thing. Nor does it appear to me, when you examine the words, that the same considerations do not apply to a married woman absolutely entitled to her separate use. [His Lordship then read section 7, and proceeded:] It is on behalf of a *cestui que trust* under disability—a person who cannot convey—that the trustee has power to sell, and that is the reason why nobody has dreamed of applying it to a bare trustee for a man. The same thing must apply to a bare trustee for a woman who is entitled for her separate use, free from restraint on anticipation. The same doctrine applies to a bare trustee for two men seised in fee in equal shares as tenants in common. The trustee cannot convey for them. How can he for two women, both of them entitled to their separate use, free from anticipation? It seems to me, therefore, in this case, that the trustees had no power whatever to convey under the Act of Parliament.

The next point is also one of very general importance. The trustees appointed one of themselves, who happened to be a surveyor, to value on behalf of the trustees. The question we have to determine is whether a valuation so made is a valid valuation under section 9 of the Lands Clauses Act. Here, again, I agree with the Vice-Chan-

cellor that it is not. We must, first of all, look at the words. [His Lordship read the section.] The natural meaning of these words is not that the other party shall nominate himself any more than the promoters of the undertaking. It means somebody else. That is the natural meaning of it. I do not think that quite decisive; but this consideration appears to me to be quite decisive, and that is, What is the meaning of nomination? It is a check upon the person on whom the power of sale is conferred. He may be a person having no interest in the property whatever. There is to be a check on the price fixed by him. Can that check be by himself? The whole theory of the Act is that an independent person is to be called in. As regards the form of the order, the plaintiff does not deny the right of the company to take the land on paying a proper price for it; and therefore we ought to declare that she is not bound to accept the price which has been fixed by the two surveyors in the way I have mentioned, but that she is entitled to have the price ascertained pursuant to the terms of the Lands Clauses Act, and to obtain payment of the price, when ascertained, from the defendant company, with liberty to apply.

BRETT, L.J.—As to the question whether the power of sale for the purpose of division was in existence and force, or whether it was at an end, I think we are not in a position to give a judicial opinion upon it. The simple opinion of the Master of the Rolls, I say unfeignedly, is of the greatest value; my own simple opinion would be of little value. But I am clearly of opinion that, even if that power was in existence, it was not exercised. It seems to me that every document, and every fact, and every circumstance in this case shews that it was not acted upon at all. Every step in the whole proceeding was taken under the Lands Clauses Act, and under nothing else; and, if they acted under the Lands Clauses Act, those proceedings cannot be sustained unless the valuation can be sustained. It seems to me that it would be contrary to every principle of right, contrary to every view of the construction of the Act of Parlia-

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ment, and contrary to justice, that where the Act of Parliament (and it is clear to my mind that it does) says that these valuers are placed in that position for the purpose of being a check on the persons to whom the power is entrusted, that person can exercise that power himself. It would be to do away at once with the spirit of the Act of Parliament. The meaning of the words is clear that a check was intended, and by this process the check would be done away with. I am, therefore, clearly of opinion that the judgment of the Vice-Chancellor must be affirmed.

COTTON, L.J.—I am of opinion that the appeal fails, and that the judgment of the Vice-Chancellor must be affirmed, with the variations which have been suggested by the Master of the Rolls. We have to consider whether the sale to the company can hold either under the exercise of the power contained in the will, or under the provisions of the Lands Clauses Act. As we have not heard Mr. Kekewich, I express no opinion on the question as to whether this power of sale is existing. I in no way express an opinion that it is not; but, in my view, it is not necessary to the determination of this case to decide that point, for I come to this conclusion, that the trustees never did act in exercise of the power of sale, assuming it to be existing. It was necessary, in order to shew that there had been an exercise of that power, to prove that the trustees exercised the discretion given to them by the will; but everything, in my opinion, shews the contrary. [His Lordship then related the circumstances of the conveyance.] In my opinion, if the company could maintain their case, it must be under the Lands Clauses Act; but on both the grounds that have been dealt with by the Master of the Rolls, I am of opinion that they fail, because, although clause 7 of the Act refers in terms to the trustees as persons who are able to convey, the latter part of the section shews that it was not intended to substitute trustees for persons who are

beneficially entitled, and under no disability whatever to sell. The trustees are to sell, and the sale by them is to be as effectual as if the person beneficially interested had sold, and had been under no incapacity or disability. Then we come to the 9th section, which requires the price to be fixed, and put a check on the exercise of the statutory power of sale; and the provisions of the statute must be strictly and in substance followed if the parties are to rely on the exercise of that power. The price at which property is to be sold by persons who are acting solely under the Act, and who are otherwise incapable of selling, is to be not less than that which is fixed by two able practical surveyors. The nomination of Mr. Glasier was not, in my opinion, a compliance with the substance of the 9th section. If it were, what would there be to prevent people who are authorised to do what they could not otherwise do from selling at an improper price? To say that there is any check on trustees or on the tenant-for-life, as binding the remainderman, if the trustee or the tenant-for-life nominates himself, would be ridiculous. Therefore, arriving at the conclusion that the intention is—as on the face of it it obviously is—to put a check on the sale by persons acting solely under the authority of the Act, the provisions of the 9th section have not, in my opinion, been complied with in this case. I agree with the Vice-Chancellor, entirely irrespective of any question as to whether the price was sufficient. The price has not been so fixed as to bind those interested if they are dissatisfied with the amount of the valuation.

Solicitors—Cope & Co., for appellants; Wyatt & Barraud, for respondents.

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Administration—*domicil: general administratrix in Ireland: limited administrator in India: surplus assets in India: general administratrix entitled to receive and give good discharge for same*—General administration was granted by the Irish Court to the widow of an intestate, who died in Ireland, and who left property in India. The Irish letters of administration were sealed in England. F., under a power of attorney from the administratrix in the usual form, obtained limited administration to the intestate in India, and, after satisfying all claims, remitted the surplus Indian assets to his agents in England, who refused to pay over the same to the administratrix without the receipt of all of the next-of-kin of the deceased:—*Held* (affirming the decision of *Fry, J.*, ante, p. 182), first, that the intestate having died in Ireland, his domicile, in the absence of evidence to the contrary, was Irish; secondly, that F. was bound to hand over the surplus Indian assets to the Irish administratrix, the next-of-kin not having intervened. *Eames v. Hacon* (App.), 740
De la Viesca v. Lubbock (10 Sim. 629) approved and followed. *Ibid*.

2. — *proof: insolvent estate: annuity: covenant: contingent liability: valuation: contingency arising during administration: judicature act, 1875, s. 10: bankruptcy act: bankruptcy rules*—A testator covenanted to pay his daughter a sum of 5,000*l.*, with interest at four per cent. per annum, within one month after the death of his wife, and to pay his said daughter an annuity of 100*l.* a year, during the joint lives of himself and his wife and the life of the survivor, if his daughter should so long live. The testator died in 1879, leaving his widow and daughter surviving, and judgment for the administration of his estate,

which was insolvent, was given in an action instituted by the daughter as a creditor. The daughter sent in a proof in respect of the principal sum and the annuity, and they were valued as at the date of the judgment. The testator's widow died before the chief clerk had made his certificate:—*Held*, that section 10 of the Judicature Act, 1875, applied as to the proof which was of a contingent liability, and that following the rules in bankruptcy as to contingent liabilities, the daughter was entitled to prove for the full amount of the 5,000*l.*, less a rebate of interest at four per cent. per annum for the period between the date of the judgment and the death of the widow, but only for the amount of the arrears of the annuity at the time of the judgment and for the amount accrued due between that time and the death of the widow, less a similar rebate. *In re The Northern Counties of England Fire Insurance Company (Lim.)* (Ante, p. 273) followed. *In re Bridges. Hill v. Bridges*, 470

— assignee of unpaid legacy: set-off. See SET-OFF, 1.

— priority of legacies. See WILL, 11.

Administration Action—costs of. See COSTS, 1-3.

— practice in. See PRACTICE, 9, 23.

Administrator—durante minore etate: mortgage and sale of assets: prejudice of infant—An administrator *durante minore etate* has for the time being all the powers of an ordinary administrator, and assignees from him of his intestate's assets are in precisely the same position as if they were dealing with an ordinary administrator. *Cope v. Cope*, 13

2. — **powers of: trustee: under-lease by: option of purchase**—An administrator, although he may under-let the leasehold of his intestate, if such a mode of dealing with the assets be advisable for the due administration of the intestate's property, cannot give an option of purchase at a future time. *The Oceanic Steam Navigation Co. v. Sutherland* (App.), 308

3. — **will: implied power of sale of testator's real estate: administrator with will annexed**—An administrator with the will annexed has no such implied power to sell the testator's real estate as an executor has, the executor being a nominee of the testator to pay his debts, the administrator being only an officer of the Probate Court. Nor is such power given to the administrator by the 16th section of the 22 & 23 Vict. c. 35. *In re Clay and Teiley* (App.), 164

— breach of trust: notice. See MORTGAGE, 11.

— domicile: right to recover assets. See ADMINISTRATION, 1.

Advances—hotchpot: interest. See WILL, 8.

Affidavit. See PRACTICE, 11, 29.

Amendment. See PRACTICE 1, 13, 14; PRESCRIPTION ACT, 1.

Annuity—annuities charged on land: registration: subsequent incumbrancer with notice: priorities: trustee in bankruptcy—Notwithstanding the 12th section of the Act, 18 & 19 Vict. c. 15, rent-charges and annuities charged on land for valuable consideration subsequent to the passing of that Act, though unregistered, are valid as against the trustee in bankruptcy of the grantor, and also as against subsequent incumbrancers and purchasers of the land who take with notice of such charges. *Greaves v. Tofteld* (App.), 118

2. — **gift of annuity "out of" rents: gift over of "remainder" of rents: rents insufficient to satisfy annuity**—A testator devised his real estate and bequeathed his residuary personal estate on trust, in the first place, out of the rents and profits thereof to pay his widow the clear annual sum of 300*l.* during her life, and to pay the remainder of such rents and profits to his sister during her life, and after her decease, as to the trust estate, in trust for all the children of his said sister as tenants-in-common. The rents and profits were insufficient to pay in full the annuity to the widow:—*Held* (reversing the decision of FRY, J., ante, p. 482), that the widow was not entitled to a continuing charge upon the rents and profits after her own death until the arrears of her annuity should be satisfied, but only to the rents and profits during her life. *Wormald v. Muesen* (App.), 776

— proof by annuitant. See ADMINISTRATION, 2.

Appeal. See PRACTICE, 3-7.

Appointment. See POWER, 1-5.

Apportionment—tenant-for-life and remaindermen: purchase of stock "cum div.": apportionment act, 1870—A testator bequeathed to trustees 15,000*l.* to be raised out of his estate, and to carry interest at 4½ per cent. from his death until appropriated, upon trust for investment with the consent of A, and to pay the annual income, including therein the 4½ per cent. interest, to A for life with remainder over. The trustees, with A's consent, placed the 15,000*l.* on deposit account at a bank for nearly three months, at the end of which time they invested

it in the purchase (partly) of railway debenture stocks, on which, at the time of purchase, five months' out of the half-year's interest had already accrued:—*Held*, that A, being entitled under the will to the whole income of the 15,000*l.*, was entitled to the entire half-year's dividends, and that the Apportionment Act, 1870, had no application to such a case. *In re Clarke. Barker v. Perovna*, 733

— of legacy between pure and impure personality. See CHARITY, 5.

— of rent: winding-up: distress. See COMPANY, 20.

Arbitration—reference to, by railway company. See RAILWAY COMPANY.

Architect—personal earnings: undischarged bankrupt. See BANKRUPTCY, 27.

Army—charge on officer's commission. See MORTGAGE, 12.

Army Agent—value of commission: set-off]—K., an officer in the army, kept a current account with C. & Co. as his bankers. On K.'s retirement from the army the sum of 3,000*l.*, the value of his commission, was paid to C. & Co., as the army agents of his regiment, and was in due course carried to a deposit account kept by C. & Co. with the Army Purchase Commissioners, there to remain till K.'s retirement was gazetted. At this time K.'s current account was overdrawn by 647*l.* The day after K.'s retirement was gazetted C. & Co. received notice of a deed, by which K. had mortgaged the value of his commission to secure the repayment of 6,000*l.* The mortgagees having claimed payment of the whole 3,000*l.*, C. & Co. claimed to deduct out of it the 647*l.*—*Held*, that as soon as the retirement of K. was gazetted, the 3,000*l.* became, in the hands of C. & Co., money received to the use of K.; and that, independently of the question whether C. & Co. had a banker's lien, they had at common law the right to set off against such moneys the debt due to them. *Roxburghe v. Cox* (App.), 772

Association. See COMPANY, 2.

Attachment of Debt—garnishee order: mortgage to three successive mortgagees: assignment of third mortgage: sale by first mortgagee: judgment creditor of third mortgage: garnishee order against mortgagor: right to surplus proceeds of sale: common law procedure act, 1864, ss. 61 and 62: rules of court, 1875, order XLV. rules 1 and 2: 27 & 28 Vict. c. 112, s. 1]—A mortgaged leaseholds to B, C and D successively. X, a judgment creditor of D, obtained a garnishee order against A, attaching all debts due from A to D, to answer his judgment. Subsequently D assigned his mortgage to E. B, the first mortgagee, sold

the property under his power of sale, and paid off himself and C; and there remained in his hands a surplus insufficient to satisfy the third mortgage. Upon the question of who was entitled to the surplus proceeds of sale,—*Held* (affirming the decision of Bacon, V.C., *ante*, p. 227), that X was not entitled, as against E, to the surplus proceeds of sale in B's hands, inasmuch as the liability of A as mortgagor to D, as third mortgagee, did not constitute a debt due from the garnishee to the judgment debtor within the meaning of section 61 of the Common Law Procedure Act, 1854, and Order XLV. rule 2 of the Rules of Court, 1875. *Chatterton v. Watney* (App.), 635

— “dealing with bankrupt”: protected transaction. See BANKRUPTCY, 4.

Attachment of Person—notice of motion for attachment: service on solicitor: personal service: rules of court, 1875, order XLIV. rule 2]—Under ordinary circumstances a notice of motion for a writ of attachment to issue against a party should be served personally, and not merely on the solicitor on the record of the party. *Mann v. Perry*, 251

— contempt of court. See EXTRADITION ACT.

Attornment Clause—See MORTGAGE, 1-3.

Banker—general guaranty for payment of bills. See BANKRUPTCY, 21.

— set-off: army agent. See ARMY AGENT.

Bankruptcy—act of bankruptcy: fraudulent preference: breach of trust: sale of goods and application of purchase-money to make good breach of trust: the bankruptcy act, 1869, ss. 6 (sub-s. 2) and 92]—A trustee, who had misappropriated trust funds and was also insolvent, informed his co-trustee of his position, and induced him to purchase of him certain goods, and applied the purchase-money, with the knowledge of his co-trustee, in making good his breach of trust:—*Held*, that the transaction was not an act of bankruptcy within section 6, sub-section 2, of the Bankruptcy Act, 1869, as being a fraudulent transfer of property, nor a fraudulent preference of the trust estate within the 92nd section of the Act. *In re Wilkinson; ex parte Stubbins* (App.), 547

A mere voluntary transfer impeachable only on the ground that it is a preference by a debtor of a creditor is not an act of bankruptcy. *Ibid*.

2. — act of bankruptcy: period of committal: six months from presentation of petition: exceeding twelve months from order of adjudication: bankruptcy act, 1869, ss. 6 (sub-s. 6), 8 and 11]—Sections 6 and 11 of the Bankruptcy Act, 1869,

are perfectly distinct, and an adjudication may be good, if the act of bankruptcy on which it is founded was committed within six months from the presentation of the petition, though the same act of bankruptcy is the only one to which the title of the trustee can relate back, and was committed more than twelve months before the order of adjudication. *In re Grepe*; *ex parte Grepe*, 723

3. **Bankruptcy (continued)—adjudication: petition for liquidation: bankruptcy act, 1869, ss. 28 and 80 (sub-s. 10), s. 125 (sub-s. 4), s. 126: bankruptcy rules, 1870, rules 266, 295**—Where there has been a simple adjudication of bankruptcy, without any stay of proceedings under it, under rule 266, such adjudication must override any liquidation proceedings that may be pending, and the Registrar has no authority to register resolutions for liquidation which have been passed subsequently to the adjudication. *Ex parte Davis*; *in re Russ* (46 Law J. Rep. Bankr. 61; Law Rep. 2 Ch. D. 231) dissented from. *In re Stanley*; *ex parte Milward* (App.), 166

4. — **attachment of debt by garnishee order: service of order: prior act of bankruptcy: protected transactions: bankruptcy act, 1869 (31 & 32 Vict. c. 71), ss. 94 (sub-s. 3) and 95 (sub-s. 3)**—An attachment of a debt due to a bankrupt under a garnishee order is not a "dealing with the bankrupt" within the protection of section 94, sub-section 3. *In re Curtoys*; *ex parte Pillers* (App.), 691

Whether it is an "attachment against the goods" of a bankrupt within the protection of section 95, sub-section 3, *quære*. *Ibid*.

But *semble*, as an attachment against the goods of a bankrupt must, in order to be protected by that section, be perfected by seizure and sale, an attachment of the debt, if it be within the section, must be completed by the actual payment of the attached debt before the order of adjudication. *Ibid*.

5. — **composition: creditor omitted: application to admit proof: close of proceedings: bankruptcy act, 1869, s. 126**—When resolutions for composition under section 126 have been registered, and there is no trustee appointed to receive and distribute the composition, and no security given for its payment, a creditor whose name has been omitted from the debtor's statement of affairs, and who has taken no part in the composition proceedings, cannot come in and prove his debt. *Ex parte Lacey*; *in re Lacey* (App.), 207

The Court of Bankruptcy has no jurisdiction to entertain a claim for a personal demand against the debtor himself, when there is no property for the Court to administer. (*Per JAMES, L.J.*) *Ex parte Carew* (44 Law J. Rep. Bankr. 67; Law Rep. 10 Chanc. 308) explained and distinguished. *Breslauer v. Brown* (47 Law J. Rep. C.P. 729; Law Rep. 3 App. Cas. 672) explained. *Ibid*.

6. — **composition: duties and powers of registrar: refusal to register: bankruptcy act, 1869 (32 & 33 Vict. c. 71), s. 126**—The duty of a Registrar upon an application to register resolutions is not, even in the absence of all opposition to the registration, purely ministerial. He is entitled and bound, even in the absence of opposition, to refuse to register resolutions when he sees that they must necessarily have been passed in the interest of the debtor. *In re Williams*; *ex parte Williams* (App.), 741

7. — **composition: resolutions: seizure under s. fa. between first and second meeting of creditors: secured creditor: acquiescence: "extraordinary resolution": the bankruptcy act, 1869, s. 126 (sub-s. 2, 4)**—A resolution accepting a composition passed at the first meeting of creditors, held under the 126th section of the Bankruptcy Act, 1869, does not become an extraordinary resolution until it has been confirmed at the second meeting, and is of no validity until it has been duly registered; therefore, any creditor of a compounding debtor, who signs judgment and levies execution for his debt before such registration, obtains a valid security on the debtor's property, unless he has done something to raise an equity against himself. Merely attending the first meeting to ascertain what is going on, without voting or proving, does not raise an equity; and in such a case silence is not acquiescence. *In re Maccolla*; *ex parte MacLaren* (App.), 203

8. — **composition: resolution: agreement to pay one creditor in full: bankruptcy act, 1869 (32 & 33 Vict. c. 71), s. 126**—When resolutions for composition have been passed in manner required by the Bankruptcy Act, one of the creditors who is bound by the composition cannot, behind the backs of the other creditors who are also bound thereby, enter into an arrangement with the debtor whereby he is to be paid his own particular debt in full, nor can the fact that the creditor agrees on his part to supply the debtor with goods on credit at all validate the arrangement. *Ex parte Barrow*; *in re Andrews* (App.), 821
Jakeman v. Cook (48 Law J. Rep. Exch. 166; Law Rep. 4 Ex. D. 26) distinguished. *Ibid*.

9. — **composition: resolution: approval of the judge: fraud: judicial discretion: bankruptcy act, 1869, ss. 28 and 126**—When resolutions for composition passed by the proper majority of creditors under section 28 of the Bankruptcy Act, 1869, come before the Judge for his approval, it is his duty, in the exercise of his judicial discretion, to enquire into any relevant circumstances submitted to him by a dissentient creditor, and pronounce a judicial decision thereon. Proceedings under the 28th section differ from those under the 126th. The Judge under the former section has power to withhold his approval of resolutions passed even in the

absence of any fraud in the proceedings. The Judge in giving or withholding his approval must have regard to the state of facts as shewn before him to be then existing, and not that existing at the date of the meeting when the resolutions were passed. *Ex parte The Merchant Banking Company of London; in re Durham (App.)*, 606

the execution creditor at the value appraised by the jury is a sale within the meaning of sub-section 3 of section 95 of the Bankruptcy Act, 1869; and such a seizure and sale, when perfected, without notice of any act of bankruptcy, committed prior to the seizure, is a protected transaction. *In re Bannister; ex parte Vale (App.)*, 797

10. — *debtor's summons: jurisdiction of court: "residence": "carrying on business": bankruptcy rules, 1870, rule 17*—A clerk engaged at a fixed salary in a bank whose office was in the city of London, was held to carry on business within the district of the London Bankruptcy Court within the meaning of the 17th of the Bankruptcy Rules, 1870, so as to give that Court jurisdiction to issue a debtor's summons against him; *JAMES, L.J.*, also considering that he "resided" within the district within the meaning of the same rule, although the house in which he lived and slept was outside the district. *In re Bowie; ex parte Breull (App.)*, 384

11. — *execution creditor: writ of elegit: seizure of goods: liquidation: the bankruptcy act, 1869, s. 87*—Section 87 of the Bankruptcy Act, 1869, does not apply to a seizure of goods under a writ of elegit. Where, therefore, the sheriff under such a writ seized the goods of a judgment debtor before the judgment creditor had notice of an act of bankruptcy, though the inquisition of the jury as to the value of the goods was not completed until after an act of bankruptcy,—*Held* (affirming the decision of the Chief Judge), that the judgment creditor was a secured creditor within sub-section 5 of section 16 of the Bankruptcy Act, 1869. *In re Gourlay; ex parte Abbott (App.)*, 80

12. — *execution creditor: elegit: seizure of goods only: bankruptcy act, 1869, ss. 12, 16 (sub-s. 5), 87, 95 (sub-s. 2, 3)*—A seizure, under a writ of elegit, of goods only, does not bring the execution within the protection of section 95, sub-section 2, of the Bankruptcy Act, 1869; and therefore, where goods only (not land) of an execution debtor had been seized by the sheriff under a writ of elegit, after the date, though without notice, of the act of bankruptcy, and before the order of adjudication,—*Held*, that the execution was not protected by section 95; that the execution creditor was consequently not a secured creditor; and that the goods belonged to the trustee in bankruptcy by virtue of the doctrine of relation back. *Ex parte Sulger; in re Chinn*, 687

13. — *execution creditor: elegit: judgment creditor: notice of act of bankruptcy after seizure but before inquisition: protected transaction: act of bankruptcy: the bankruptcy act, 1869, ss. 6 (sub-s. 5), 87, 95 (sub-s. 3)*—A delivery of goods seized by the sheriff under an elegit to

14. — *fraud on the bankruptcy law: reputed ownership: agreement for sale or hire: power of distress: jurisdiction in an action under section 13 of the bankruptcy act*—Agreement for the hire of railway waggons for the term of five years at a yearly rent of 10*l.* apiece, with power to the lessors, when the rent should be in arrear for seven days, to distrain goods on the lessee's premises, and sell, &c., as landlords may on distress for rent, the lessee at the end of the term to have the option of purchasing the waggons for 5*s.* each. The lessee having gone into liquidation, the lessors distrained under the agreement. The agreement being admitted to be of a usual character, having regard to the subject-matter, a motion in an action by the debtor and the receiver under his petition to restrain proceedings upon the distress was refused. The agreement and the distress thereunder were held not to be in fraud of the general creditors in the lessee's bankruptcy. A power to distrain will not by itself in an ordinary case render such an agreement fraudulent against creditors in bankruptcy. *Leman v. The Yorkshire Rail. Waggon Co.*, 293

Quere, whether the jurisdiction under section 13 of the Bankruptcy Act, 1869, to restrain proceedings can be exercised in an action. *Ibid.*

15. — *liquidation: resolutions: registration: small amount of assets: execution creditor*—The statement of affairs of a liquidating debtor showed his unsecured debts at 1,758*l.*, and his net assets at 43*l.* The requisite majority of his creditors duly passed resolutions for liquidation by arrangement, and granted him his discharge. The registration of the resolutions was opposed by a creditor, who was in a position to sign judgment and levy execution, on the ground that there were no substantial assets, and that the proceedings were an abuse of the procedure of the Court:—*Held*, that the resolution must be registered. *Ex parte Early* (Law Rep. 13 Ch. D. 300) followed. *In re Sharpe; ex parte Matthews (App.)*, 284

16. — *liquidation: resolutions: ultra vires: power to carry on debtor's business to make profits: the bankruptcy act, 1869, ss. 14, 16, 20, 25*—Under sections 14 and 25 of the Bankruptcy Act, 1869, a trustee has no power, nor have the creditors power to authorise the trustee, to carry on a debtor's business except so far as may be necessary for the beneficial winding up of the same. It cannot be carried on, however

profitable, to make profits to increase the dividends, and a resolution passed by a statutory majority with such an object is not binding on a dissentient creditor. *In re Batey; ex parte Emanuel* (App.), 305

17. Bankruptcy (continued)—practice: appeal: time for: twenty-one days: appeal from county court to chief judge: from chief judge to court of appeal—In appeals in bankruptcy from the County Court to the Chief Judge the old bankruptcy rule still applies, and therefore, in the computation of the twenty-one days within which, by rule 143 of Bankruptcy Rules, 1870, an appeal must be entered with the Registrar, Sundays are still excluded. *Secus*, in appeals from the Chief Judge to the Court of Appeal. *Ex parte Hall; in re Alvon* (App.), 400

18. — practice: production of documents: discretion of court: the bankruptcy act, 1869, s. 96—After an adjudication in bankruptcy the bankrupt and his wife assigned by way of mortgage to N. a policy of assurance on the life of the wife, and alleged to be the separate estate of the wife. N. assigned the mortgage to W., who subsequently purchased and took an assignment of the equity of redemption from the wife. The wife died shortly afterwards. W., who had acted as the solicitor of the wife, on summons by the trustee in bankruptcy under the 96th section of the Bankruptcy Act, 1869, attended before the Court and was examined touching the bankrupt's property, but refused to produce the deeds by which the above transactions had been carried into effect. The Registrar, acting as Chief Judge, having ordered their production,—*Held*, on appeal, that the power vested in the Court by the 96th section was discretionary, and that the Registrar had rightly exercised such discretion. *In re Thorp; ex parte Tatton* (App.), 792

19. — proof: accommodation acceptance: deposit of, as security for less than value of bill: proof for full amount—The holder of a bill, accepted for the accommodation of the drawer, and deposited with him by the drawer as security for a sum less than the amount of the bill, is entitled to prove in the bankruptcy of the acceptor against his estate for the whole amount of the bill; but with the restriction that he shall not receive dividends on his proof to an amount exceeding the sum due on his security. *Ex parte Newton; ex parte Griffin; in re Bunyard* (App.), 484

20. — proof: joint and separate estates: payment in full: right to interest after adjudication—A creditor, whose proof had been admitted against both the joint and separate estates of bankrupt partners, elected to receive and did receive dividends from the separate estates, whereby his debt was paid in full. He then claimed to receive further dividends from the separate

estates until he had received interest on his debt from the date of the adjudication until it was paid.—*Held*, that he was not entitled to the interest he claimed until the joint creditors had received 20s. in the pound. *In re Collic; ex parte Findlay* (App.), 696

21. — proof: liquidation: indorsement: right of proof against acceptor's estate: general guarantee for payment of bills in the place of indorsement: voluntary payment—F. & H. drew bills on F., W. & Co. which the latter accepted, and which the drawers indorsed and discounted with S. & Co., bill brokers. S. & Co. rediscounted the bills with the London and Westminster Bank, with which bank they were in the habit of rediscounting bills. According to a general well-recognised custom, S. & Co. did not on each occasion of discounting bills with the bank indorse the bills, but had given the bank a general guarantee, under which, in consideration of the bank discounting for them bills from time to time, they guaranteed due payment of the bills when they respectively became due. Before the bills became due the drawers went into liquidation, and in consequence S. & Co., the next day, suspended payment. Under a composition in the liquidation of S. & Co. the bank received dividends in respect of the bills held by them. The bank afterwards, under a deed of arrangement, received further sums towards discharge of the balance remaining unpaid on the bills from the estate of the drawers, and also from F., W. & Co., the acceptors. On F., W. & Co. going into liquidation the trustee of S. & Co. claimed to prove in the liquidation against the estate of F., W. & Co. for the amount of the dividend paid out of S. & Co.'s estate to the bank, and for interest at five per cent. on that amount of dividend.—*Held* (affirming *BACON, C.J.*), that the proof in respect of the amount of dividend must be admitted, and (reversing *BACON, C.J.*) that the proof must also be admitted in respect of the interest. *In re Fox, Walker & Co.; ex parte Bishop* (App.), 18

The practice of giving such a guarantee is well known, and there is no principle or authority on which the liability on such guarantee differs from the liability on an indorsement. *Ibid.*

22. — receiver: equitable execution: delivery of debtor's lands in execution: appointment of receiver: prior appointment of receiver by bankruptcy court: bankruptcy act, 1869 (32 & 33 Vict. c. 71), ss. 12, 13, 95, sub-s. 2: practice: appointment of receiver after final judgment: "cause or matter pending": judicature act, 1873, s. 24, sub-ss. 1, 4, 6, 7: rules of court, 1875, order XLII.]—S., having obtained final judgment in an action against C. for a debt and costs, issued an *elegit*. C. having only some leasehold property which was in mortgage and the mortgagee in possession, the sheriff returned that he had no lands, goods or chattels which could be seized. On the 14th of September, S.,

not earlier than 4 P.M., obtained from a Judge in chambers the appointment of a receiver. At 3.45 P.M. the same day a receiver and manager was appointed of C.'s rents and profits by the Court of Bankruptcy, upon a petition for adjudication in bankruptcy filed on that day against C. upon an act of bankruptcy committed on the 13th of September. S. had not, prior to the appointment of the receiver on his application, any notice of any bankruptcy proceedings against C., or of any act of bankruptcy committed by him. Subsequently the bankruptcy proceedings were turned into proceedings for liquidation by arrangement, and trustees were appointed. The mortgagees having sold the mortgaged property, there remained a surplus in their hands:—*Held* (by the Court of Appeal, affirming the *MASTER OF THE ROLLS*), that the receiver of the Court of Bankruptcy having legal, although not actual, possession from the moment of his appointment, the subsequent equitable execution obtained by S. was ineffectual; and that the seizure by the sheriff, after the Court of Bankruptcy had taken possession of the property by its receiver, was not such a lawful seizure as is protected by the 95th section of the Bankruptcy Act, and therefore the trustees in the liquidation were entitled to the surplus:—*Held* (by the *MASTER OF THE ROLLS*), that the receivership in bankruptcy was a good receivership until the receiver was discharged, and that the conversion of the bankruptcy proceedings into proceedings for liquidation by arrangement did not in any way affect his appointment. *Held* (also by the *MASTER OF THE ROLLS*), that after final judgment in an action a receiver may be appointed (although the writ contains no claim for a receiver) without the issue of any fresh writ, so long as the judgment remains unsatisfied, the action being in such a case "a cause or matter pending" within the meaning of the Judicature Act, 1873, s. 24, sub-s. 7. *Salt v. Cooper* (App.), 529

23. — *trustee: disclaimer: lease: under-lease: bankruptcy of lessee: disclaimer by trustee of bankrupt: bankruptcy act, 1869* (32 & 33 Vict. c. 71), s. 23]—It is a rule of construction of statutes, that the literal construction of a section ought not to prevail if it results in an absurdity or an inconsistency with the intention of the Legislature, as apparent from the statute. The generality of the words of the 23rd section of the Bankruptcy Act must be so far limited as to have the effect merely of relieving the estate of the bankrupt and his trustee from liability, and entitling those whose rights, as regards the enforcement of liabilities against the bankrupt or trustees, are interfered with by the disclaimer, to prove against the bankrupt's estate for the amount of the injury they may have sustained. The rights of third parties are not to be affected by the disclaimer. *Ex parte Walton; in re Levy* (App.), 657

"When a statute enacts that something should be deemed to have been done, which in fact was not

done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to"—*per JAMES, L.J.* Ibid.

W. granted a lease of a house to L. for ten years, at the yearly rent of 70*l.* L., a few days after, in consideration of a premium of 180*l.*, sub-let the house to M. for a term of nine and a-half years, at the yearly rent of 56*l.* L. filed a liquidation petition, and his trustee applied for leave to disclaim the lease, which the Registrar granted in spite of the opposition of W. On appeal by W. the order of the Registrar was affirmed, the Court holding that W.'s right as against M. to receive the rent reserved by, and to enforce the covenants contained in, the original lease was not affected by the disclaimer. Leave given to M. to prove against L.'s estate in respect of the loss sustained by him by reason of his liability to pay the higher rent. Ibid.

24. — *trustee: disclaimer: leasehold interest of bankrupt: previous severance of tenant's fixtures: special stipulation: bankruptcy act, 1869, s. 23*

—A lease contained a proviso that the tenant, his executors, administrators or assigns, might remove tenant's fixtures at any time within twelve months from the expiration or other sooner determination of the term. The tenant's trustee in liquidation having sold certain tenant's fixtures, and afterwards disclaimed the lease,—*Held*, that, having regard to the proviso, the disclaimer had not the usual effect, by virtue of section 23 of the Bankruptcy Act, 1869, of surrendering to the lessor the tenant's fixtures not disannexed at the date of the trustee's appointment, and that the trustee was entitled to them. *In re Latham; ex parte Gregg*, 711

Ex parte Brook (48 *Law J. Rep. Bankr.* 22; *Law Rep.* 10 Ch. D. 100) discussed. Ibid.

25. — *trustee: disclaimer: lease: assignment: bankruptcy of assignee: the bankruptcy act, 1869, ss. 23 and 24: the bankruptcy rules, 1871, rule 28: rights of lessor*—On an application by a trustee under the 23rd section of the Bankruptcy Act, 1869, for leave to disclaim onerous property of the bankrupt, the Court will alone consider whether the disclaimer will be for the benefit of the bankrupt's estate and those interested in its administration, and will not take into consideration what effect the disclaimer will have on the rights and interests of third parties; neither will it, on allowing the disclaimer, preface the order with any declaration of opinion as to the effect of the disclaimer on the right of such third parties. *In re Clark; ex parte The East and West India Dock Co.* (App.), 789

Leave to appeal to the House of Lords on a question of discretion will not be granted. Ibid.

26. — *trustee: disclaimer: lease: power of court to impose conditions: bankruptcy act, 1869, s. 23: bankruptcy rules, 1871, rule 28*—

Where a trustee applies, under rule 28, for leave to disclaim a lease, the Court has, under that rule, a judicial discretion as to imposing terms upon which such leave should be granted, not only for the benefit of a third party, who has acquired an interest in the lease under the bankrupt, but also for the benefit of the lessor. *Ex parte Ladbury; in re Turner* (App.), 838

27. Bankruptcy (continued)—trustee: earnings of bankrupt: architect—The remuneration of an uncertificated bankrupt belongs to the trustee of his estate. An architect, an uncertificated bankrupt, sued for breach of contract and claimed an injunction to restrain the employment of architects and the use of his plans, specific performance, remuneration for services performed and damages for wrongful dismissal:—*Held*, that the cause of action in respect of remuneration and damages accrued to the trustee of his estate. *Emden v. Carter*, 492

28. — trustee: "salary or income": payment to trustee of bankrupt of part: voluntary allowance: bankruptcy act, 1869, ss. 89 and 90—A voluntary allowance, to which the bankrupt has no legal or equitable claim, is not "salary or income" within the language of section 90 of the Bankruptcy Act, 1869, and is therefore not subject to an order of the Court of Bankruptcy directing payment of it, or any part, to the trustee; and it is immaterial whether the bankrupt was in receipt of such allowance before the bankruptcy, or whether it commenced subsequently. *Ex parte Wicks; in re Wicks* (App.), 620

— bill of sale: after-acquired chattels: effect of discharge of bankrupt. See BILL OF SALE, 1.

— composition: bankruptcy act, 1869, ss. 28, 81, 12: acceptance of composition and annulment of adjudication. See SET-OFF, 2.

— distress under attornment clause in mortgage, validity of. See MORTGAGE, 1-3.

— growing crops: registration of bill of sale. See BILL OF SALE, 3.

— infant: adjudication against: trade debts. See INFANT, 1.

— practice: production of documents: privileged communication. See PRODUCTION OF DOCUMENTS.

— proof: contingent liability. See ADMINISTRATION, 2.

— proof: principal and surety: liability of surety in judgment against principal. See PRINCIPAL AND SURETY, 4.

— proof: secret profit by promoter: "debt incurred by means of fraud or breach of trust." See COMPANY, 6.

Beer—sale of: breach of covenant. See COVENANT.

Bill of Exchange—principal and surety: right of indorser to securities of acceptor in hands of creditor—The indorser of a bill of exchange is in the position of a surety for the acceptor, and, as such, upon payment to a discounteer of the amount due on the bill after its dishonour by the acceptor, is entitled to the benefit of securities of the acceptor held by the discounteer to secure the bill. The holder of the bill and security is at liberty to deal with the bill without prejudicing his security at any time before notice of dishonour. *Quare*, as to the rights of a stranger to the acceptors, who has given such security. *Duncan, Fox & Co. v. The North and South Wales Bank* (H.L.), 355

— accommodation acceptance deposited as security: proof in bankruptcy. See BANKRUPTCY, 19.

— right of proof against acceptor's estate. See BANKRUPTCY, 21.

Bill of Sale—after-acquired chattels: bankruptcy: discharge: effect of discharge on bill of sale—Where a bill of sale of the chattels upon premises contains an assignment of chattels which may subsequently be brought upon the premises, and the grantor of the bill of sale becomes bankrupt and obtains his order of discharge, such assignment will be effectual as to chattels brought upon the premises by the grantor after obtaining his order of discharge. *Collyer v. Isaacs*, 707

Lyde v. Mynn (1 Myl. & K. 683; 4 Sim. 505) followed. *Thompson v. Cohen* (41 Law J. Rep. Q.B. 221; Law Rep. 7 Q.B. 527) and *Cole v. Kernot* (41 Law J. Rep. Q.B. 221; Law Rep. 7 Q.B. 534 n) distinguished. *Ibid*.

2. — consideration, statement of: explanation or correction of, by receipt: bills of sale act, 1878 (41 & 42 Vict. c. 31), ss. 8 and 10—A bill of sale, duly attested and registered, purported to be executed in consideration of a sum of 120*l.* advanced by the grantees to the grantor. In fact only 90*l.* was advanced, the balance being retained to pay for the interest on the sum advanced and the expenses connected with the advance. A receipt for 90*l.* signed by the grantor on the deed immediately below the attestation clause stated that that sum, "together with the agreed sum of 30*l.* for interest and expenses, makes the sum of 120*l.*, being the consideration money within expressed to be paid to me":—*Held*, that the receipt formed

no part of the deed, and could not be read so as to contradict the statement in the bill of sale, and that the bill of sale not containing in itself a statement of the true consideration, was void as against the trustee in liquidation of the grantor. *Ex parte The National Mercantile Bank*; in *re Haynes* (49 Law J. Rep. Bankr. 62; Law Rep. 15 Ch. D. 42) distinguished. *Ex parte The Charing Cross Advance and Deposit Bank*; in *re Parker* (App.), 157

3. — registration: "growing crops": severance]—Although growing crops are not personal chattels, but pass by a deed as an interest in land, and the deed does not, as far as regards them, require registration; yet when they are severed from the land they become personal chattels and pass to the trustee in bankruptcy of the grantor, unless the grantee has prior to the bankruptcy taken possession of them. *In re Phillips*; *ex parte The National Mercantile Bank* (App.), 231

Breach of Trust. See BANKRUPTCY, 1; MORTGAGE, 11; TRUST AND TRUSTEE, 1, 2.

Building Societies Act, 1874. See FRIENDLY SOCIETY, 1.

Call—prepayment of. See COMPANY, 12.

— ultra vires. See COMPANY, 3.

Charity—administration: construction of charitable bequests: charitable gifts for doles and apprenticing: charity commissioners: scheme: cyprès: diversion of funds to educational purposes]—When a scheme has been settled by the Charity Commissioners the Court will not interfere unless the commissioners have exceeded their jurisdiction, or have made some slip or gross miscarriage which calls for the intervention of the Court. *In re The Campden Charities* (App.), 646

Lord Campden, by his will, in 1629, gave 200*l.* "to be yearly employed for the good and benefit of the poor of the town of K., in such manner as" certain specified persons "and the churchwardens of the parish of K. from time to time should think fit to establish for ever." Lady Campden, by her will, in 1643, gave to nine specified parishioners of K. and the churchwardens for the time being, 200*l.* on trust to purchase land of the yearly value of 10*l.*, "one-half whereof should be applied from time to time for ever for and towards the better relief of the most poor and needy people of good life and conversation that should be inhabiting within the said parish of K., and the other half thereof should be applied yearly for ever to put forth one poor boy or more of the said parish to be apprenticed; the said 6*l.* due to the poor to be paid to them half-yearly for ever,

at Lady Day and Michaelmas, in the church or the porch thereof at K." By a deed of feoffment, in 1651, a piece of land known as "Cromwell's gift" was conveyed to certain parishioners of K., but no trust was declared thereof. The three charities were for many years administered by the same body of trustees, the income of Lord Campden's charity being applied in pensions to the deserving poor of the parish, the income of Lady Campden's charity half in pensions and half in apprenticing boys, and the income of Cromwell's gift three-quarters in pensions and one-quarter in apprenticeships. The income of the united charities now exceeded 3,500*l.*, but there was in the parish of K. no lack of deserving recipients of the charities thus administered. In 1879 the Charity Commissioners made an order confirming a new scheme for the administration of the charities, under which one moiety of the entire income was in effect devoted to the advancement of the education of the children resident in K. attending public elementary schools. This scheme was objected to by the trustees on various grounds, and on petition to the Court to set aside or vary the scheme, HALL, V.C., held that the scheme departed substantially from the proper application of the income of the charity by diverting to educational purposes a large portion of the income which was originally intended for eleemosynary objects—that is, doles and the apprenticing of poor boys—and remitted it to the commissioners for their reconsideration. On appeal by the commissioners,—*Held* (by the Court of Appeal, reversing the decision of HALL, V.C., 49 Law J. Rep. Chanc. 676), that the scheme was in accordance with the modern practice in such cases, and must be affirmed. *Ibid.*

2. — charitable trusts acts, 1853, ss. 24, 26, 62, 66; 1855, ss. 29 and 48: endowment: charity maintained partly by voluntary contributions: sale of land: consent of charity commissioners]—The Royal Society, a voluntary association, whose income was derived in part from the subscriptions or voluntary donations of its members, and in part from the interest of moneys bequeathed to the society upon special trusts, was possessed of land purchased wholly out of such subscriptions or voluntary donations. On a summons under the Vendor and Purchaser Act, 1874, for a declaration that the society could sell such land without the consent of the Charity Commissioners,—*Held*, that the land having been purchased by the society out of property which might be legally applied as income, did not form an "endowment" within the meaning of the Charitable Trusts Acts, 1853 and 1855, and that consequently, by virtue of section 62 of the Act of 1853, and section 48 of the Act of 1855, the society was, so far as respected this land, a charity expressly exempted from the operation of the Acts, within the meaning of the latter section, and could, there-

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fore, notwithstanding section 29 of the Act of 1855, sell the land without the consent of the Charity Commissioners. *The Governors of the Corporation for the Relief of Poor Widows and Children of the Clergy v. Sutton* (27 Beav. 651; 29 Law J. Rep. Chanc. 393; *nom. The Corporation of the Sons of the Clergy v. Sutton*) considered and followed. *In re The Royal Society of London and Thompson*, 344

3. **Charity (continued)**—*charitable trusts act, 1855* (16 & 17 Vict. c. 137), ss. 17, 62, 63: *action against dean and canons: mandamus: sanction of charity commissioners, whether necessary*—By the Parish of Manchester Division Act, 1850, it was enacted that the defendants, after certain payments, should pay the residue of the caputal revenue to the Ecclesiastical Commissioners, to be applied (subject to certain payments thereout) for the benefit of the rectors and incumbents of the parishes or districts within the parish of Manchester in augmentation of their incomes, and the defendants were to render yearly accounts to the Ecclesiastical Commissioners stating the particulars and items of their receipts and disbursements. An action having been brought by the Attorney-General on the relation of the rectors and incumbents, alleging that the accounts rendered by the defendants contained improper items of disbursement, and claiming a declaration to that effect, and a *mandamus* ordering the defendants to render proper accounts, the defendants demurred on the ground that it did not appear that the action had been sanctioned by the Charity Commissioners as required by section 17 of the Charitable Trusts Act, 1853:—*Held* (following *The Attorney-General v. Sidney Sussex College*, 15 W.R. 162), that, although by section 62 the defendants as a caputal body were expressly exempted from the operation of the Act, yet section 17 applied, and that therefore the action could not be maintained without the sanction of the Charity Commissioners. *Held*, further, that even if the action were to be treated as a mere action for a *mandamus* (and therefore prior to the Judicature Acts a simple common law action), yet inasmuch as it involved the investigation of the accounts of the caputal revenues it was within section 17. *The Attorney-General v. The Dean and Canons of Manchester*, 562

Semble, a *mandamus* is a "proceeding" within the meaning of that section. *Ibid.*

In re Meyrick's Charity (1 Jur. N.S. 438; 24 Law J. Rep. Chanc. 669) considered and explained. *Ibid.*

The granting of their sanction by the commissioners is not mere matter of form but matter of substance for their serious consideration. *Ibid.*

4. — **mortmain: bequest for "establishment" of charitable institutions in such manner as not to violate mortmain acts**—A testator bequeathed to his trustees a sum of 4,000*l.* out of pure personality, and directed them to apply the same,

or such part thereof as they should think fit, and the annual income of such part as should not, for the time being, be so applied, "in the establishment of a soup kitchen for the parish of S., and of a cottage hospital adjoining thereto, in such manner as not to violate the Mortmain Acts;" such hospital to be provided with not less than four beds for patients, and with all other necessary furniture and appliances. The testator also directed that his trustees should set apart a sum of 2,500*l.* out of pure personality, and should, "so far as they or he lawfully could, without violating the laws enacted against the disposition of property in mortmain, apply a sum not exceeding 1,000*l.*, part thereof, in establishing an Independent chapel at A," and stand possessed of the residue upon certain trusts for providing a stipend for the minister of such chapel and otherwise for his benefit:—*Held*, that the first bequest was valid, inasmuch as it might be carried out without the purchase of land by the trustees, but that the second bequest in favour of the Independent chapel was void under the Mortmain Acts, because it, by its terms, directed the trustees personally to apply the money in the establishment of the chapel, and thus involved the purchase of land by them. *Biscoe v. Jackson*, 597

5. — **mortmain: legacy consisting partly of the proceeds of sale of land: apportionment**—Josiah H. by his will gave all his real and personal estate to trustees, upon trust (after the death of A.) to convert the trust premises into money, and thereout to pay a legacy of 5,000*l.* to his brother, Jacob H. Jacob H. by his will (in effect) bequeathed this legacy to charitable purposes. At the death of Jacob H., the legacy was still reversionary, and the real estate of the first testator had not been sold:—*Held*, that the legacy did not fail entirely; but that there must be an apportionment, and that so much of the legacy as was payable out of pure personality was well given. *In re Hill's Trusts*, 134

6. — **mortmain: partnership property: real estate directed to be sold: the mortmain act**—The proceeds of sale of real estate, forming part of the partnership property of a testator, and directed by him to be sold, are an interest in land within the meaning of the Mortmain Act. *Attree v. Howe* (47 Law J. Rep. Chanc. 863; Law Rep. 9 Ch. D. 337) explained. *Marsh v. The Attorney-General* (2 Jo. & H. 61; 30 Law J. Rep. Chanc. 233) questioned. Decision of Malins, V.C., affirmed. *Ashworth v. Mann* (App.), 107

Charter-party. See SHIPPING LAW.

Cheque—gift of. See DONATIO MORTIS CAUSA.

Church and Clergy—incumbents' resignation act, 1871 (34 & 35 Vict. c. 44), s. 10: pension of retired clerk—In an action brought by a retired clerk against his successor in the incumbency for payment by him out of the revenues of the vicarage of the arrears of the pension allowed under the provisions of the Incumbents' Resignation Act, 1871, the incumbent claimed to set off against such arrears a judgment debt previously due to him from the retired clerk:—*Held* (affirming the decision of JAMES, M.R.), that no such right of set-off could be maintained. *Gathercole v. Smith* (App.), 671

Collateral Security. See MORTGAGE, 4.

Commission in the Army—mortgage of: priority. See MORTGAGE, 12.

— value of: set-off by army agents. See ARMY AGENT.

Common—common pasturage: herbage: extent of right: custom: prescription: prescription act (2 & 3 Will. 4. c. 71), ss. 1 and 7: profit à prendre in alieno solo: evidence: admissibility of, to explain ancient decree—By a decree made in 1693 in a suit between the owners of Ashdown Forest and persons claiming rights of common, after allotting to the owners for inclosure and improvement portions of the forest within which the commoners were to be excluded and debarred from any common of pasture, herbage or pasturage, the residue, consisting of 6,400 acres, was allotted, to remain open and uninclosed, so that the commoners should have and take "sole common pasturage and herbage" thereof, the owners, their trustees and assigns, being for ever excluded "from having or claiming" any common of pasture or herbage upon or in the said lands so left for common:—*Held* (affirming BACON, V.C.), first, that under "common pasturage and herbage" the commoners were only entitled to take what could be taken by the mouth or bite of their cattle, and not to cut or carry away any part of the growth of the soil. Secondly, that no special custom existing at the date of the decree entitling the commoners to take any part of the growth of the soil was proved. Thirdly, that evidence of subsequent usage was not admissible to affect the construction of the decree, which was plain and unambiguous. *Held* (reversing BACON, V.C.), that the defendant and his predecessors in title having been shewn to have claimed to take and to have actually taken as of right, litter for the use of his particular tenement for upwards of sixty years, immediately before the commencement of the action, had acquired under the Prescription Act a right to do so, and the fact that they had claimed to do so under the mistaken supposition that all the commoners were entitled to do so did not prevent the acquisition of

the right by prescription. *Earl De la Warr v. Miles* (App.), 754

The object of the Prescription Act is to legalise a thing done as of right for sixty years. *Ibid.*
A defendant to maintain a defence under the Prescription Act must prove two facts: first, that he has taken or enjoyed, as a fact, for the period for which he prescribes, a certain right, profit or benefit; second, that he has taken and enjoyed this right, profit or benefit for the requisite period as of right, without regard to the permission of the lord. When these two facts are proved the question of law is, Could the acts done for that period as of right have been the subject-matter of a custom or prescription or grant?—not whether they were claimed as a matter of prescription or custom or grant. *Ibid.*
Where a Judge is asked to find the fact of a grant, and to say that it has been lost, he must have some grounds for believing that such was the fact—*Per BAWR, L.J.* *Ibid.*

Company—borrowing powers: debentures: formalities: mortgage: deposit of deeds: certificate: evidence: companies clauses act, 1845 (8 & 9 Vict. c. 16), s. 42: marshalling—A lender to a company was held not bound to see that the loan had been duly authorised by a meeting. The deposit of deeds of a company in respect of a past debt was held a mortgage to the extent of the company's power to borrow on mortgage then unexhausted, but only entitled to be paid *pari passu* with the mortgagees of the company's whole assets, to the extent of the particular assets. *The Landowners' West of England Drainage and Enclosure Co. v. Ashford*, 276

2. — constitution: association or partnership for investing capital: "carrying on business": acquisition of gain: companies act, 1862, s. 4—A deed was made between the defendants, called trustees, of the one part, and a covenantor on behalf of the holders of certificates of the other part, reciting subscriptions by numerous persons for the purchase by the trustees of the stocks, shares and debentures of certain submarine telegraph companies, which had been transferred into the trustees' names, and that it was intended to issue to the subscribers certificates of the nominal amount of 100*l.* in respect of every subscription of 90*l.*, and to issue as part of the certificate coupons of reversion, one coupon for each subscription of 90*l.*, in addition to the certificates for 100*l.*, and the deed contained provisions by way of trust for application of the annual produce in payment of expenses and interest, and the redemption of the certificates according to a scheme and for distribution of the available moneys *pari passu* among the certificate-holders; and that the certificates to be redeemed should be selected by lot; and for ultimate division of any surplus between the holders of the coupons of reversion; and for sale or conversion of the securities at the discretion

of the trustees, the produce to be applied in the redemption of certificates, or, with the assent of the certificate-holders, in the purchase of similar securities; and for remuneration of the trustees; and for an annual meeting of the certificate-holders, the proceedings thereof to be in manner prescribed by Table A; the business of the meeting to be (a) to receive a report of the trustees on the condition of the trust; (b) to appoint auditors; (c) to elect new trustees. The 4,200 certificates were issued, and the holders were more than twenty:—*Held* (reversing the decision of THE MASTER OF THE ROLLS), that the certificate-holders did not form an association which, under section 4 of the Companies Act, 1862, was illegal for want of registration. That the object of the deed was not the carrying on a business for the acquisition of gain within the section, but the holding and management of a trust fund, and that the powers given by the deed of selling and re-investing in certain cases were merely provisions similar to those found in ordinary settlements, and as being merely incidental to the management of the trust fund did not bring the case within the section. That the business (if any) authorised by the deed to be carried on was carried on by the trustees as trustees, and not as directors, and that they being under twenty, the case did not fall within the section. *Sykes v. Beadon* (48 Law J. Rep. Chanc. 522; Law Rep. 11 Ch. D. 170) disapproved; and *In re The Arthur Average Association* (44 Law J. Rep. Chanc. 569; Law Rep. 10 Chanc. 542) doubted by BRETT, L.J. *Per BRETT, L.J.*—No transaction within the association or company between the members of it can be taken into consideration to determine whether the company or association was one formed to carry on a business within the meaning of section 4. *Smith v. Anderson* (App.), 39

3. Company (continued)—directors: business to be carried on by not less than five directors: call: forfeiture: ultra vires—Where articles of association provide that the business of a company is to be carried on by not less than a minimum or more than a maximum number of directors, the words are imperative, not merely directory. Consequently, a forfeiture of shares for non-payment of a call made when there are less than the specified number of directors is invalid. *In re The Alma Spinning Co.*, 167

4. — directors: claim against directors for misfeasance: claim where no creditors: lapse of time: companies act, 1862, s. 165—The position of a liquidator making a claim against directors under section 165 of the Companies Act for misapplication of moneys in improperly paying a dividend otherwise than out of profits, is, with regard to the duty of promptitude, the same as that of an ordinary claimant. Where, therefore, the liquidator in a winding-up which commenced in 1876 applied in 1879 for an order against directors to repay a dividend declared

by them at the close of 1872 and paid soon after, the application was dismissed as a stale demand. It was held to be also a material fact against the liquidator that there were no existing unsatisfied creditors, except one who had as a shareholder received the dividend. *In re the Mammoth Copperopolis of Utah*, 11

5. — directors: misfeasance: private partnership: transfer of shares by vendor to directors: subsequent allotment of shares to the public: the companies act, 1862, s. 165—In January, 1874, an agreement was entered into between the three owners of a patent and R., whereby R. was to assist them in forming a company to purchase the patent for 32,000*l.*, and R. was to receive 6,000*l.* out of the purchase-money in paid-up shares. This agreement was not registered. In March, 1876, a company was incorporated with a capital of 50,000*l.* in shares of 100*l.*, to adopt and carry into effect an agreement, dated the 27th of February, 1875, and made between the three patentees of the one part, and a trustee for the company of the other part, for the sale to the company of the patent for 32,000*l.* This agreement was registered. The company was incorporated, and adopted the agreement of the 27th of February, 1875. Eight persons signed the memorandum of association of the company, namely, the three patentees, R. and three other gentlemen, and the solicitor of the company, all of whom, except the solicitor, were named in the articles as the first directors of the company. In April, 1875, the assignment of the patent to the company was executed, and thereupon the directors allotted and issued 320 fully paid-up shares to the patentees, one of whom the same day executed the following transfers for a nominal consideration: Thirty-five shares to R. in part payment of his 6,000*l.*, and fifteen shares to each of the other three directors, partly as a bonus and partly in payment of moneys advanced by them respectively to develop the patent. The above transactions were known to all the eight members of the company, and it was at first intended to carry on business as a private company, and not to admit any of the public, and the eight original members continued to be the only members of the company until July, 1876, when the directors, finding that more funds were required to further develop the patent, allotted shares to five persons who applied for them after investigating the position and affairs of the company; but the agreement of 1874, and the above transfers made in April, 1875, were not disclosed to them. On the winding up of the company,—*Held*, that R. and the three directors could not be made liable under the 165th section of the Companies Act, 1862, to repay to the company the nominal value of the shares that had been transferred to them as above mentioned. *The Society of Practical Knowledge v. Abbott* (2 Beav. 559) distinguished. *In re The British Seamless Paper Box Co. (Lim.)* (App.), 497

6. — *promoter: secret profit: bankruptcy: discharge: proof: "unliquidated damages": "debt incurred by means of fraud or breach of trust": bankruptcy act, 1869, ss. 31 and 49*—The vendors to a company agreed to give a secret profit to G., a financial agent and promoter of the company, and G. received such profit out of the purchase-money payable to the vendors without the knowledge of the company. The company brought an action against G. to compel him to account for the amount of the secret profit, and upon certain issues which were directed to be tried, the Court found that G. was a promoter of the company, and that a large sum was due from him under the undisclosed agreement with the vendors. G.'s creditors subsequently passed a resolution under the Bankruptcy Act, 1869, for the liquidation of his affairs by arrangement, a trustee was appointed, and G. was granted his discharge. On motion for judgment on the result of the issues,—*Held*, that the company were to be at liberty to go in and prove in G.'s liquidation as creditors for the sum found due from him, such sum being a demand arising by reason of a contract, and not in the nature of unliquidated damages, and therefore provable notwithstanding section 31 of the Bankruptcy Act, 1869. *Held* also, that the sum found due from G. was a debt "incurred by means of fraud or breach of trust" within the meaning of section 49 of the same Act, and that G. was not released therefrom by his discharge, and he was therefore ordered personally to pay the debt to the company, less any sum they might receive under his liquidation. *The Emma Silver Mining Co. v. Grant*, 449

7. — *prospectus: fraudulent misrepresentation: promotion-money: formation expenses: contract: the companies act, 1867, s. 38*—The prospectus issued by the promoters of a projected company stated that the purchase-money to be paid by the company to the vendors was 32,500*l.*, of which 16,000*l.* was to be paid in 3,000 fully paid-up shares, and that "the remuneration of the directors will be paid by the shareholders, and it is proposed that they should be paid only by a commission on the profits made, no promotion-money whatever being paid to them by the company, and all formation expenses being paid by the vendors." The 32,500*l.* was the real price originally agreed to be paid to the vendors. Shortly after the registration of the company the vendors, who were two of the first directors of the company, transferred 800 of their vendors' paid-up shares to their co-directors in pursuance of an understanding which existed at the time the prospectus was issued, but which was not disclosed. The shares were so transferred as promotion-money, and in order to induce them to continue directors. In an action by a shareholder against the directors, claiming damages, on the ground that he had been induced to take his shares in the company by the fraudulent misrepresentations contained in the above paragraph of the prospectus, and on the faith of

which he had taken his shares,—*Held* (per FAY, J., and the Court of Appeal), that the understanding was not a contract within the 38th section of the Companies Act, 1867, and that the omission to state it in the prospectus did not make the latter fraudulent within the statute. *Held* also (but reversing the decision of FAY, J.), that although the transaction between the vendors and their co-directors might be ground for holding them liable in some other proceedings, it did not render the prospectus false or fraudulent, and that the action must be dismissed with costs. *Arkwright v. Newbold* (App.), 372

"Formation expenses" necessarily include promotion-moneys paid to persons as commission for floating a company; and where a prospectus states that "no promotion-money will be paid by the company, and that the formation expenses will be paid by the vendors," it must be shewn, in order to prove such a statement false, that the purchase price agreed upon has been purposely and fraudulently increased for the purpose of making the company pay the promotion-money in addition to what was understood to be the real price between the parties. *Ibid.*

8. — *shareholder: prospectus: change of directors: repudiation*—A. applied for shares in a company, on the faith of a statement in the prospectus that G. was the managing director. Before the shares were allotted G. retired, and another director was appointed in his place. A. received from the company the usual letter of allotment, together with a letter informing him of the change which had taken place in the direction; and at once wrote to the company withdrawing his application for shares.—*Held*, that A. had a right to withdraw his application, and that his name must be removed from the register of shareholders. *In re The Scottish Petroleum Co. Anderson's Case*, 269

9. — *shares: dividends out of capital: repairs: depreciation: loss of capital: reserve fund: ordinary shareholders: preference shareholders: dividends depending on profits of particular year*—The articles of association of a tramway company provided that "no dividend should be declared except out of profits;" that the directors should, with the sanction of the company, declare annual dividends "out of profits," and that the directors should, before recommending a dividend, set aside "out of profits," subject to the sanction of the company, "a reserve fund for maintenance, repairs, depreciation and renewals." For several years previous to the year 1878, no proper reserve fund had been set aside by the company, and no sufficient sum had been expended by the company in the maintenance, repairs and renewals of their tramways, so that in the year 1878 they had become much out of repair. The company had for several years previous to, and also for the

first half-year of, 1878 paid dividends on their ordinary shares, and had declared a dividend for the half-year ending the 31st of December, 1878. In an action by a shareholder to restrain the directors from paying the dividend, and it appearing that the amount available for the dividend was less than the sum required for the renewal and repairs of the tramways,—*Held*, that the company could only declare a dividend out of net profits, and that there could be no net profits until the tramways had been restored to a proper state, and provision for that purpose had been made out of the company's assets; and an injunction was accordingly granted to restrain the directors from paying to the ordinary shareholders the dividend declared. Certain preference shares had been issued by the company to bear a preferential dividend "dependent upon the profits of the particular year only." A dividend had also been declared on the preference shares for the half-year ending the 31st of December, 1878, but the directors declined to pay the same until the capital of the company had been restored by the amount previously improperly paid away in dividends. For the year 1878 the accounts of the company shewed a net profit, after making due provision for repairs, depreciation and renewals and to place the tramways of the company in the same condition on the 31st of December, 1878, as they were in on the 1st of January, 1878, sufficient to pay the stipulated dividend to the preference shareholders:—*Held*, that the preference shareholders were co-adventurers for each particular year only, and inasmuch as the accounts for the year 1878 shewed a net profit on the working of that year, after making all due provision for repairs, depreciation and renewals, sufficient for the payment of a dividend to the preference shareholders, that they were entitled to be paid such dividend without deduction, and that they were under no liability to recoup the amounts which had previously been improperly paid away in dividends. *Dent v. The London Tramways Co. (Lim.)*, 190

10. *Company (continued)—winding-up: contributory: companies acts, 1862, s. 98; 1867, s. 25: contract to take shares: set-off in respect of shares not allotted at date of winding-up*—Section 25 of the Companies Act, 1867, has no application in a question in a winding-up of liability to take shares which were never allotted by the company. Therefore in a winding-up effect was given to an unregistered contract which was interpreted as entitling a person to set off against calls on shares to be allotted to him moneys to become due to him for work done for the company, no shares having been allotted to him before the winding-up. *In re The Victoria Mansions (Lim.)*. *Norton's Case*, 464

11. — *winding-up: contributory: companies act, 1862: life insurance: articles of association: construction: policy-holders*—Where the consti-

tution of a life insurance society was such that participating policy-holders were liable as contributories after shareholders, it was held on the construction of the articles that a policyholder who had assigned his policy before the winding-up was not liable as contributory. *In re The Albion Assurance Society; ex parte Brown* 714

12. — *winding-up: contributory: forfeited share resold: the companies act, 1867, s. 25: set-off: prepayment of call: fraudulent preference: the companies act, 1862, s. 164*—Original shares that have been forfeited by the company for non-payment of calls can be resold by the directors for less than the nominal value without a contract registered in accordance with the Companies Act, 1867, s. 25. *In re The Exchange Banking Co. (Lim.)*. *Ramwell's Case*, 827 Calls due from a shareholder who is also the solicitor of the company may be set off against his bill of costs. *Ibid*.

Directors with power to accept payment in advance of calls authorised their solicitor R., who was a shareholder, to pay the claims of three pressing creditors, amounting to 250*l*. R. paid these creditors and took from the directors a receipt for the amount "in prepayment of calls." These creditors were paid when the insolvency of the company was admitted but before the presentation of the winding-up petition. The official liquidator having made a call which amounted in R.'s case to 320*l*.—*Held*, that the 250*l*. was a valid payment *pro tanto*, in advance of calls, and was not a fraudulent preference, and that R. was only liable for the balance. *Ibid*.

13. — *winding-up: contributory: purchase by company of its shares: power in articles: surrender of shares: reduction of capital: companies acts, 1862 to 1877, table A*—A company incorporated under the Companies Act, 1862, was empowered by its memorandum to acquire a particular colliery business and carry on the trade of coal miners, and to do all things conducive to the attainment of the above object. One of the articles of association empowered the directors from time to time to purchase for the company any shares in the company at such price as they should think reasonable. Shares so purchased might be dealt with by the directors as if they had never before been issued. The purchase-money payable by the company for any shares so purchased might be paid out of any assets of the company, and such shares might be transferred to the company, or to such person as they should determine. Any profit arising on the re-issuing or subsequent sale of any shares purchased for the company were to be considered as profits of the year in which such shares should be re-issued or sold for the company. The memorandum contained no power to purchase the shares. An arrangement was made in 1872 under which the directors pur-

chased the shares of W., who executed a transfer of them to the company, which afterwards appeared in the register sent to the Registrar of Joint-Stock Companies as the holder. Such arrangement was admitted to be *bona fide*, and was approved by the shareholders at a special meeting. In 1879 the company was ordered to be wound up. Upon an application by the liquidator to put W. on the list of contributories in respect of the shares so purchased of him,—*Held* (reversing the decision of JESSE, M.R.), that the purchase being authorised by the article was valid, notwithstanding that it might amount to a reduction of capital, and that W. having by that transaction got rid of his shares, and having ceased to be a member for more than twelve months before the winding-up, could not be put upon the list of contributories. *In re The Driffield Silkestone Coal Co. (Lim.)*; *ex parte Ward* (App.), 387

The fact that the article was in terms wide enough to authorise a trafficking in its shares constituted no reason for impeaching a transaction effected under it, which was confined within legal limits. *Ibid.*

The only right of a creditor of a company is to proceed against every present member and every past member who was a member within twelve months before the commencement of the winding-up, and who were such members must be tried in the same way as if there were no winding-up. *Ibid.*

14. — *winding-up: contributory: shares taken by husband in name of wife*—D. in 1864 applied for 300 shares in a bank, 100 in his own name and 200 in the name of M., his wife, and paid the deposit on the whole 300. M. was ignorant of the transaction. D. subscribed the memorandum and articles of association for himself and M. and paid all calls on the shares. The company went into liquidation in 1866, and D. died soon afterwards, having within a year from the winding-up sold and transferred 140 of the 200 shares allotted to M. M. was placed on the A list in respect of the 60 shares and on the B list in respect of the 140 shares, and her separate estate being insufficient to meet the calls, the liquidator applied to have the B list rectified by placing the executors of D. thereon in respect of the 140 shares:—*Held*, that as the company had accepted M. as a shareholder and there had been no concealment of the nature of the transaction, the estate of D. could not be charged. *In re The London, Bombay and Mediterranean Bank (Lim.)*, 567

15. — *winding-up: costs: contributory summons: representative case*—The costs of a representative contributory summons in the winding up of a company are not to be allowed as between solicitor and client. *Part's Case* (Law Rep. 10 Eq. 622) not followed on this point. *In re The Mutual Society*, 400

16. — *winding-up: costs ordered to be paid to contributory out of assets of company: right of contributory's solicitors to sue in name of company to recover assets for payment of costs: jurisdiction: costs*—Where an order is made in a winding-up giving persons interested in the assets of the company leave to take proceedings in the name of the company on giving such indemnity as the Court shall direct, the giving of the indemnity is a condition precedent to the institution of any such proceedings, and must be the subject of a substantive application before such proceedings are taken. Such leave will only be given to creditors or contributories of the company. Where, therefore, a contributory obtained an order that his taxed costs of an application in the winding-up should be paid to him out of the assets of the company, and the contributory having become bankrupt, and the liquidators of the company alleging that they had no assets to meet such costs, the solicitors obtained an order that on giving such indemnity as the Court should direct they might bring an action in the name of the company against the former directors and promoters of the company with a view to increase the assets in the winding-up, and forthwith commenced such an action; on an application by the defendants in the action,—*Held*, on appeal, that the order giving leave to bring the action must be set aside, and all proceedings in the action must be stayed, on the grounds, first, that the giving of the indemnity was a condition precedent which had not been complied with; and, secondly, that the order itself was made without jurisdiction, as the solicitors were not persons interested in the assets of the company. *Held* also, that the solicitors must pay the costs of the defendants and of the liquidators as between party and party. *The Cape Breton Co. (Lim.) v. Fenn* (App.), 321

17. — *winding-up: distress: commencement: appointment of liquidator: compulsory order: the companies act, 1862, ss. 87, 130, 133, 163: the judicature act, 1875, s. 10: the bankruptcy act, 1869, s. 34*—The 10th section of the Judicature Act, 1875, does not import into a winding-up the 34th section of the Bankruptcy Act, 1869, so as to enable a landlord to distrain after the commencement of a winding-up for rent due to him from the company. *Thomas v. The Patent Lionite Co. (App.)*, 544

The appointment of a voluntary liquidator is not necessary to give effect to a voluntary winding-up for the purposes of the 163rd section of the Companies Act, 1862. *Ibid.*

A compulsory order, which "supercedes" a voluntary winding-up as from the date of such order, does not thereby entirely put an end to everything previously done under the voluntary winding-up. *Ibid.*

Where, therefore, landlords, after the commencement of the voluntary winding-up of the company, but before the date of the compulsory

order, distrained for rent due to them prior to the commencement of the voluntary winding-up. —*Held*, that the distress was invalid, no special grounds being shewn why the judicial discretion vested in the Court under the 87th section of the Companies Act, 1862, should be exercised in their favour. *Ibid*.

18. Company (continued)—winding-up: distress: mortgage: companies act, 1862, ss. 87, 138, 163]

—An application in a winding-up under supervision by mortgagees for leave to distrain under a power in their mortgage for interest due before the winding-up was refused. *In re Brown, Bailey and Dixon (Lim.)*; *ex parte Roberts and Wright*, 738

19. — winding-up: distress: rent: companies act, 1862, ss. 87, 163]

—The lessor of a coal mine to a company had power when the rent was in arrear to stop the working and enter. On the winding up of the company the liquidator continued the working after notice from the lessor to cease or pay the rent in arrear:—*Held*, that the landlord was entitled to be paid the full rent in arrear, or distrain. *In re The Silkstone and Dodsworth Coal and Iron Co.*; *ex parte Perkins*, 444

20. — winding-up: distress: rent: companies act, 1862, ss. 87, 163: apportionment act, 1870, s. 2]

—The landlord of premises occupied by the liquidator for carrying on business during winding-up was held entitled to payment in full of the apportioned rent in respect of the time subsequent to the presentation of the petition on which the winding-up order was made. *In re The South Kensington Co-operative Stores (Lim.)*; *ex parte Seymour*, 446

21. — winding-up: petition of company: wishes of majority of creditors: companies act, 1862, s. 91]

—A company admitting its present inability to pay its debts presented a petition, asking to have the voluntary winding-up, which had been previously resolved upon, continued under the supervision of the Court. No creditor supported the petition. A majority of the creditors opposed, and asked for a compulsory order. The Court, out of regard to the wishes of the majority (Companies Act, 1862, s. 91), adjourned the petition for a fortnight, in order to enable them to present a petition of their own asking for a compulsory order. *In re The Electric and Magnetic Co.*, 491

Where a petition is presented, asking for a supervision order, or "such other order as to the Court shall seem meet," the Court has the power, if the petitioner be willing, to make an order for a compulsory winding-up. *Ibid*.

22. — winding-up: practice: action against unregistered company: order for payment of costs of action: stay of execution refused: the

companies act, 1862, ss. 85, 119, 199, 201, 204: the judicature act, 1873, s. 25, sub-ss. 4 and 5]—Where the plaintiff in an action obtains judgment with costs against the principal defendant, and a formal but necessary party to the action has been made a co-defendant and is entitled to his costs of the action, the proper practice now is to make a direct order on the principal defendant to pay the costs of such co-defendant, and not to direct the plaintiff to pay such costs and to have them over again against the principal defendant. The words "being wound up" in the 204th section of the Companies Act, 1862, mean "in course of being wound up," and the effect of that and of the 199th section is to import into the winding up of an unregistered company all the provisions of the Act relating to the winding up of companies by the Court. Where, therefore, there was a pending winding-up petition against an unregistered company, the Court, in the exercise of its judicial discretion, under the 85th section, allowed an execution for costs against the company to be proceeded with, the order for payment having been made after the presentation of the petition through the *lack* of the company, and the position of the execution creditor having been materially affected by the order. *Rudow v. The Great Britain Mutual Life Ass. Society (App.)*, 504

23. — winding-up: practice: injunction: jurisdiction to restrain presentation: solvent company: creditor: disputed debt]

—The Court has jurisdiction to restrain by injunction a person claiming to be a creditor of a company from presenting a petition to wind up the company in the case of a *bona fide* dispute as to the debt, and where the company is proved to be solvent. *The Cercle Restaurant Castiglione Co. v. Lavery*, 837

24. — winding-up: practice: injunction: mortgagee: exercise of power of sale: interim injunction]

—Where a mortgagee, who was also a shareholder in the company, filed a petition for winding up the company, alleging that if the business were sold as a going concern there would be assets to return a dividend to the shareholders, but that there were at present no assets available for payment of his debt except the lease, plant and machinery, which could not be sold without stopping the business,—*Held*, that, as mortgagee of the lease, plant and machinery, he ought to be restrained from exercising his power of sale till the hearing of the petition. *In re The Cambrian Mining Co. (Lim.)*; *ex parte Fell*, 836

25. — winding-up: practice: interrogatories: public officer: documents: rules of court, order XXXI. rules 1 and 4]—The provisions of Order XXXI. of the Rules of Court with regard to discovery are applicable to proceedings in a

winding-up, and leave will be given to serve interrogatories on a public officer or other member of a company carrying in a claim in a winding-up, where the Judge is satisfied that such public officer or member is likely to be able to give the information required. *In re The Alexandra Palace Co.*, 7

26. — *winding-up: proof: costs: companies act, 1862: order of 1862, rule 27: consolidated order XI. rule 24*]—A creditor claimed to prove in a winding-up for sums parts of which were allowed. The liquidator made a claim against the creditor, which was disallowed:—*Held*, that costs of the creditor so far as they resulted from his own claim were to be added to his debt, and so far as they resulted from the claim of the liquidator were to be paid in full out of the assets of the company. *In re The Lombard Deposit Bank; ex parte The Lombard Building Society*, 749

27. — *winding-up: proof: fully paid-up shares: proof for breach of contract to allot*]—A., the holder of debentures of a limited company, by arrangement with the company exchanged his debentures for shares in the company, which were issued to him as fully paid up. No contract in writing in respect to the shares was filed with the Registrar of Joint-Stock Companies, as required by section 25 of the Companies Act, 1867, and accordingly, in the winding up of the company, A. was held liable as contributory in respect of the shares as unpaid shares:—*Held*, that A. was entitled to prove in the winding-up against the company for damages in respect of their breach of contract in not issuing to him fully paid-up shares. *In re The Great Australian Gold Mining Co. Appleyard's Case*, 564

Mudford's Case (49 Law J. Rep. Chanc. 452; Law Rep. 14 Ch. D. 634) followed. *Howdsworth v. The City of Glasgow Bank* (Law Rep. 5 App. Cas. 317) distinguished. *Ibid*.

28. — *winding-up: proof: policy of fire insurance: fire after winding-up, and before time fixed for sending in claims: companies act, 1862, s. 168: rule 25 of orders of November, 1862: judicature act, 1875, s. 10*]—The holder of a policy of assurance against fire granted by a limited company, and which is current at the date of the winding up of the company, is entitled to prove for the full amount of his policy, where a loss by fire exceeding such amount occurs after the winding-up and before the time fixed for sending in claims against the company. *In re The Northern Counties of England Fire Ins. Co. (Lim.)*, 273

29. — *winding-up: proof: salaries of clerks: bankruptcy act, 1869, s. 32. sub-s. 2: judicature act, 1875, s. 10*]—The rule in bankruptcy giving clerks' salaries due from the bankrupt (Bankruptcy Act, 1869, s. 32. sub-s. 2) priority over

his other debts applies, under section 10 of the Judicature Act, 1875, to a company in liquidation. *In re The Association of Land Financiers (Lim.)*, 201

30. — *winding-up: proof: secured creditor: mistake as to value of security: judicature act, 1875, s. 10: bankruptcy rules, 1870, rules 90-101: companies act, 1862, s. 107*]—Rules 99-101 of the Bankruptcy Rules, 1870, are by section 10 of the Judicature Act, 1875, made applicable to the winding up of companies. A secured creditor of a company, on account of a mistaken estimate of its value, elected to stand upon his security. Having subsequently discovered its true value he sought to prove for his debt, after giving credit for the value of the security:—*Held*, that he was entitled to do so, provided no dividend already declared was disturbed, this being his right under rules 99-101 of the Bankruptcy Rules, 1870. *In re Kit Hill Tunnel (Lim.)*; *ex parte Williams*, 303

31. — *winding-up: proof: secured creditor: execution creditor: the bankruptcy act, 1869, s. 87: the judicature act, 1875, s. 10*]—The 10th section of the Judicature Act, 1875, merely abrogates the old rule which obtained in Chancery in the administration of assets of deceased persons, and in the liquidation of companies, that a creditor holding security for his debt was entitled to prove for the whole of his debt, without making any deduction in respect of his security—provided he did not receive in the whole more than twenty shillings in the pound for his debt—and substitutes therefor the rule in bankruptcy, that a secured creditor can only prove for the balance of his debt after realising his security or giving credit for its value. The section does not introduce any of the rules in bankruptcy as to the avoidance of securities any more than it introduces the bankruptcy rules as to fraudulent preference or order and disposition. Where, therefore, a judgment creditor of a company issued a *fi. fa.*, under which the sheriff seized, but, before sale, a petition was presented against the company, on which a winding-up order was subsequently made,—*Held* (affirming the decision of MALINS, V.C.), that the judgment creditor was a secured creditor of the company. *In re The Printing and Numerical Registering Co.* (47 Law J. Rep. Chanc. 580; Law Rep. 8 Ch. D. 535) overruled; *In re Richards & Co.* (48 Law J. Rep. Chanc. 555; Law Rep. 11 Ch. D. 676) approved and followed. *In re The Withernsea Brick Works (Lim.) (App.)*, 185

32. — *winding-up: witness: companies act, 1862, s. 115: contributory*]—An order, allowing contributories to attend the examination of witnesses by the official liquidator and further examine them, was enforced. *In re The Silkstone and Dodsworth Coal and Iron Co. (Lim.)*. *Whitworth's Case*, 752

— evidence : companies clauses act : certificate of execution of works. See EVIDENCE, 2.

— similarity of name : registration : injunction. See INJUNCTION, 1, 2.

— winding-up : practice : leave to appeal after time expired. See PRACTICE, 6.

Composition. See BANKRUPTCY, 5-9.

Condition—*restraint of marriage : will : devise of real estate : condition subsequent : validity*—Testatrix devised real estate to her brother for life, with remainders in favour of his wife and his sons, daughters and issue in tail, with remainder in favour of the plaintiffs; and provided that if her brother should have married or should thereafter marry a domestic servant, or a person who was or had been a domestic servant, then the devise in favour of her brother, his wife, sons, daughters and issue, should be void, and that the estate should go over as in default of issue of her brother. After the testatrix's death, her brother married a domestic servant:—*Held*, that the condition was valid, and that the gift over took effect. *Jenner v. Turner*, 161

— precedent : marriage with consent of guardians. See WILL, 1.

Conflict of Law—domicile : administration. See ADMINISTRATION, 1.

Consolidation. See MORTGAGE, 5, 13.

Constructive Notice. See MORTGAGE, 7, 8.

Contempt of Court—*issue of advertisements : motion to commit*—Pending an appeal from a judgment pronouncing in favour of the validity of a patent owned by the plaintiffs, advertisements were issued in a newspaper—one asking for funds to carry on the appeal on the ground that the action was a test action in which the trade generally were interested, and the other offering a reward of 100l. to anyone who could produce documentary evidence that the art of nickel plating was carried on before a certain date. Motion to commit the printers of the newspaper for contempt of Court was dismissed with costs. *The Plating Co. (Lim.) v. Farquharson* (App.), 406

Pool v. Sacheverel (1 P. Wms. 675) questioned. *Ibid*.

Motions to commit, when there is no intention to ask for committal, but merely for an apology and costs, will be discouraged, and no costs of such motions will be given. *Ibid*.

— arrest abroad under warrant. See EXTRA-DITION ACT.

Contingent Remainder. See WILL, 2.

Contribution. See COSTS, 5; PRINCIPAL AND SURETY, 1, 2.

Contributory. See COMPANY, 10-15.

Conversion. See HUSBAND AND WIFE, 4; LUNACY, 2; PARTITION, 2; POWER, 2.

Copyright—*newspaper : registration : newspaper article : author : injunction : copyright act, 1842, 5 & 6 Vict. c. 45, s. 18*—A newspaper is a "periodical work" or "book" within the meaning of the 18th section of the Copyright Act, 1842, and requires to be registered under that Act in order to give the proprietor a copyright in its contents and a right to sue in respect of the piracy of any article therein. The proprietor must, moreover, show that the article in question was composed on the terms that the copyright therein should belong to him and that he had paid the author for his services. *Walter v. Howe*, 621

Cor v. The Land and Water Journal Company (39 Law J. Rep. Chanc. 152; Law Rep. 9 Eq. 324) not followed. *Ibid*.

2. — *title of book : trade-mark : infringement of : periodical : registration : copyright act, 1842 (5 & 6 Vict. c. 45), ss. 16, 17, 18*—D. brought an action for an injunction restraining Y. from using the words "Splendid Misery" as the title of a novel, on the ground that D. was the registered proprietor of the copyright in that title. The same title had been used for a novel published in 1801. There was no evidence that the author of the story, in the title of which D. claimed the copyright, had invented the title, or that he had not himself copied it from the earlier novel:—*Held* (reversing RACON, V.C.), that there was no copyright in the words "Splendid Misery," neither the combination itself, nor yet the adoption of that combination as the title of a novel, being new or original; and that, independently of these grounds, the want of evidence of invention on the part of the author of the plaintiffs' story would have disentitled the plaintiff to relief. To entitle a work to the protection of copyright it must be original. *Dicks v. Yates* (App.), 809.

Per JAMES, M.R., and JAMES, L.J.: "There can be in general no copyright in the title or name of a book." There may be a trade-mark in a title, and an action for fraud will lie against a person using the title of a book already published for the purpose of passing off such book as that of a former author. *Ibid*.

Weldon v. Dicks (48 Law J. Rep. Chanc. 201; Law Rep. 10 Ch. D. 147) observed upon. *Ibid*. Copyright and trade-mark distinguished. *Ibid*.

D. was, on the 8th of June, 1869, registered at Stationers' Hall as the proprietor and publisher

of a periodical called *Every Week*. The date of the first publication of *Every Week* was the 8th of July, 1869. D. published the story, "Splendid Misery," in *Every Week*, in six parts, the first part being published in the weekly issue of the 30th of December, 1874, and the last part in that of the 5th of February, 1876. On the 25th of September, 1879, D. registered himself as the proprietor and publisher of the copyright in a novel or work called "Splendid Misery; or East End and West End;" and gave the 30th of December, 1874, as the date of first publication:—*Held*, that the first registration was void, being made before the first publication of the serial, but that the second was sufficient to protect the copyright (if any) in the title of D.'s story. *Ibid*.

A registration of the first part of a story is not less a registration of such first part because the subsequent parts have been published. *Ibid*.

The notice of objection required to be given by section 16 of 5 & 6 Vict. c. 45, is sufficiently given if given on the pleadings. *Ibid*.

Costs—administration: executors: action by residuary legatee: rules of court, 1875, orders III. rule 8, XV. rule 1]—A residuary legatee objected to certain items in accounts furnished by the executors, amounting in all to about 100*l.*, and issued a writ for an account specially indorsed under Order III. rule 8, and payment of the balance. An account was taken under Order XV. rule 1 without any pleadings being delivered, and the chief clerk disallowed all the items objected to, and made his certificate accordingly:—*Held*, that the executors must pay the costs of the action. *In re Radclyffe. Pearce v. Radclyffe. De Foe v. Radclyffe*, 317

2. — administration: executors appearing by same solicitor: defaulting executor: costs]—Two executors in an administration suit appeared by the same solicitor, to whom they had given a joint retainer. One of them was a debtor to the estate, and subsequently became bankrupt:—*Held*, as to the costs incurred by them prior to the bankruptcy, that the solvent executor was to be allowed only his own proportion of them out of the fund; the defaulter's proportion of those costs being set off against the debt due from him. But the costs incurred subsequently to the bankruptcy were allowed in full. *Watson v. Row* (43 Law J. Rep. Chanc. 664; Law Rep. 18 Eq. 660) dissented from. *Smith v. Dale*, 352

3. — administration: will: intestacy as to real estate]—A testatrix gave certain legacies, and died intestate as to her residuary personalty, and as to her real estate:—*Held*, that the entire costs of an action, brought by the heir-at-law, to administer the real and personal estate, were payable, primarily, out of the residuary personal estate. *In re Middleton. Thompson v. Harris*, 525

4. — enquiry: practice]—The costs of an enquiry were reserved in order to keep the control over undue expense with the Judge. *Slack v. The Midland Rail. Co.*, 196

5. — jurisdiction: contribution]—There is no jurisdiction to enforce contribution in respect of costs between defendants to an action in a separate action. *Middleweek v. Dearsley*, 777

6. — taxation: abandoned motion: discontinuance of action: unfinished affidavits or pleadings]—Upon taxation of the costs of a motion where a notice of withdrawal is given, the Taxing Masters will allow the costs of all work in preparing, briefing or otherwise, relating to affidavits or pleadings, reasonably and properly and not prematurely done, down to the time of the giving of the notice which stops the work; but the Taxing Masters will have regard to the circumstances of each case, and will decide whether the work was reasonable and proper, and whether the time for doing the same had arrived. The same principles will be applied in taxing costs on a discontinuance of an action, and the practice in that respect has not been altered since the Judicature Acts. *Harrison v. Leutner*, 264

7. — taxation: copies of documents: mortgagee or transferee]—A mortgagee or transferee of a mortgage, who is being paid off, has a right, until the transaction is completed, to keep one fair copy of the draft deed of reconveyance or transfer only, and to charge the mortgagor for making it; but on payment off he is bound to hand over that and all other copies of documents relating to the property to the mortgagor. *In re Wade and Thomas (solicitors)*, 601

8. — taxation: evidence: affidavit of increase: judicature act, 1875, s. 21: order on costs, rule 28]—The recitals in a judgment in the Chancery Division were held sufficient evidence for the purpose of taxation, without an affidavit of increase. *Smith v. Day*, 333

9. — taxation: solicitor and client costs: plaint on equity side of county court: taxation by chancery division: solicitors act, 1843, s. 27: county court acts, 1856, ss. 35 and 36, and 1875, s. 8: county court rules, 1875, order XXXVI. rule 1]—The Chancery Division has jurisdiction to tax under the 27th section of the Solicitors Act, 1843, the solicitor and client costs of any proceeding on the equity side of a County Court where the amount involved exceeds a sum of 20*l.*, the jurisdiction conferred by that Act not being taken away by the subsequent County Courts Act or the County Court Rules. *In re Worth*, 262

10. Costs (continued)—taxation: third party: taxation as between solicitor and client: party and party costs: solicitors act, 1843, s. 38—The solicitors of a company, on the withdrawal of a petition for its winding-up, gave the petitioners' solicitors a written undertaking "to pay all proper costs and charges incident to and recoverable under the petition, such costs in case of difference to be taxed." The petitioners' solicitors subsequently delivered their bill to the solicitors of the company, but they were unable to agree the amount. The company subsequently obtained an order of course under section 38 of the Solicitors Act, 1843 (the third party section), for the taxation of the bill:—*Held*, on motion to discharge the order, that the undertaking was one to pay party and party costs, that section 38 of the Solicitors Act, 1843, referred only to the taxation of solicitor and client costs, that the company were not third parties within the section, and that the order was therefore irregular and must be discharged with costs. *In re Hartley* (30 Beav. 620) considered and explained. *In re Grundy, Kershaw & Co.*, 467

Semle, that if on a party and party taxation, where the party taking the taxation pays the costs, the solicitor whose bill is under taxation delivers an extortionate bill with the view of increasing the costs of taxation, the Taxing Master has a discretion and can report the circumstances specially, and the Court has authority in such a case not only to deprive the solicitor of his costs, but also to make him pay the costs of taxation. *Ibid*.

— administration action: intestacy as to real estate. See **ADMINISTRATION**, 2.

— defendant ordered to pay costs to co-defendant. See **COMPANY**, 22.

— priority: solicitor's lien. See **SOLICITOR**, 2.

— proof in winding-up. See **COMPANY**, 26.

— sequestration for. See **PRACTICE**, 23.

— trustees, allowance of. See **TRUST AND TRUSTEE**, 5.

— winding-up. See **COMPANY**, 15, 16.

Counter-claim. See **PRACTICE**, 16.

County Court—appeal: time. See **BANKRUPTCY**, 17.

— taxation of costs. See **COSTS**, 9.

Covenant—breach: "beershop": off licence—A covenant that no building to be erected on a plot of land should be used as a "public-house, tavern or beershop," was held to be broken by the sale in a shop erected on that land of beer

under an off licence authorising the sale of beer not to be drunk on the premises. *The London and Suburban Land and Building Co. v. Field* (App.), 549

2. — breach: construction: "beerhouse": evidence: technical term—The sale of beer not to be drunk on the premises was held not to be an infringement of a covenant not to carry on the business of a "public-house, tavern or beer-house." *Holt & Co. v. Collyer*, 811

Evidence of the meaning of "beerhouse" in the brewing trade was not admitted in construing a covenant in a lease by a builder to a grocer. *Ibid*.

3. — breach: brewer: public-house: construction: void instrument: duress: surprise: illegality: forcible entry: 5 Rich. 2. c. 8: possession—A covenant by a publican to buy all beer of his landlord's brewers is satisfied by buying as an undisclosed principal through an agent. *Edwick v. Hawker & Co.*, 577

The publican is relieved from the obligation of such covenant with respect to any article his landlord will not supply. *Ibid*.

A letter by the tenant licensing the landlord to enter and evict by force was held void as being a licence to commit a crime under 5 Rich. 2. c. 8, and voidable as being obtained under pressure of authoritative and mistaken statement of legal rights. *Ibid*.

The fact that no resistance is made to actual entry does not remove the illegality of entry with shew of force and subsequent forcible eviction under the statute 5 Rich. 2. c. 8. *Ibid*.

4. — lease: restrictive covenant: notice of lessor's title: representation that no such covenant exists: vendor and purchaser act, 1874 (37 & 38 Vict.), s. 2. sub-s. 1—A lessee has constructive notice of his lessor's title, such notice being of the usual title deducible on a purchase, and he will be fixed with constructive notice of any restrictive covenant affecting the property notwithstanding that he may have an express contract with the lessor allowing a breach of the restrictive covenant, and notwithstanding that a representation may have been made to him that the property is not subject to any such restrictive covenant. The above rule is not altered by section 2, sub-section 1, of the Vendor and Purchaser Act, 1874, which provides that a lessee shall not be entitled to call for the title to the freehold, the effect of the section being simply to put a lessee into the same position as if he had before the Act stipulated not to enquire into the lessor's title. *Wilson v. Hart* (35 Law J. Rep. Chanc. 569; Law Rep. 1 Chanc. 463) considered. *Patman v. Harland*, 642

5. — restrictive covenant by purchaser of freehold: breach by sub-tenant: notice: vendor and purchaser act, 1874, s. 2—A sub-tenant is liable

to a restrictive covenant entered into by the purchaser of the freehold for himself and his assigns, though neither the sub-tenant nor his lessor has actual notice of it, and in spite of the provision of section 2 of the Vendor and Purchaser Act, 1874, preventing the examination of the title to the freehold. In the conveyance in 1875 to F. of part of a building estate purchased by him, F. covenanted for himself, his heirs, executors, administrators and assigns with the owner or owners for the time being of the remainder of the property, not to carry on the trade of retailer of wine, spirits or beer on the land purchased. F. leased to D., who sub-leased to J., neither D. nor J. having actual notice of the restriction. J. opened a shop for the sale of wine and beer to be consumed off the premises. Upon a motion for an injunction by T., the purchaser of another part of the building estate,—*Held*, that J. was liable to the covenant. *Thornwell v. Johnson*, 641

— not to assign without consent, such consent not to be unreasonably withheld. See LANDLORD AND TENANT, 1.

— proof in administration. See ADMINISTRATION, 2.

— to assign: severance of joint tenancy. See HUSBAND AND WIFE, 3.

— to exercise power in particular way. See POWER, 1.

— to settle after-acquired property. See SETTLEMENT, 2.

Crown—petition of right: will: intestacy as to personal estate: next-of-kin: solicitor to the treasury: moneys paid to trustee for the crown: interest]—The Crown not having taken out letters of administration to an intestate is not liable for interest to the next-of-kin who subsequently establish their title to the fund in the hands of the Solicitor to the Treasury. *In re Gosman* (App.), 624

— forfeiture of gale: re-entry. See FOREST OF DEAN.

Curtesy. See HUSBAND AND WIFE, 1.

Damages—measure of: solicitor: negligence. See SOLICITOR, 4.

— tenant at will: forcible entry. See LANDLORD AND TENANT, 3.

De Bene Esse—examination. See PRACTICE, 29.

Debtor Summons. See BANKRUPTCY, 10.

Debtors Act—Disqualification of alderman: arrangement with creditors. See MUNICIPAL CORPORATION.

Deed—general words. See EASEMENT.

Delay—claim against directors of company for misfeasance. See COMPANY, 4.

Demurrer. See PRACTICE, 18.

Director. See COMPANY, 3-5.

Disclaimer—by tenant. See LANDLORD AND TENANT, 2.

— by trustee in bankruptcy. See BANKRUPTCY, 23-26.

Discontinuance of Action—costs. See COSTS, 6.

Discovery. See PRACTICE, 8-10.

Distress—by landlord of company in liquidation. See COMPANY, 17-20.

— mortgage: attornment clause. See MORTGAGE, 1.

— power of: fraud on bankruptcy law. See BANKRUPTCY, 14.

Distributions, Statute of—*intestate domiciled in England: legitimation of ante natus by subsequent marriage: foreign law: next-of-kin: brother's child*]—A child born in Holland before wedlock, but legitimatised, according to the law of that country, by the subsequent marriage of her parents, who were at the time of the birth domiciled in Holland,—*Held* (by JAMES, L.J., and COTTON, L.J.; *dissentiente* LUSH, L.J.), entitled to share as one of the next-of-kin in the personal estate of an intestate who had died domiciled in England. Decision of JESSEL, M.R., reversed. The question of a person's legitimacy is a question of *status* to be determined by the law of the country where his parents are at his birth domiciled, and the English law, except as to succession to real estate in England, recognises and acts on the *status* as declared by the law of the domicile. *Boyes v. Bodale* (1 Hem. & M. 798; 33 Law J. Rep. Chanc. 283) disapproved. *In re Goodman's Trusts* (App.), 426

Documents. See EVIDENCE; PRODUCTION OF DOCUMENTS.

Domicil. See ADMINISTRATION, 1; DISTRIBUTIONS, STATUTE OF.

Donatio Mortis Causa—*bill of exchange: deposit: cheque*—M., while in contemplation of death, signed a cheque for 500*l.*, part of a larger sum on deposit at seven days' notice, and gave it to A. that he might give notice and get cash for the donor's wife. M. died before the notice expired:—*Held*, that there was not a good *donatio mortis causa*. M., while in contemplation of death, gave his bills of exchange to A. to realise when due for M.'s wife. M. died before the bills became due:—*Held*, there was a good *donatio mortis causa*. *In re Mead. Austin v. Mead*, 30

Drainage Act, 1845—order of reference under. See **SETTLED ESTATES ACT, 1.**

Easement—*right of way: general words*—General words in a deed of partition carry a right of way over an existing path in actual use over one property to the other. *Barkshire v. Grubb*, 731

—light and air: obstruction: injunction. See **LIGHT.**

—watercourse: prescription: unity of possession: yearly tenant. See **PRESCRIPTION ACT, 2.**

Ejectment. See **LANDLORD AND TENANT, 2.**

Election—sale under Partition Act: married woman. See **PARTITION, 2.**

Elegit—writ of: secured creditor: seizure of goods. See **BANKRUPTCY, 11-13.**

Estoppel. See **MORTGAGE, 10.**

Estovers. See **COMMON.**

Evidence—*admissibility: public document: admissibility to prove birthplace and age*—M., a Genoese, applied to the senate for the appointment of diplomatic agent in England. The senate referred the matter to a board called the "Giunta della Marina," to report as to his fitness. In the report made by the Giunta, it was stated that M. was "a native of Q., aged about forty-five." There was nothing to shew the mode of enquiry used by the Giunta:—*Held*, that the report was inadmissible as evidence of the age and birthplace of M. *Sturla v. Freccia (H.L.)*, 86

2. — *company: companies clauses act: certificate of execution of works*—A statutory certificate under seal of execution of works given by directors of a company for the purpose of entitling the company to a charge.—*Held, prima facie* evidence only in favour of the company of the facts certified. *The Landowners' West of England Drainage and Enclosure Co. v. Ashford*, 276

3. — *corporation: minutes*—Entries of proceedings made in a *Liber Protocolorum* of a college which were not attested in the usual manner were not admitted in evidence on a question of legitimacy. *Fox v. Bearblock*, 489

4. — *improvement of jurisdiction of equity act, 1852, s. 32*—The attestation of execution of an instrument in a colony necessary to make it receivable as evidence need not have been made for the purpose. *Brooke v. Brooke*, 528

—admissibility of, to explain ancient decree. See **COMMON.**

—admissibility of extrinsic, to explain contract of sale. See **VENDOR AND PURCHASER, 2.**

—costs: taxation: sufficiency of evidence. See **COSTS, 8.**

—meaning of word: construction of covenant. See **COVENANT, 2.**

—witness: examination of. See **PRACTICE, 28-30.**

Execution Creditor. See **BANKRUPTCY, 11-13; COMPANY, 31.**

Executor—*business: trade assets: judgment creditor: execution: renewal of lease of business premises occupied by testator in his own name: additional property included in new lease: deposit to secure executor's own debt: purchaser for value without notice: possession of title-deeds*—An executor, six years after the death of his testator, surrendered the lease of the premises in which the testator and the executor since the testator's death, under a power in the will, had carried on the business, and took a renewed lease, including additional property, and at an increased rent, in his own name. This lease he subsequently deposited to secure money advanced to him, which he used for his own purposes. The mortgagee did not know, nor had means of knowing, that the executor was not beneficial owner of the lease. An action was brought to administer the testator's estate. Under a consent order the leasehold property was sold and the proceeds paid into Court, the mortgagee, for the purposes of the sale, giving up his deed. Upon an application by the mortgagee for payment of the proceeds of sale,—*Held* (affirming *Ex. J.*), that the lease formed in equity part of the testator's estate, and that the equitable mortgagee only acquired a title subject to the prior equities of that estate; and that the equitable mortgagee had not been injured by the order to give up the indenture of lease, and had not thereby

acquired any right to the proceeds. *In re Morgan. Pillgrem v. Pillgrem*, 664 (App.), 834 A., an executor, carried on the business of his testator for nine years in his own name at premises where he lived, under a power to postpone the sale of the business and carry it on in the meanwhile:—*Held* (by FAY, J.), that a creditor of A. was not entitled to execution against the trade assets. *Ibid*.

2. — *retainer: one of three executors*—The statute 32 & 33 Vict. c. 46 (which abolishes the distinction between specialty and simple contract debts in the administration of the estate of a deceased person), does not affect the executor's right of retainer. *In re Stewart. Crowder v. Stewart*, 136

3. — *retainer: statutory assets*—An estate administered by the Court was deficient; the personal estate was insufficient to pay specialty debts. After the specialty debts had been paid the proceeds of personality came into Court. A claim on behalf of the estate of deceased executor to be paid a simple contract debt in full out of such proceeds was disallowed. *Walters v. Walters*, 819

— defaulting: costs. See COSTS, 2.

— See ADMINISTRATOR.

Executory Devise—estate pur autre vie: leaseholds for lives. See TENANT PUR AUTRE VIE.

— limitation to first son who should attain twenty-five. See WILL, 2.

Executory Settlement—power of appointment. See TRUST AND TRUSTEE, 4.

Express Trust. See LIMITATIONS, STATUTE OF, 3.

Extradition Act—*contempt of court: writ of attachment: criminal offences: arrest abroad under warrant: detainer under writ: abuse of procedure*—Disobedience of an order of the High Court of Justice in a civil action, though a contempt of Court, is not an "offence" within the meaning of the 19th section of the Extradition Act, 1870, which applies only to political and criminal offences. Where, therefore, a party to a civil action in England was arrested in Paris under a warrant issued under the Extradition Act, and while in prison in England under the warrant was served with a writ of attachment for disobedience to an order in the action,—*Held*, that the attachment was valid, and that he was not entitled to his discharge until he had purged his contempt, although he had been acquitted of the criminal charge on which

he had been arrested. *Pooley v. Whetham* (App.), 236

If a warrant is obtained under the Extradition Act, not for the *bona fide* purpose of trying a person for a crime, but with the indirect object of bringing him within the jurisdiction so as to make him amenable to an attachment in a civil action, it will be an abuse of the process of the Court, and the attachment will be set aside. *Ibid*.

Fixture—disclaimer of lease by trustee of bankrupt. See BANKRUPTCY, 24.

— right of mortgagee to. See MORTGAGE, 2.

Forcible Entry. See LANDLORD AND TENANT, 3.

Foreclosure—statute of limitations. See LIMITATIONS, STATUTE OF, 5.

Foreign Law—illegitimate children. See DISTRIBUTIONS, STATUTE OF.

Forest of Dean—*forfeiture of gale: re-entry: application for gale: priority: petition of right: Forest of Dean act (1 & 2 Vict. c. 43), s. 29*—Where a gale is forfeited for non-user, under the provisions of the Forest of Dean Acts, the forfeiture is complete on service of the notice of forfeiture without actual re-entry on the part of the Crown. *Ex parte Young and Grindell*, 221

Forfeiture of Shares. See COMPANY, 3.

Fraud—action on ground of fraud when barred by lapse of time. See LIMITATIONS, STATUTE OF, 4.

— debt incurred by means of. See COMPANY, 6.

— fraudulent preference. See COMPANY, 12.

— on bankruptcy laws. See BANKRUPTCY, 14.

— on company. See COMPANY, 5.

— on public: specific performance: evidence. See SPECIFIC PERFORMANCE, 1.

— injunction: company: similarity of names. See INJUNCTION, 1, 2.

— on power. See POWER, 1.

Frauds, Statute of—agreement to settle property on marriage. See HUSBAND AND WIFE, 8.

— contract for sale of land. See **VENDOR AND PURCHASER**, 2.

— pleading. See **PRACTICE**, 18.

Fraudulent Misrepresentation. See **COMPANY**, 7.

Friendly Society—*the building societies act, 1874, s. 12: incorporation: certificate*—An action cannot be maintained to impeach the incorporation of a society under the Building Societies Act, 1874. *Glover v. Giles*, 568

2. — *the friendly societies act, 1875, s. 16. sub-s. c: loan on personal security: loan prohibited by statute*—The trustees of a friendly society advanced 300*l.*, on the security of a promissory note, to a person not a member:—*Held*, that such a loan, being expressly prohibited by section 16, sub-section c, of the Friendly Societies Act, 1875, no claim could be enforced against the borrower in respect thereof. *In re Coltman. Coltman v. Coltman*, 721

Garnishee Order. See **ATTACHMENT OF DEBT**.

General Words—effect of, to carry right of way. See **EASEMENT**.

Guarantee. See **PRINCIPAL AND SURETY**.

Herbage—common of. See **COMMON**.

Hotchpot. See **WILL**, 8.

Husband and Wife—*curtesy: devise to daughter: death before testator: wills act (1 Vict. c. 26). ss. 3 and 33*—A testator, by a will made since 1834, devised freeholds to his daughter in fee-simple for her separate use. She died before him, intestate, and having had issue capable of inheriting the freeholds:—*Held*, that her husband was entitled to an estate by curtesy in them. *Eager v. Furnivall*, 537

2. — *equity to a settlement: infant: separate examination*—When a married woman is under twenty-one, her consent to waive her equity to a settlement will not be taken. *Shipway v. Ball*, 263

3. — *joint tenancy: personal estate: severance: marriage: covenant to assign*—The settlement made on the marriage of A, contained a covenant by her and her intended husband to assign to the trustees any personal estate which should, during the coverture, vest in her or in her husband in her right. At this time she was entitled, as joint tenant with her sister, to certain personal property, expectant on the death

of B. B died during the coverture:—*Held*, that the joint tenancy was severed by the marriage, and also by the covenant to assign. *Baillie v. Trakerne*, 295

4. — *lunacy of husband: conversion of husband's property by wife: recovery from estate of wife*—An action was brought by the representative of a deceased husband against the representatives of his deceased wife, and the statement of claim stated that the wife during the lifetime of the husband (who was a lunatic, though not so found by inquisition) took possession of and sold certain of the husband's chattels and applied the proceeds of sale to her own use, and claimed to recover the proceeds from the wife's estate in the hands of her executors:—*Held*, on demurrer, that the action was sustainable. *In re Williams. Williams v. Stratton*, 495

5. — *separate estate: covenant: after-acquired property: restraint on anticipation*—The general engagements of a married woman are payable out of the separate estate she had at the time the engagement was entered into, or so much of it as remains when the judgment is recovered against her. The liability does not extend to her after-acquired separate property, nor to any separate property which during the coverture she was restrained from anticipating. When judgment is recovered against a married woman in respect of her general engagements made during coverture, the proper enquiry is, what was the separate estate which the married woman had at the time of contracting the debt, and whether that separate estate or any part of it still remains capable of being reached by the judgment and execution of the Court. *Pike v. Fitzgibbon (App.)*, 394

6. — *separate estate of wife: injunction to restrain dealing with: judicature act, 1873, s. 25. sub-s. 8*—The Court will not in an action by a creditor who has dealt with a married woman on the faith of her separate estate, grant an injunction to restrain her from parting with that estate until the creditor has established his right by obtaining judgment. *Robinson v. Pickering (App.)*, 527

7. — *separate estate: "sole use and disposal"*—A legacy given to a married woman "for her sole use and disposal" vests in her as separate estate. *Prichard v. Ames (Turn. & R. 222)* followed. *Bland v. Dawes*, 252

8. — *statute of frauds: letter of intending husband: agreement to settle wife's property*—A gentleman, the day before his marriage, wrote to the lady's solicitor as follows: "In the event of my marriage with Miss W. taking place before the settlements are ready, I agree to her fortune

being settled on herself, subject, of course, to certain conditions, chiefly relating to myself and the children of our marriage (if any)." The marriage took place without a settlement:—*Held*, that the marriage must be presumed to have taken place on the faith of the agreement contained in the letter; and that there must, therefore, be the usual reference to chambers to approve of a proper settlement. *Viret v. Viret*, 69

— after-acquired property: settlement. See SETTLEMENT, 2.

— gift by husband to wife: declaration of trust. See TRUST AND TRUSTEE, 3.

— legacy to wife: priority. See WILL, 11.

Illegitimate Children. See DISTRIBUTIONS, STATUTE OF.

Incumbents' Resignation Act. See CHURCH.

Infant—*adjudication in bankruptcy: trade debts: bankruptcy act, 1869 (32 & 33 Vict. c. 71), ss. 6 and 125. sub-s. 12*—An infant who had carried on business, and become indebted for goods supplied in the course of such trading, filed a petition for liquidation, but no resolutions were passed, and the liquidation proceedings fell through. Subsequently alleged trade creditors filed a petition for adjudication in bankruptcy against him, and the County Court Judge adjudicated him a bankrupt. The infant had not represented himself to be an adult:—*Held* (reversing the judgment of the Chief Judge, who had affirmed the County Court Judge), that the infant did not by merely trading constitute himself a debtor; that by taking the step, which only an adult trader could take, of presenting a liquidation petition, he did not alter his status or give the Court jurisdiction under section 125, sub-section 12, of the Bankruptcy Act to adjudicate him bankrupt. *In re Lynch; ex parte Lynch* (45 Law J. Rep. Bankr. 49; Law Rep. 2 Ch. D. 227) overruled. *In re Jones; ex parte Jones* (App.), 673

To create an equitable liability in an infant to pay, on the ground of fraud, it is necessary to prove express representations by him that he was of age and that they were reasonably believed in and relied on by the person to whom they were made. *Ibid*.

2. — *maintenance: will: accumulation clause: tenant-for-life: infant tenant-for-life in remainder: allowance for benefit of infant*—A testator devised real estate of considerable value to trustees, upon trust to accumulate the rents for twenty-one years, and to lay out the same in the purchase of lands. And, at the expiration of twenty-one years, the real estates then

subject to the trusts of the will to be held upon trust for Sir H. Havelock for life, with remainder to H. (his eldest son), an infant, for life, with remainder to H.'s first and other sons in tail, with a similar trust for A. (Sir H. Havelock's second son) and his children, with divers remainders over. Sir H. Havelock's income was insufficient to maintain and educate his two sons in a manner suitable to their future prospects. Upon an application by the two sons that a sum of 2,700*l.* per annum should be paid to their father for their maintenance,—*Held*, that, under the circumstances, it was for the benefit of the infants that such an allowance should be made, and application granted. *In re Allan. Havelock v. Havelock*, 778

— custody of: separation deed. See SPECIFIC PERFORMANCE, 2.

— gift to, on marriage with consent. See WILL, 1.

— sale of estate of: discretion of trustees. See TRUST AND TRUSTEE, 6.

— waiver of equity to settlement by. See HUSBAND AND WIFE, 2.

Injunction — *company: similarity of name: intention to appropriate business: fraud*—The plaintiffs, the "Guardian Fire and Life Assurance Company," were established in 1821, and carried on the business of fire and life insurance at 11 Lombard Street. A company called the "Guardian Horse and Vehicle Insurance Association (Limited)" was established in 1877, and carried on, at No. 31 Lombard Street, the business of insurance of horses and vehicles against accident until the year 1880, when the company transferred its business to the defendants, a new company incorporated in March, 1880, and called the "Guardian and General Insurance Company (Limited)." This new company, in addition to insuring horses and vehicles and persons against accident, proposed to engage in fire insurance business:—*Held*, in an action by the plaintiffs to restrain the defendants from carrying on their business so as to deceive, that the plaintiffs' and defendants' names were so similar as to lead to confusion, and that an injunction would have been granted to restrain the defendants from carrying on business under the name of the "Guardian and General Insurance Company (Limited)" had they not given an undertaking to change their name to the "Guardian Horse, Vehicle and General Insurance Company (Limited)." *Held* also, that the defendants must pay the costs of the action. *The Guardian Fire and Life Ass. Co. v. The Guardian and General Ins. Co. (Lim.)*, 253

2. Injunction (continued)—*company: similarity of names: registration: quia timet: injunction to restrain company from applying for registration: fraud: intention to deceive*—An injunction was granted to restrain a proposed new company from applying to the Registrar of Joint-Stock Companies for registration under a name which, in the opinion of the Court, was calculated to deceive, although the company had not begun to carry on its business. It is not necessary, to entitle the plaintiffs to an injunction, that the defendants should have a fraudulent intent. They are responsible for the reasonable consequences of their action. The statutory right to register must not be exercised in such a way as to violate some other right, or offend against the law. The decision of the MASTER OF THE ROLLS (*Ante*, p. 267) reversed. *Hendriks v. Montagu* (App.), 456

— copyright: newspaper. See COPYRIGHT.

— jurisdiction to restrain persons threatening to remove an alderman from his office. See MUNICIPAL CORPORATION.

— legal mortgagee, right of, to injunction. See PRACTICE, 21.

— local authority: right to enforce injunction against successors in title to local authority. See NUISANCE, 1.

— married woman, to restrain, from dealing with separate estate. See HUSBAND AND WIFE, 6.

— metropolitan main drain. See METROPOLIS.

— nuisance, to restrain. See NUISANCE, 2.

— obstruction of light, to restrain. See LIGHT.

— railway commissioners, to restrain. See RAILWAY COMPANY.

— winding-up: stay of proceedings pending. See COMPANY, 23, 24.

Insurance—fire policy: proof in winding-up. See COMPANY, 27.

— life insurance society: contributory: participating policy-holder. See COMPANY, 11.

— vendor and purchaser: right to insurance-moneys. See VENDOR AND PURCHASER, 1.

Interest—compound: breach of trust. See TRUST AND TRUSTEE, 2.

— crown, payable by. See CROWN.

— on advances. See WILL, 8.

— on purchase-money: railway company. See LANDS CLAUSES ACT, 2.

— proof in bankruptcy: joint and separate estate. See BANKRUPTCY, 20.

— right of mortgagee to. See MORTGAGE, 6, 13.

Interrogatories. See COMPANY, 25; PRACTICE, 8-10.

Joint Tenancy—severance. See HUSBAND AND WIFE, 3.

Judgment—against married woman. See HUSBAND AND WIFE, 6.

Judgment Creditor—garnishee order. See ATTACHMENT OF DEBT.

Jurisdiction—sequestration: probate and divorce division. See PRACTICE, 24.

Landlord and Tenant—*lease: words importing a covenant: covenant not to assign without consent, such consent not to be unreasonably withheld: covenant by landlord*—Among the covenants by the lessee in an indenture of lease was a covenant not to assign without the lessor's previous consent in writing, "but such consent not to be unreasonably withheld":—*Held*, that the words quoted did not constitute a covenant by the lessor, but a qualification upon the lessee's covenant. *Sear v. The House Property and Investment Co. (Lim.)*, 77

Treloar v. Bigge (43 Law J. Rep. Exch. 95; Law Rep. 9 Exch. 151) followed. *Ibid*.

2. — *notice to quit: disclaimer: ejectment*—A denial by a tenant of his landlord's right to "raise the rent," coupled with an offer to pay the "customary rent," was held a repudiation of the landlord's title, and to dispense with the necessity of giving notice to quit before bringing ejectment. *Vivian v. Mout. Vivian v. Walker*, 331

3. — *tenant-at-will: forcible entry: 5 Rich. 2. c. 8: damages*—A tenant-at-will holding over after notice to quit cannot recover damages against his landlord for forcible entry and evic-

tion, but he can recover in respect of collateral injury to furniture. *Newton v. Harland* (1 Man. & G. 644; 1 Sc. N.R. 474) followed. *Beddall v. Maitland*, 401

— disclaimer of lease by trustee of bankrupt: tenant's fixtures. See **BANKRUPTCY**, 24.

— distress: attornment clause. See **MORTGAGE**, 3.

— distress for rent: winding-up. See **COMPANY**, 17-20.

— easement: prescription: yearly tenant. See **PRESCRIPTION ACT**, 2.

— restrictive covenant: notice. See **COVENANT**, 4, 5.

Lands Clauses Consolidation Act—*application of compensation: tenant-for-life and remainderman: property subject to leases: dividends arising from purchase-money: form of order*—A tenant-for-life of lands settled by a will, in exercise of a power contained in the will, granted repairing leases of the lands. The lands were subsequently taken by a railway company, and the purchase-money was paid into Court under the Lands Clauses Consolidation Act. The income arising from the purchase-money was in excess of the aggregate rental reserved by the leases:—*Held*, that the tenant-for-life was entitled only to so much of the dividends as was equivalent to the amount he would have received as rent in case the lands had not been taken by the railway company, and that the rest of the dividends must be accumulated and applied according to the principle of *In re Wootton's Estate* (35 Law J. Rep. Chanc. 305; Law J. Rep. 1 Eq. 589). *In re Wilkes's Estate*, 199

Form of order in such a case providing for the apportionment of the purchase-money among the several properties comprised in the several leases, and giving liberty to the tenant-for-life to apply in chambers for payment to him of the increased dividend to which he would become entitled at the several times at which the leases would respectively have determined. *Ibid.*

2. — *purchase under lands clauses consolidation act, 1845: sections 75 and 85: interest*—A railway company purchasing land under its statutory powers must pay interest on the purchase-money from the time when a good title is shewn to the land. *In re Pigott and The Great Western Rail. Co.*, 678

3. — *sale by trustees for parties absolutely entitled: appointment of one trustee as surveyor under section 9*—A trustee holding property

upon trust for a married woman seised in fee for her separate use, and not restrained from anticipation, cannot (unless exercising a power to sell for the purpose of division) sell and convey under the 7th section of the Lands Clauses Consolidation Act, 1845, without the concurrence of his beneficiary. *Peters v. The Lewes and East Grinstead Rail. Co.*, 839

Where trustees selling to a railway company, under section 7 of the Lands Clauses Act, appointed one of themselves, who was an able practical surveyor, to act as surveyor on their behalf, to make the valuation required to be made under section 9 of the Act,—*Held* (affirming the decision of HALL, V.C., *ante*, p. 173), that such appointment was a fatal irregularity which invalidated the proceedings. *Ibid.*

Trustees may sell for a price fixed by two surveyors afterwards adopting that price. *Ibid.*

Lapse. See **HUSBAND AND WIFE**, 1; **WILL**, 9, 12.

Lease. See **LANDLORD AND TENANT**.

Legacy. See **WILL**, 10, 11.

Legitimacy—legitimation by subsequent marriage. See **DISTRIBUTIONS, STATUTE OF**.

Lien—*solicitor.* See **SOLICITOR**, 1-3.

Light—*vendor and purchaser: owner of house and land: sale of house and land to different purchasers: simultaneous conveyances: grant of all lights: right of purchaser of land to obstruct lights of house: easement: injunction*—Where simultaneous conveyances are executed by the owner of a dwelling-house and of the adjoining land to different purchasers who have each notice of the conveyance to the other, the purchaser of the land cannot build thereon so as to obstruct the lights of the house. The owner of a piece of land with two dwelling houses thereon, possessing certain ancient lights, and of an adjoining piece of land, by his will devised his real estate to his two sons and a third person in trust for sale, and gave each of his sons an option of purchasing any part of his real estate. The trustees of the will by simultaneous conveyances granted the piece of land with the houses, "together with all lights thereunto belonging," to one son in fee, and the adjoining piece of land, "together with all lights thereunto belonging," to the other son in fee. The purchaser of the latter piece of land commenced building thereon in a way to obscure the lights in the two dwelling-houses:—*Held*, that the purchaser was not entitled to build so as to obscure the lights in the two dwelling-houses, and an injunction was granted to restrain him from doing so. *Allen v. Taylor*, 178

Limitations, Statute of—acknowledgment: twenty years' adverse possession—An acknowledgment in writing will be sufficient to exclude the operation of the Statute of Limitations (3 & 4 Will. 4. c. 27), although not given until after the twenty years limited by the statute have expired. *Sanders v. Sanders*, 367

2. — debt of record: sum due from receiver—A sum of money due from a receiver, whether the amount has been ascertained or not,—*Held*, so long as the recognisance exists, to be a debt of record. *Seagram v. Tuck*, 572

3. — express trust: mortgagor and mortgagee: mortgage of ship: sale by mortgagee: surplus proceeds of sale: express trust: acknowledgment of debt: admission of open account: consolidation: interest on mortgage debt: interest payable in advance: 3 & 4 Will. 4. c. 27. s. 25: Judicature act, 1873, s. 25. sub-s. 11: 9 Geo. 4. c. 14. s. 1: 19 & 20 Vict. c. 97. s. 13—A constructive trust of surplus proceeds of sale by a mortgagee arises (no trust being expressed in the mortgage-deed) when it is shewn that there is such surplus; but evidence that there is such surplus will not establish an express trust for the purpose of section 25 of the statute 3 & 4 Will. 4. c. 27. *Banner v. Berridge*, 630

Tanner v. Heard (23 Beav. 555) explained. *Ibid.* *Semble*, 3 & 4 Will. 4. c. 27. s. 25, is by the effect of the Judicature Act applicable to personal property as well as land. *Ibid.*

Express trusts within that section are not confined to trusts expressed by deed, but cover a case where property wholly belonging to one party is put in the hands of another for the owner's benefit. *Ibid.*

Semble, an unqualified admission of an account being open, or one which either party is at liberty to examine, implies a promise to pay the balance found due. *Ibid.*

Correspondence and expressions with regard to an open account from which the Court collected (without resort to the above implication) a promise to pay the amount due. *Ibid.*

4. — fraud: will: intestacy: real and personal estate—The plaintiffs sued to recover property, both real and personal, to which, as alleged, their predecessors in title had become entitled upon the death of a testator, in 1798, who had died intestate as to the whole property comprised in his will; and alleged fraud and concealment on the part of the defendants and their predecessors in title, which could not, with reasonable diligence, have been discovered prior to 1879:—*Held*, upon demurrer, that, as to the real estate, the alleged fraud might, with reasonable diligence, have been sooner discovered, and that, therefore, the plaintiff's title was barred by the 26th section of 3 & 4 Will. 4. c. 27; and that, as regarded the personal estate, the 13th section of 23 & 24 Vict. c. 38

was an absolute bar to the plaintiff's claim, that section being held to be retrospective. *In re Jennens. Willis v. Earl Howe*, 4

5. — mortgage: foreclosure: construction (37 & 38 Vict. c. 57. ss. 1 and 8; 7 Will. 4 and 1 Vict. c. 28): payment—A foreclosure action is not within the 8th section of 37 & 38 Vict. c. 57, but is within the 1st section of that Act. *Herlock v. Ashberry*, 746

Payment of rent by a tenant of a mortgagor to the mortgagee on his demand, but without the authority of the mortgagor, is a payment under 7 Will. 4 and 1 Vict. c. 28, so as to keep alive the right of the mortgagee to bring a foreclosure action. *Ibid.*

6. — mortgage: possession by mortgagee of part of the mortgaged property: absence of mortgagee beyond seas—Possession by a mortgagor of part of the mortgaged property does not, since the passing of the 3 & 4 Will. 4. c. 27, operate to prevent his being barred by lapse of time from redeeming such part as is in the possession of the mortgagee. Absence beyond seas is not, under the same statute, a disability as between mortgagor and mortgagee. *Kinsman v. Rouse*, 486

7. — mortgagor and mortgagee: disabilities: real property limitation act, 1874 (37 & 38 Vict. c. 57), ss. 3 and 7: statute of limitations, 1833 (3 & 4 Will. 4. c. 27), ss. 16 and 28—Section 3 of the Real Property Limitation Act, 1874, saving the rights of persons under disability, does not apply to section 7, which bars a mortgagor at the end of twelve years from the time when the mortgagee took possession. Where, therefore, a mortgagee entered into possession in 1861, and had remained in possession ever since without any written acknowledgment, and a redemption action was brought in 1879 by the representatives of the mortgagor, who had been under disabilities of infancy and marriage,—*Held*, that the Statute of Limitations was a bar to the action. *Forster v. Patterson*, 603

8. — simple contract debt: executor's action for administration (21 Jac. 1. c. 16)—A simple contract debt was incurred in November, 1873. In 1878 the executor of the debtor, who had died meanwhile, began an action for the administration of his estate, and the judgment usual in such an action was given in December, 1879. Soon afterwards the simple contract creditor carried in a claim for the amount of his debt:—*Held*, that the claim was inadmissible, being barred by the Statute of Limitations. *In re Greaves. Bray v. Tofield*, 817
Sternale v. Hankinson (1 Sim. 393) explained. *Ibid.*

— when deemed to be barred. See SET-OFF, 2.

Liquidation. See BANKRUPTCY, 16, 16.

Liquidator. See COMPANY, 17.

Local Government Act. See PUBLIC HEALTH ACT.

Lord St. Leonards' Act, 1859. See TRUST AND TRUSTEE, 5.

Lunacy—inspection of proceedings in lunacy: production of documents]—The inspection of proceedings in lunacy is not a matter of right, and any person, other than the parties to the proceedings, or those claiming under them, must make out a case to the satisfaction of the Court of his right to such inspection. *In re Smyth* (App.), 34

2. — sale of real estate of lunatic: conversion: equity to a re-conversion: partition act, 1868, s. 8: leases and sales of settled estates act, 1856, ss. 23–26]—By an order made in a partition action certain real estate was sold in which a lunatic was interested, and the proceeds of sale representing his share were paid into Court to the credit of the matter of the lunacy, but not carried over to a real estate account. Upon the death of the lunatic, intestate, his administrator presented a petition for payment out of the moneys representing his share, but it was held that the moneys still retained the character of land, and as such passed to his heir-at-law. *In re Barker* (App.), 334

The words of the 23rd section of the Leases and Sales of Settled Estates Act, when introduced into the Partition Act by section 8, are not to be restricted to a sale of settled estates only, but to all sales effected under the Partition Act. *Ibid.*

— lunatic trustee: cestui que trust absolutely entitled: vesting order. See TRUSTEE ACT, 2.

Maintenance. See INFANT, 2.

Marriage—consent of guardians. See WILL, 1.

Marriage Settlement. See SETTLEMENT.

Married Woman. See HUSBAND AND WIFE.

— leave to sign final judgment against, on bill of exchange. See PRACTICE, 31.

— request for sale by, in partition action. See PARTITION, 2, 3.

Metropolis—metropolis local management act, 1862, s. 61: metropolitan main drain: drainage from property outside the area: injunction]—By the Metropolis Management Act, 1862, s. 61, no person shall make any sewer or drain, or make any opening into any sewer vested in the Metropolitan Board of Works without the

previous consent in writing of such Board; provided that it shall be lawful for any person with such consent, at his own expense, to make any drain into any sewer vested in such Board, in such manner as the Board shall direct. The defendants were the owners of land situated immediately outside the metropolitan drainage area, and abutting on to a certain brook. There were four cottages on the land, and the surface drainage of the land and the sewage of the four cottages were discharged into the brook by an eighteen-inch barrel drain. The brook was by the Metropolis Management Act, 1855, vested in the Metropolitan Board of Works as a sewer and part of the metropolitan drainage system. In 1871 the Board under their statutory powers covered in the brook as a sewer, and made a drain-eye connecting the eighteen-inch barrel drain with the sewer, by means of which the drainage from the defendants' land and four cottages was discharged into the sewer as theretofore. The defendants subsequently erected additional cottages on their land, and claimed to drain such new buildings into the sewer through the eighteen-inch barrel drain. In an action by the Board to restrain them from so doing,—*Held* (on appeal from HALL, V.C., 49 Law J. Rep. Chanc. 355), that the defendants not having proved any prescriptive right of drainage in respect of the additional cottages, and not having obtained the written consent of the Board under section 61 of the Act of 1862, were not entitled to use the eighteen-inch barrel drain for any other purpose than the drainage of the four old cottages and of the surface land as theretofore; and, therefore, that the plaintiffs were entitled to an injunction. *The Metropolitan Board of Works v. The London and North Western Rail. Co.* (App.), 409

Metropolis Local Management Act, 1855, s. 68. See NUISANCE, 2.

Mortgage—attornment clause: distress: right to apply surplus proceeds in reduction of principal]—A mortgage-deed contained the usual attornment clause by the mortgagor, and the rent reserved thereunder coincided with the interest payable on the principal debt. The mortgagor having gone into liquidation, the mortgagees distrained under the attornment clause for arrears of rent, and the distress realised more than the arrears of interest then due:—*Held* (affirming the decision of BACON, C.J.), that the mortgagees, in the absence of any provision to the contrary in the mortgage-deed, were entitled, as against the trustee in liquidation, to retain the surplus proceeds of the distress in payment *pro tanto* of the principal due to them under the mortgage. *In re Betts; ex parte Harrison* (App.), 332

Quære, whether *Hampson v. Fellows* (37 Law J. Rep. Chanc. 694; Law Rep. 6 Eq. 575) is sound law. *Ibid.*

2. Mortgage (continued)—attornment clause: first and second mortgages: attornment clause in each deed: distress under second attornment: valid against trustee in bankruptcy]—K., the lessee of a hotel, demised it by way of mortgage to P. to secure an advance. The deed contained an attornment clause by which, "for better securing payment of the interest" the mortgagor attorned tenant to the mortgagee at a rent which was equal to the amount of the yearly interest on the sum advanced. K. subsequently mortgaged the same premises to H. The deed recited the first mortgage, and contained an attornment clause in similar words to that in the first mortgage. K. filed a liquidation petition on the 3rd of July, 1879. Trustees were appointed on the 14th of July. Afterwards the first mortgagees distrained for a quarter's rent due under the attornment clause in their mortgage on the 18th of July. In September, the second mortgagee distrained under his attornment clause for a half-year's rent due in August. The hotel was subsequently put up for sale by auction by the first mortgagees under an arrangement, and the trade fixtures and also the furniture and loose chattels were sold:—*Held*, that the second mortgagee had a right to distrain after the bankruptcy of K. under the attornment clause in his mortgage for one year's rent, and that his right was not at all affected by the fact that there was a prior attornment to a prior mortgagee. The attornment being for the better securing payment of the interest does not constitute between mortgagor and mortgagee the relation of tenant and landlord only, nor compel the mortgagee to elect between his character of mortgagee and landlord. He remains mortgagee with all the incidents attaching to that position. The attornment is merely an additional security. Therefore fixtures added by the mortgagor after the date of the mortgage were held to pass to the mortgagee in his capacity of mortgagee. *Morton v. Woods* (9 B. & S. 632; 37 Law J. Rep. Q.B. 242; Law Rep. 3 Q.B. 658; affirmed 9 B. & S. 650; 38 Law J. Rep. Q.B. 81; Law Rep. 4 Q.B. 293) approved and followed. *Ex parte Punnett*; *in re Kitchen* (App.), 212

3. — attornment clause: landlord and tenant: tenancy from year to year: tenancy-at-will: distress: bankruptcy act, 1869, s. 34]—By deed dated the 1st of June, 1871, A mortgaged a mill and other premises to the trustees of a building society. The mortgage-deed contained an attornment clause whereby A attorned tenant from year to year to the trustees in respect of the mortgaged premises at a yearly rent of 800*l.*, to be paid by equal quarterly payments, and it was thereby agreed that it should be lawful for the trustees "at any time after the 1st of September, 1871, without giving previous notice of their intention so to do, to enter upon and take possession of the premises, and to determine the tenancy created by the aforesaid attornment." A filed a liquidation petition on the 17th of May, 1879, when a receiver was appointed, and notice

of the petition and the appointment was given to the mortgagees. On the 19th of May the mortgagees entered and distrained upon the goods and chattels on the premises in respect of a half-year's rent:—*Held* (affirming the decision of the Chief Judge), that the attornment clause created a tenancy from year to year, although determinable at the will of the landlord, and not a tenancy-at-will, and that the mortgagees were entitled, under the 34th section of the Bankruptcy Act, 1869, to distrain for the half-year's rent due from A to them at the date of the petition. *Morton v. Woods* (9 B. & S. 632; 37 Law J. Rep. Q.B. 242; Law Rep. 3 Q.B. 658; affirmed and distinguished, 9 B. & S. 650; 38 Law J. Rep. Q.B. 81; Law Rep. 4 Q.B. 293) explained. *In re Threlfall*; *ex parte Blakey* (App.), 318

4. — "collateral" security: mortgage of freehold: contemporaneous mortgage of leasehold to secure same mortgage debt: incidence of mortgage debt]—A mortgage of freeholds contained a recital that the mortgagees had "agreed to advance out of moneys belonging to them on a joint account the sum of 4,900*l.* on having the repayment of the same with interest secured as thereafter mentioned, and by a collateral security or indenture intended to bear even date with these presents, whereby it is intended that the mortgagor shall demise certain leasehold hereditaments to the mortgagees, and covenant with them for payment and other purposes as therein mentioned," but was in other respects in common form. The mortgage of the leaseholds, after reciting the mortgage of even date of the freeholds, and that "upon the treaty for the said advance it was agreed that the principal and interest should be further secured by these presents," was expressed to be "in consideration of the said sum of 4,900*l.* to the mortgagor advanced by the mortgagees out of moneys belonging to them on a joint account, and which sum is so secured by indenture of even date herewith as aforesaid," but was in other respects in common form. The mortgagor died intestate:—*Held*, that, as between his heir-at-law and next-of-kin, the mortgage debt of 4,900*l.* must be borne rateably by the freehold and leasehold properties according to their values. *Athill v. Athill* (App.), 123

5. — consolidation: one security non-existing: mortgage by three persons and mortgage by two of them in trust for the three]—A and B mortgaged to W. certain premises which they held under a lease, such lease being determinable by the lessor on the bankruptcy of the lessees. They subsequently took C into partnership, and A and B declared that they held the leasehold premises subject to the mortgage in trust for the three partners as part of the assets of the partnership. A, B and C subsequently mortgaged to W. a debt due to the firm from X, and the securities they held for its repayment, and shortly after

wards became bankrupt, whereupon the lessor determined the lease under the proviso. Upon motion by W. claiming to consolidate the debt and securities due from X mortgaged to him with the mortgage on the leasehold premises, —*Held* (affirming the Registrar), that the doctrine of consolidation cannot be extended so as to be applied to a case where one security is gone. *In re Raggett; ex parte Williams* (App.), 187

Quere, whether a mortgagee can consolidate a mortgage made to him by three persons with one made to him by two of the three persons as trustees for the three. *Ibid*.

6. — *mortgagee in possession: covenant to pay interest, with proviso for reducing rate on punctual payment: account*—Where a mortgage-deed contains a covenant for payment of interest, with a proviso for reducing the rate on punctual payment, a mortgagee in possession is entitled, in taking the account, to be credited with the higher rate, notwithstanding that he has received the rents punctually, and they have equalled or exceeded the amount payable in respect of interest at the higher rate. *The Union Bank of London v. Ingram*, 74 *Stains v. Banks* (9 Jur. N.S. 1049) was reversed on appeal (Reg. Lib. 7 B. 1863, 1761). *Ibid*.

7. — *notice: solicitor: constructive notice to clients*—A borrowed 8,000*l.* on mortgage from his solicitor, B. Of this money, 800*l.* belonged to C, a client of B's, who had handed it to B for investment. No notice was ever given to A, either by B or by C, that the 800*l.* belonged to C. Afterwards A paid off the 8,000*l.*, and B shortly after died insolvent. On a claim made by C for the 800*l.* against A,—*Held*, that as C, by his negligence in not giving notice of his claim to A, had enabled A to pay back the whole of the mortgage-money to B, he had no equity to compel A to pay part of the money over again; and claim refused. *In re Lord Southampton's Estate; Roper's Claim*, 155

8. — *notice: solicitor: constructive notice: equitable mortgage: transfer*—S. deposited certain title-deeds with J. B., who was his solicitor, together with a memorandum of deposit for securing the sum of 3,000*l.* J. B., who was also the solicitor of H. B., afterwards handed the deeds and memorandum of deposit to H. B., together with a further memorandum to the effect that 2,000*l.*, part of the 3,000*l.*, belonged to H. B. with interest at five per cent. H. B. subsequently, on the request of J. B., returned the deeds (without the memorandum) to him on the assurance that others of equal value should be deposited with him, and J. B. afterwards deposited other deeds with H. B. which proved utterly valueless. S. had no notice of H. B.'s security. The property comprised in the original deeds was sold by the trustees of the will of S., and the 3,000*l.* mortgage-money paid to J. B. On a claim by

H. B. against the estate of S. for payment of the 2,000*l.* advanced by him,—*Held*, that he had lost all claim in consequence of his neglecting to give notice to S. of the transfer and of his having given up the documents originally deposited with him by way of security. *In re Lord Southampton's Estate. Allen v. Lord Southampton; Banfather's Claim*, 218

9. — *power of sale: construction: "assigns": notice*—Previously to the exercise of a power of sale in a mortgage-deed three months' notice to the mortgagor or his assigns was requisite. A second mortgage was executed:—*Held*, that notice to the mortgagor alone was insufficient. *Hoole v. Smith*, 576

10. — *priorities: holders of forged leases: estoppel: equitable mortgage of freehold: costs*—In 1874 T., as lessee under a fictitious lease from a fictitious freeholder of freehold property in Surrey, mortgaged it by sub-demise to Keate. Shortly afterwards M., as lessee under another fictitious lease from a fictitious freeholder of the same property, mortgaged it by sub-demise, which mortgage became vested in Phillips. In these frauds T. and M. were confederates with D., a solicitor, who in 1873 had become transferee of genuine mortgages on the freehold, which he sub-mortgaged. The property was sold by the sub-mortgagee in 1875, under his power of sale, to a trustee for M., and in 1876 that trustee conveyed the property to M., who was a trustee for D. In 1877 M., purporting to be beneficially entitled, obtained an advance from McStephens, on deposit of the genuine title-deeds. This advance was afterwards confirmed by D. as equitable owner, and a further advance was obtained by D. The frauds being discovered, and an action brought to decide the question of priorities,—*Held*, that (assuming that D. was answerable for the acts of T.), still this gave Keate only a personal equity against D., and not an equitable charge on the land. *Held* also, that the sub-demise by M. to Phillips was not perfected by estoppel on M. acquiring the legal estate as trustee. *Held* also, that McStephens, as depositor of the genuine title-deeds, alone had a charge upon the land. No order as to costs. *Keate v. Phillips*, 664

11. — *priorities: notice: mortgage by administrator: authority from next-of-kin: breach of trust*—An intestate being entitled to the renewal of leases on completion of repairs, died in 1872, leaving his next-of-kin one son (his administrator) and three daughters. The daughters gave a written authority to the son to borrow money on the security of the leasehold houses for the repairs. The repairs were completed, and a lease granted to the son in 1872. No money was required to be borrowed for the completion of the repairs, but the son deposited the lease and the authority with S. to secure his private debt. In 1875 the son wound up the adminis-

tration accounts, stating that no use had been made of the authority. In May, 1877, the son executed a legal mortgage to S. of his one-fourth share of the leasehold houses, and in December, 1877, a mortgage of the daughters' shares, purporting to be made under the authority. No notice was given by S. to the daughters of the previous deposit of the authority or of this mortgage:—*Held*, that the mortgage did not affect the shares of the daughters, and that they were entitled to a re-assignment. *Jones v. Stöhwasser*, 625

12. Mortgage (continued)—priority: notices: price of officer's commission: mortgages: retirement of officer—Money paid to army agents by the Army Purchase Commissioners as the value of an officer's commission is not payable to the officer until his retirement has been gazetted; and, therefore, notices given to the army agents by incumbrancers before the publication of the *Gazette* are inoperative. An officer charged the value of his commission in favour of three different mortgagees (who had no notice of each other's securities). On the 29th of March, 1879, the Army Purchase Commissioners sent to the army agents a warrant to draw on the Paymaster-General for 800*l.*, being the amount due to the officer "on his retirement." The army agents received the 800*l.*, and carried it to the credit of the commissioners on account of the officer. The officer's retirement was gazetted on the 16th of May. The first mortgagee gave notice of his charge in 1875, and on the 29th of March, 1879. The second mortgagee gave notice on the 17th of May. The third mortgagee gave notice on the 29th of March and the 17th of May:—*Held*, that by virtue of their notices the second mortgagee was entitled to rank first, and the third mortgagee to rank second. The costs of all parties were ordered to be paid out of the fund. *Johnstone v. Cox*, 216

13. — priority: tacking: consolidation: interest payable in advance—A mortgagee cannot tack to his debt another mortgage debt, the property mortgaged to secure which has ceased to exist. *Banner v. Berridge*, 630

The contract of mortgage of a ship provided that interest should be paid half-yearly in advance. The mortgagee sold the ship shortly before a half-yearly day for payment of interest, and received the balance of purchase-money (covering his principal debt) three days after that half-yearly day:—*Held*, that he was only entitled to interest in respect of the three days for that half-year. *Ibid.*

— commission in the army: set-off. See **ARMY AGENT**.

— company: borrowing powers. See **COMPANY**, 1.

— equitable mortgage: lease renewed by executor: possession of title-deeds. See **EXECUTOR**, 1.

— injunction and receiver, right of legal mortgage to. See **PRACTICE**, 21.

— reconveyance: right to copy of reconveyance. See **COSTS**, 7.

— sale under power: constructive trust of surplus proceeds. See **LIMITATIONS, STATUTE OF**, 3.

— sale under power: garnishee order. See **ATTACHMENT OF DEBT**.

— sale under power: injunction to restrain: winding-up. See **COMPANY**, 24.

— stamp on mortgage-deed. See **STAMP**.

— statute of limitations: possession by mortgagee. See **LIMITATIONS, STATUTE OF**, 6.

— successive mortgages: sale: right to surplus proceeds. See **ATTACHMENT OF DEBT**.

Mortmain. See **CHARITY**, 4-6.

Municipal Corporation—alderman: private arrangement with creditors: disqualification: municipal corporations act: debtors act—An alderman of a borough made a proposal, by circular letter, to his creditors, that they should accept a composition on his debts. This was assented to, and the alderman borrowed a sum of money for the purpose of paying the composition, and gave a bill of sale, to which the general body of creditors were not parties, to secure the amount borrowed:—*Held*, that he had not become disqualified under the provisions of the Municipal Corporations Act, 1835, s. 52, or of the Debtors Act, 1869, s. 21. *Aslatt v. The Mayor and Corporation of Southampton*, 31

The Chancery Division of the High Court has, since the passing of the Judicature Acts, jurisdiction to restrain, by injunction, persons improperly threatening to remove an alderman from his office. *Ibid.*

Name—use of: injunction. See **INJUNCTION**, 1, 2.

Negligence—solicitor: damages. See **SOLICITOR**, 4.

Notice—lessor's title: restrictive covenant. See **COVENANT**, 4, 5.

— priority by. See ANNUITY, 1; MORTGAGE, 7, 8, 10-12.

Notice to Quit. See LANDLORD AND TENANT, 2.

Nuisance—*perpetual injunction against local authority: right to enforce injunction against successors in title to the local authority: the public health act, 1875, s. 275*—In 1875 a perpetual injunction was obtained against a sanitary authority, restraining them from polluting a river with sewage. In 1877 a provisional order of the Local Government Board was made under the Public Health Act, 1875, constituting a new and larger district drainage board. In an action by the persons who had obtained the injunction in 1875 against the district drainage board, claiming a declaration that they were entitled as against the district drainage board to the same benefit of the injunction as if such board had been defendants to the former action, —*Held*, that the injunction did not run with the land; that the liability was not a liability constituted under the Act, and therefore the plaintiffs were not entitled to such a declaration. *The Attorney-General v. The Birmingham, Tame and Rea District Drainage Board* (App.), 786

2. — *vestry: erection of urinal: public nuisance: the metropolis local management act, 1855, s. 88: public health act, 1875, s. 39*—A vestry is not empowered under section 88 of 18 & 19 Vict. c. 120, to do upon a public place that which if done by a private owner on his own private ground would constitute a nuisance. There is nothing in the section which authorises a vestry in erecting a urinal to commit a nuisance; and, consequently, if in the erection of a urinal they create a nuisance, they are acting *ultra vires*, and an injunction will be granted to restrain the act. The "damage" mentioned in the section means only any direct damage caused by the mere erection of the structure itself, and does not extend to include "compensation" for injury caused by the structure when erected. *Vernon v. The Vestry of St. James, Westminster* (App.), 81

Parent and Child—custody of child. See SPECIFIC PERFORMANCE, 2.

— mortgage by child to secure parent's debt. See UNDUE INFLUENCE.

Parliamentary Deposit—*railway company: undertaking: abandonment: judgment creditor: receiver: railway companies act, 1867 (30 & 31 Vict. c. 127), ss. 4, 31-35: abandonment of railways act, 1869 (32 & 33 Vict. c. 114)*—By the provisions of the special Act of a railway company, the Parliamentary deposit was not to be paid out unless the company should, within the

period named, either open the railway or prove, to the satisfaction of the Board of Trade, that one-half of their capital had been paid up and expended; and in default thereof the special Act provided that the deposit should be applied in compensating landowners and others injured by the company, and, subject thereto, should either be forfeited to the Crown, in the discretion of the Court, if the company should be insolvent and be ordered to be wound up, or if a receiver should be appointed, should be wholly or in part paid or transferred to the liquidator or receiver, or be otherwise applied as part of the assets of the company for the benefit of the creditors thereof. The company had never purchased any land or commenced their railway, and the time for completing the same had expired. They had not paid up or expended one-half of their capital, and had no uncalled capital. The Board of Trade had refused to grant a warrant of abandonment of the railway. On a petition under the 4th section of the Railway Companies Act, 1867, by a judgment creditor of the company who had obtained a charging order on the deposit, asking for the appointment of a receiver of the undertaking of the company and for an enquiry as to the claims of any landowners and others injured by the exercise of their compulsory powers by the company, and for payment, subject to such claims, to the receiver, of the Parliamentary deposit, and for the application thereof in payment of the amount due to the petitioner and the other creditors of the company,—*Held*, that no receiver could be appointed, inasmuch as, under the circumstances, there was no "undertaking" of the company within the meaning of the 4th section of which a receiver could be appointed, and that, as no winding-up order of the company had been made, the Court had no power to make any order dealing with the deposit. *In re The Birmingham and Lichfield Junction Rail. Co.*, 594

Parties. See PRACTICE, 13-16.

Partition—*sale: parties interested: service of judgment: dispensing with service: form of judgment: partition act, 1876, s. 3*—Where in a partition action, at the request of the parties to the action, but in the absence of some of the other persons interested, a sale is asked for, the Court will not preface the order by a declaration that a sale is more beneficial than a partition. Form of order for sale under section 3 of the Partition Act, 1876, providing that service of the judgment may be dispensed with. *In re Hardman. Pragnell v. Batten*, 272

2. — *sale: request for: married woman: authority: request for sale by counsel: purchase-money: conversion: election to take as personality: fund under 200l.: separate examination: partition act, 1876, s. 6*—An order for the sale of a married

woman's share of real estate, when made with her consent or at her request under section 6 of the Partition Act, 1876, operates as a conversion of such share into personal estate; but a request for sale under that section should be made by a person with special authority to act on her behalf in the action, and a request by her counsel is not sufficient. *Crooks v. Whitworth* (Law Rep. 10 Ch. D. 289) not followed. *Wallace v. Greenwood*, 289

Where in a partition action the share of a married woman in the proceeds of sale is under 200*l.* an order will be made for payment out to her upon her separate receipt and an affidavit of no settlement, and her separate examination as to her election to take the money as personal estate will be dispensed with. *In re Shaw* (49 Law J. Rep. Chanc. 213) not followed. *Ibid.*

3. Partition (continued)—sale: request for, by married woman: partition act, 1876 (39 & 40 Vict. c. 17), s. 6]—In a partition action a request for sale on behalf of a married woman was directed to be made in writing, signed by her, authorising and requesting her solicitor to instruct counsel to ask for a sale. *Grange v. White*, 620

— conversion: estate of lunatic. See LUNACY, 2.

Partnership—dissolution, action for: equitable grounds: date from which dissolution should commence]—Where partnership articles contain no provision for the dissolution of the partnership, and the intervention of the Court is sought to put an end to the partnership on purely equitable grounds, such as incompatibility of temper, and a dissolution is decreed, the dissolution will date from the date of the judgment. *Lyon v. Tweddell* (App.), 571

2. — dissolution: return of premium]—The plaintiff and defendant entered into partnership as solicitors for a term of twelve years, "the partnership to be determinable at the option of either partner" by giving three months' notice; and the plaintiff to have the option of increasing his share in the profits of the business upon payment to the defendant of 600*l.* The plaintiff paid the premium of 600*l.* Afterwards the defendant dissolved the partnership by giving a notice as provided by the articles:—*Held*, that the plaintiff was entitled to the return of a proportionate part of the premium. *Rooke v. Nisbet*, 588

3. — sharing profit and loss: right to goodwill: claim by former servant to be partner: sale of business: mode of sale]—An agreement to share the profit and loss of a business entitles each party as against the other to the general rights of a partner, including an interest in the goodwill; and the agreement would have this legal effect notwithstanding a stipulation that the

parties should not be partners. *Pawsey v. Armstrong*, 683

Where a former servant claims to be a partner, his case must be made out by strong evidence. *Ibid.*

Where the premises at which a partnership business was carried on belonged to one partner exclusively, the Court in directing a sale of the business in an action between the partners for dissolution, ordered the sale to be conducted by an independent firm of solicitors, with liberty to either partner to bid. *Ibid.*

— association or partnership for investing capital: "carrying on business." See COMPANY, 2.

Pasturage—common of. See COMMON.

Patent—infringement: user of patented article: agency]—J. S. & Co., a firm in London, acting for the occasion without remuneration as Custom House agents, on behalf of K. & Co., a firm in Cologne, took the necessary steps in clearing through the Custom House and obtaining the necessary warrants for enabling cargoes of lithofracteur, manufactured by K. & Co. at Cologne, to be discharged into lighters in the Thames for the purpose of being stored in K. & Co.'s warehouses. This lithofracteur was manufactured by a process which was patented in this country by letters patent vested in the plaintiff company. On an action by the plaintiffs for damages and an injunction against J. S. & Co. on the ground of user of the patented invention, —*Held* (reversing the decision of BACON, V.C.), that the act of J. S. & Co., although it was one of the steps that must of necessity be taken before K. & Co. could discharge the cargoes, and (assuming that the trans-shipment and storage in K. & Co.'s warehouse was, having regard to the nature of the invention, a user of it within the meaning of the letters patent) J. S. & Co. thereby assisted K. & Co. in infringing the patent, yet did not constitute any infringement on the part of J. S. & Co., nor was it an actionable wrong, and the action was dismissed with costs. *Nobel's Explosive Co. v. Jones, Scott & Co.* (App.), 582

The Court in dealing with agents in cases of this description has regard to the character of the agency—that is, the agency must be an agency in the making, using, exercising or vending the patented invention. *Ibid.*

2. — validity: chemical product: want of novelty: prior publication: importation and sale in England of patented article made abroad by same process: infringement: injunction]—Prior publication to be anticipation must give really the same full and sufficiently precise information which is required in a specification. Although an article has been produced by laboratory experiments and the fact has been recorded in

chemical publications, that is no anticipation of a process by which a person for the first time produces the article in quantity, so that it becomes of practical and public utility, and is manufactured as an article of commerce. *Von Heyden v. Neustadt* (App.), 126

The importation into and sale in England of a patented article that has been made abroad by the patented process is an infringement of the English patent, and will be restrained. *Elmslie v. Bournier* (39 Law J. Rep. Chanc. 328; Law Rep. 9 Eq. 217) and *Wright v. Hitchcock* (39 Law J. Rep. Exch. 97; Law Rep. 5 Exch. 9) approved and followed on this point. *Ibid.*

— co-owners: right to sue. See PRACTICE, 15.

Paving—expenses. See PUBLIC HEALTH ACT.

Pension—retired incumbent. See CHURCH AND CLERGY.

Petition of Right. See CROWN; FOREST OF DEAN.

Pleading. See PRACTICE, 17-20.

Power—appointment: fraud on power: bond to appoint a certain sum under power]—M., having a limited power of appointing a trust fund by will only among his children (to whom in default of appointment the fund was given equally), by his will appointed a sum of 5,000*l.* to his son J. Shortly after the date of his will he executed a bond to his son J., whereby after reciting the power, and the appointment by will already made, he bound himself that J. should receive either out of the trust fund or out of his, M.'s, own property, the sum of 5,000*l.* at the least. M. died, without having revoked his will:—*Held* (affirming the decision of the MASTER OF THE ROLLS), that the appointment was a good exercise of the power, and that the fact that it might have the effect of discharging M.'s own estate from a liability did not invalidate it. *Coffin v. Cooper* (2 Dr. & S. 365; 34 Law J. Rep. Chanc. 692) followed. A covenant by the donee of a limited power that he will exercise it in a particular way is void and does not render the donee's estate liable to an action for breach of the covenant. (By BRETT, L.J., *dubitante* COTTON, L.J.) *Palmer v. Locke* (App.), 113

2. — appointment: land sold under power in a settlement: trust for re-investment: investment of proceeds of sale in consols: general power of appointment by will: equity to reconversion: general bequest, "all my personal estate": wills act]—Land was settled to the use of such person or persons as A B should by will appoint. The settlement contained a power enabling the trustee to sell, with A B's

consent, the proceeds of sale to be re-invested in land to be settled to like uses, and in the meantime to be invested in Government or real securities. The land was sold under the power, and the proceeds invested in consols, which were transferred, at A B's request, into her own name, before the date of the will, and remained in such state up to the time of her death. By her will A B gave legacies to the amount of 30,000*l.*, and bequeathed all the residue of her personal estate and effects, whatsoever and wheresoever, unto and equally between two persons named. Her own personal estate was under 6,000*l.*:—*Held* (affirming the decision of JESSEL, M.R.), that under section 27 of the Wills Act the residuary bequest of all her personal estate operated as an execution of the power over real estate reserved to her by the will, and passed the consols representing the proceeds of sale of the land. *Chandler v. Pocock* (App.), 380

3. — appointment: power created subsequently to the will: contrary intention]—By a settlement certain real estate was conveyed to trustees, upon trust to sell, and to pay the proceeds of sale to such persons as A should by deed or will appoint. By a second deed of settlement A appointed that the trustees of the first settlement should stand possessed of the sale moneys in trust for such persons as she should by will appoint. By her will, made previous to the second settlement, A, "in pursuance of" the power contained in the first settlement, appointed the property comprised therein (describing it as real estate) to her three sons. *Semble*, that the will was revoked by the second settlement. *Held*, that the will, if not revoked, did not operate as an execution of the power contained in the second settlement. *Thompson v. Simpson*, 461

4. — appointment of share of fund: postponement of enjoyment: devolution of income in the meantime]—Where an invalid appointment of a share of certain proceeds of sale and of residuary real estate was made in favour of an infant, not one of the objects of the power, and where in case of the death of the infant under twenty-one a valid appointment was made in favour of A B, one of the objects of the power, —*Held*, that the income of the fund until the infant attained twenty-one, or until his death under that age, would go with the corpus of the fund, in the one case to the persons who took in default of appointment, and in the other case to the appointee A B. *Long v. Ovenden*, 314

5. — appointment under general power: testamentary power of appointment over real estate, with gift over in default: testamentary appointment to trustee upon certain trusts: failure of trusts in lifetime of appointor: resulting trust for appointor's heir-at-law]—The effect of a

testamentary appointment, either of real or personal estate, to a trustee upon trust for A., who dies in the lifetime of the appointor, is that the appointed property does not revert to the donor of the power, nor to those who would have taken under a gift over (if any) in default of appointment, but remains part of the general estate of the appointor. Where, therefore, a testatrix having a general testamentary power of appointment over real estate, subject to a gift over in default of appointment, devised the property to trustees upon trust for A., who died in her lifetime,—*Held*, that the property remained vested in the trustees as part of the general estate of the testatrix, subject to a resulting trust for her heir-at-law (if any). *In re Van Hagen*. *Sperling v. Rochefort* (App.), 1 *Semble*, if the heir-at-law could not be found, the title of the trustees was good as against the Crown. *Ibid*.

6. Power (continued)—*appointment: wills act* (1 *Vict. c. 26*): *appointment by will: power created before, executed after, wills act: residuary appointment embracing previous void appointment: meaning of word "devise" in wills act*—Any deed or will executing a special or general power of appointment will be construed, as to its execution and otherwise, according to the rules for the time being applicable to an ordinary deed or will disposing of property, and this rule will apply although the power may have been created before, but the deed or will executing the same may have been executed after a change in the law relating to the construction and execution of instruments exercising powers of appointment. Thus, where a power to appoint by will was created before the Wills Act, but exercised subsequently to the passing of that Act,—*Held*, that the instrument exercising the same must be executed and construed according to the rules applicable under that Act relating to the execution and construction of an ordinary will. *Freme v. Clement*, 801

The word "devise" in the Wills Act will include a devise by way of appointment under a special or general power to appoint real estate by will. *Ibid*.

Thus, where a testator made a will in execution of a special power of appointment, a devise of real estate by way of appointment which was void was held, by reason of section 25 of the Act, to fall into the residuary devise in the will to an object of the power. *Ibid*.

7. — *power of sale, when determining*—A testator devised and bequeathed all his residuary estate to trustees upon trust for his wife for life, and after her decease upon trust to pay, transfer, assign or assure the same unto his two daughters, in equal shares, for their separate use as tenants in common, with a substitutional gift over in favour of the issue of the daughters in certain events which did not happen, and "for the purpose of division" he thereby empowered his

trustees to sell his residuary estate. The two daughters survived the testator and the tenant-for-life:—*Held* (per JESSEL, M.R., affirming the decision of HALL, V.C.—BRETT, L.J., and COTTON, L.J., expressing no opinion), that the property being "at home," the power of sale given to the trustees had determined. *Peters v. The Lewes and East Grinstead Rail. Co.*, 172 (App.), 839

— execution of general power: lapses. See WILL, 12.

— implied power of sale: charge of debts: administrator with will annexed. See ADMINISTRATOR, 3.

— to mortgage: administrator. See MORTGAGE, 11.

Practice—*amendment of writ*—Leave to amend a writ will not in general be granted to raise an entirely new case of fraud. *Hendricks v. Montagu*, 456

2. — *appeal: dismissal of action: appeal by one of two plaintiffs*—Any one of two or more plaintiffs may appeal from the judgment dismissing the action, although his co-plaintiffs refuse to join in the appeal. *Beckett v. Attwood* (App.), 687

3. — *appeal for costs: declaration of title: express or implied: judicature act, 1873, s. 49*—Where in an action a Judge makes no other order than "that the defendant do pay the costs of the action," an appeal against that order is not an appeal "for costs only," within section 49 of the Judicature Act, 1873. It is not necessary that there should be an actual declaration in the order of the plaintiff's title. *Dicks v. Yates* (App.), 809

4. — *appeal: notice by respondent to ask for variation of order: original appellant not interested: rules of court, 1875, order LVIII. rule 6*—The 58th Order, rule 6, of the Rules of Court, 1875, does not entitle a respondent to give notice of his intention to ask for a variation of an order if the point on which he desires it to be varied is one in which the appellant has no interest. He must himself give a separate notice of appeal. *In re Cavander's Trusts* (App.), 292

5. — *appeal: time: order dismissing application: not mere refusal if it contains a declaration of title or expression of opinion: order LVIII. rule 16*—Whenever an order dismissing an application contains a declaration as such, or an expression of opinion of the Judge, it is not a simple refusal of the application within the 16th rule of Order LVIII., and the appeal need not be brought within the twenty-one days limited by that rule. *In re Clay and Tuley* (App.), 164

6. — *appeal: title to fund in court: leave to appeal after time expired: winding-up*—In the winding up of a company, *JESSEL, M.R.*, following a reported decision of his own, ordered a certain fund, claimed by a creditor as against the liquidator, to be paid to the liquidator. The creditor allowed the time for appealing to expire. Afterwards the decision which had been followed was overruled by the Court of Appeal. The creditor then applied for leave to appeal against the order of the *MASTER OF THE ROLLS*:—*Held*, that as the fund in question was still within the control of the Court, leave to appeal should be given. *In re The Normanton Iron & Steel Co. (Lim.) (App.)*, 223
7. — *appeal: withdrawal of, with consent of respondent: withdrawal of withdrawal*—An appellant gave notice of his intention to withdraw his appeal, and asked the respondent's consent to such withdrawal, which was given. Two days afterwards he gave notice of his intention to proceed with the appeal:—*Held*, that the withdrawal could not be rescinded, and that the appeal could not be heard. *Watson v. Cave (App.)*, 561
8. — *interrogatories: accounts: rules of court, 1875, order XXXI. rules 5 and 8*—In an action to restrain the defendants from using a trade name and from selling their goods as the plaintiffs', the defendants, by counter-claim, claimed the same relief, and also an account of all the goods sold by the plaintiffs as and for the goods of the defendants, and of the profits of such sales. Both parties claimed to derive their title to the trade name under a partnership which had been dissolved in the year 1861, since which time both had carried on the same business. An interrogatory exhibited by the defendants required the plaintiffs to set forth the quantities of goods sold by them since 1861, distinguishing the quantities sold in each year:—*Held* (affirming the decision of *BACON, V.C.*), that the interrogatory was rightly disallowed, for that it was not put for the ordinary purpose of discovery, but was directed to the details of the plaintiffs' evidence. *Saunders v. Jones* (47 *Law J. Rep. Chanc.* 440; *Law Rep. 7 Ch. D.* 435) discussed and explained. *Benbow v. Low (App.)*, 35
9. — *interrogatories: administration: creditor: order XXX. rule 5*—A plaintiff in an administration action is entitled to discovery as to the property of the deceased at the earliest stage of the action. *In re Sutcliffe. Alison v. Alison*, 574
10. — *interrogatories: summons for further answer: particulars: whole answer struck out: rules of court, 1875, order XXXI. rule 10*—In a case where all the answers to interrogatories are properly objected to, the rule that a summons for a further answer ought to specify the interrogatories or parts of interrogatories to which a further answer is required, does not apply, and the summons may be in general terms. *Furber and Price v. King*, 496
11. — *motion for judgment: evidence by affidavit: rules of court, 1875, order XXXVII rule 1, order XL*—On motion for judgment the Court has no power, under the Rules of Court, 1875, to order that the evidence shall be taken by affidavit. Accordingly, where a consent action, in which an infant and a married woman were defendants, and in which the evidence had been taken by affidavit, was set down on motion for judgment, the Court gave judgment, but directed that notice of trial should be given to the infant and married woman, and that the action should be placed in the paper again *pro forma*. *Ellis v. Robbins*, 512
12. — *official referees: judicature act, 1873, s. 56: notice of objection*—Objection to a part of a report of an official referee may be taken on the report coming before the Court for adoption. But notice of objection should be given. *In re Brook. Sykes v. Brook*, 744
13. — *parties, change of: bankrupt plaintiff: order XVI. rules 2 and 12*—An uncertificated bankrupt claimed in respect of causes of action, of which those appearing most substantial accrued to the trustee. The trustee was added as co-plaintiff and given the conduct of the action. *Emden v. Carte*, 492
14. — *parties, change of: title of action: assignment of plaintiff's interest: order to carry on proceedings in plaintiff's name: rules of court, order L. rules 3 and 4*—When there is a valid assignment *pendente lite* of the plaintiff's interest in the subject-matter of the action, and an order has been made that the assignee shall have liberty to carry on the proceedings in like manner as the plaintiff might have carried them on, the statement of claim should be amended by the insertion of the new in addition to the original title, and of averments showing how the title of the original plaintiff has devolved upon the new plaintiff. The order obtained under Order L. rule 4 corresponds to the old supplemental order, and all proceedings taken subsequently to it should be headed in both actions. *Seear v. Lawson. Chatterton v. Lawson (App.)*, 139
15. — *parties: patent: co-owners: rules of court*—One of several co-owners of a patent can sue for an injunction and an account. Where a defendant, by his statement of defence, submitted that the several co-owners with the plaintiff of a patent ought to be made parties to the action, but took no course to bring them before the Court,—*Held*, upon an objection by the defendants at the trial to the action proceeding for

want of parties, that they were too late in taking the objection, and that they ought to have moved under Order XVI. rules 13 and 14, at an earlier stage, to have the co-owners joined as parties. *Sheehan v. The Great Eastern Rail. Co.*, 68

16. Practice (continued)—parties: third party notice: application whether *ex parte* or on notice]—An application by the defendant in an action for leave to serve a notice on a third party under Order XVI. rule 18 ought to be made on notice to the plaintiff and not *ex parte*. *The Wye Valley Rail. Co. v. Hawes*, 75

17. — pleading: counter-claim: order XIX. rule 3: jurisdiction]—A counter-claim may be brought in respect of a cause of action arising after the issue of the writ in the original action. *Beddall v. Maitland*, 401

18. — pleading: demurrer: statute of frauds: order XIX. rule 23: order XXVIII. rule 2]—The defence of the Statute of Frauds cannot be raised by demurrer. *Fletcher v. Fletcher*, 735

19. — pleading: motion by defendant upon admissions in the pleadings: defendant's right to relief where no counter-claim: order XL. rule 11]—A defendant who has not counter-claimed is entitled to move under Order XL. rule 11, upon the admissions in the reply and previous pleadings, to have the action dismissed on the ground that the plaintiff is not entitled to any relief against him. Under the above rule the "relief claimed" is not confined to the old technical meaning of relief claimed by bill in Chancery, but the word "relief" is to be used in its larger and more ordinary sense, and will accordingly include relief from the liability incurred by being a defendant to an action, the "relief claimed" being that asked by the motion under the rule. *Litton v. Litton* (Law Rep. 3 Ch. D. 793; *sub nom. Linton v. Linton*, 46 Law J. Rep. Chanc. 64) considered. *Pascoe v. Richards*, 337

20. — pleading: third party notice: discretion]—The provisions contained in Order XVI. in favour of the defendant are to be made use of in such a way as not to cause delay or embarrassment to the plaintiff; therefore where the granting of leave to a defendant to serve a third party notice under rule 18 of the Order would unfairly hamper the plaintiff, the Court in the exercise of its discretion ought to refuse to grant such leave. The decision of *HALL, V.C.* (p. 75 *ante*), affirmed. *The Wye Valley Rail. Co. v. Hawes* (App.), 225

21. — receiver and manager: injunction: mortgage: business: legal mortgage]—A legal mortgagee of business premises, as, for instance, an hotel, who cannot take possession of

the mortgaged premises by reason of the conduct of the mortgagor, may upon interlocutory application obtain the appointment of a receiver and manager, and also an injunction restraining the mortgagor from interfering with the management of the business or the possession of the premises. *Truman & Co. v. Redgrave*, 830
Form of order appointing receiver and manager with such an injunction. *Ibid.*

22. — sale under direction of the court: auction: private contract: re-opening biddings: sale of land by auction act]—A contract for the sale of land under the direction of the Court, which has been confirmed by the chief clerk, will not be set aside or varied even at the instance of beneficiaries on the mere ground of an advance in price where there is no suggestion of fraud or improper conduct in the management of the sale. *In re Bartlett. Newman v. Hook*, 205
The principles of the Sale of Land by Auction Act, 1867, apply as well to sales by private contract as to sales by auction. *Ibid.*

23. — sequestration: costs: order XLVII. rules 1 and 2]—The plaintiff had been ordered to pay certain costs. A four-day order was made and at the same time leave to issue sequestration in case of non-payment of costs on the day named was given to the defendant. *Snow v. Bolton*, 743

24. — sequestration: probate and divorce division: 20 & 21 Vict. c. 85. s. 25: jurisdiction: administration]—An order was made on summons in an administration action directing payment to sequestrators appointed by the Probate and Divorce Division of income of a beneficiary under the trust being administered. *In re Slade. Slade v. Hulme*, 729

25. — service out of jurisdiction: extension of time: order IX. rule 13: order XI. rule 1: order LVII. rule 6]—The time for indorsing the date of service on a writ served at Gavelston, in the United States, was extended for a month from the application. *Hastings v. Hurley*, 577

26. — transfer: application after judgment, hearing of]—Applications after judgment in causes transferred from *BACON, V.C.*, to *Fry, J.*, for hearing should be heard by *Fry, J.* *Shaw v. Brown*, 232

27. — trial: order XXXVI. rules 3 and 26: specific performance]—An action for specific performance was directed, against the desire of the defendant, to be tried without a jury. *Uist v. Whelpin*, 611

28. — witness: action in chancery division: reference to arbitrator: compelling attendance of witness: subpoena: 3 & 4 Will. 4. c. 42. s. 40: judicature act, 1873, ss. 3 and 16]—An order

may now be made on summons in the Chancery Division under 3 & 4 Will. 4. c. 42. s. 40, requiring the attendance of a witness before an arbitrator appointed in an action in that division, and the order will be directed to be served as an ordinary subpoena. *Clarbrough v. Toothill*, 743

29. — *witness: agreement to take evidence by affidavit: examination of witnesses de bene esse: order XXXVII. rule 4: order XXXVIII.*—When the parties to an action agree under Order XXXVIII. to take the evidence in the action by affidavit, and either party subsequently finds himself unable to procure affidavit evidence, either by reason of the refusal of witnesses to make affidavits or other good cause, the Court, on his application for leave to be relieved from the agreement, will, on good cause shewn, direct the reluctant witnesses, who must be named, to be examined *viva voce*, or, at the option of the other party, discharge the agreement and order all the evidence to be taken *viva voce*, at the trial. *Warner v. Mosses* (App.), 28

Whenever it is shewn that a necessary witness is either going abroad, or is from illness, age or other infirmity likely to be unable to attend the trial, an order can be obtained under Order XXXVII. rule 4 for his examination before an officer of the Court. A like order can be obtained whenever it shall appear to the Court necessary for the purposes of justice. *Ibid.*

30. — *witness: judgment debtor: examination: order XLV.*—A judgment creditor having obtained an order under Order XLV. for the examination of his judgment debtor "as to whether any and what debts were due to him," the latter attended before the special examiner, but declined to answer any question other than whether any and what debts were due to him:—*Held*, that the examination was intended by the order to be a cross-examination of the most stringent character, and that the debtor was bound to answer all questions pertinent or relevant to the subject-matter of the examination. *Republic of Costa Rica v. Strousberg* (App.), 7

31. — *writ specially indorsed: rules of court: final judgment: feme covert: separate estate*—In an action against the defendant, who was a widow, in respect of bills of exchange given by her while under coverture, the writ being specially indorsed under Order III. rule 6, a summons was taken out by the plaintiff, under Order XIV. rule 1, for liberty to sign final judgment:—*Held*, that the defendant being under coverture when the bills were given, and there being nothing to shew she had any separate estate, the order could not be made. *Ortner v. Fitzgibbon*, 17

— amendment at trial: denial of title. See PRESCRIPTION ACT, 1.

— appeal to house of lords: bankruptcy. See BANKRUPTCY, 25.

— bankruptcy, in. See BANKRUPTCY, 17, 18.

— chambers: vesting order in: right to transfer stock: trustee act. See TRUSTEE ACT, 3.

— contempt: motion to commit. See CONTEMPT OF COURT.

— contempt of court: attachment. See EXTRADITION ACT.

— costs, contribution to. See COSTS, 5.

— costs: executors: action by residuary legatee. See COSTS, 1.

— costs: taxation. See COSTS, 6–10.

— discovery. See BANKRUPTCY, 18; PRODUCTION OF DOCUMENTS.

— enquiry: costs. See COSTS, 4.

— interrogatories: winding-up: public officer. See COMPANY, 25.

— opening settled account: liberty to surcharge and falsify. See ACCOUNT, 1.

— order, form of: tenant-for-life and remainderman: lands clauses act. See LANDS CLAUSES CONSOLIDATION ACT, 1.

— partition act: request for sale by married woman. See PARTITION, 2, 3.

— partnership action: dissolution on equitable grounds: date from which dissolution should commence. See PARTNERSHIP, 1.

— production and inspection of documents. See BANKRUPTCY, 18; LUNACY, 1; PRODUCTION OF DOCUMENTS.

— receiver, appointment of, after final judgment. See BANKRUPTCY, 22.

— sale out of court under settled estates act. See SETTLED ESTATES ACT, 2.

— sale under partition act. See PARTITION.

— service: notice of motion for attachment. See ATTACHMENT OF PERSON.

— vesting order. See TRUSTEE ACT, 2, 3.

Prescription Act—reversion: practice: amendment at trial: order XXVII. rule 1—A tenant-at-will under a remainder-man whose estate has fallen in, is a "person entitled to any reversion" within the meaning of the Prescription Act, s. 8. In an action for trespass, where the defendant claimed a prescriptive right, the Court refused an amendment by which the title of the plaintiff would be denied. *Laird v. Briggs*, 260

2. — *watercourse: 2 & 3 Will. 4. c. 71. s. 2: yearly tenant: unity of possession*—In 1791 the owner of the H. Close demised part thereof to O. to make a goit through the H. Close to carry water from his mill. In 1836 it was agreed that the demise of 1791 should be void, and that a new goit in a different course through the H. Close should be substituted for the old goit, which new goit was accordingly made. In 1836 O. became yearly tenant of the H. Close, which tenancy was determined in 1867. The plaintiffs (who were successors in title to O.) adduced evidence that from 1836 to 1880 the old goit had, notwithstanding the agreement of 1836, been used for the discharge of foul water from the mill; and they claimed a prescriptive right to use the old goit for that purpose:—*Held*, that from 1836 to 1867, O., being yearly tenant of the land, could not prescribe for the easement against his landlord, and that therefore no sufficient user had been shewn. *Outram v. Maude*, 783

— And see COMMON; WATERCOURSE.

Principal and Agent—opening settled account.
See ACCOUNT.

Principal and Surety—co-sureties: contribution: indemnity—All of several co-sureties are entitled to participate in the benefit of an indemnity taken from the principal debtor by some. *Steel v. Dixon*, 591

2. — *co-sureties: payment by one surety of half of debt: right to contribution: petitioning creditor's debt*—A surety, unless he has paid the whole of the principal debt, or a part in satisfaction of the whole debt, or more than his share of the principal debt, is not entitled to sue his co-surety for contribution. *In re Snowden; ex parte Snowden* (App.), 540
Davies v. Humphreys (6 Mes. & W. 153; 9 Law J. Rep. Exch. 263) approved and followed. *Ibid*.

3. — *guarantee: construction of: revocation of: trustee*—A guarantee given to Lloyd's against all the engagements of H. in the capacity of an underwriting member, held to continue after notice of the death of the guarantor, to include liabilities not only to the

members of Lloyd's, but also to strangers to Lloyd's, contracted at Lloyd's through subscribers, and to be enforceable for the benefit of such strangers by the committee of Lloyd's as trustees for all the persons interested under the policies underwritten by H. Judgment of FRY, J., affirmed. Guarantees given for one entire consideration—*e.g.* the granting of a lease; and guarantees for a consideration supplied from time to time and divisible—*e.g.* making advances and supplying goods—distinguished. *West v. Houghton* (Law Rep. 4 C.P.D. 197) observed upon. *Lloyd's v. Harper* (App.), 140

4. — *liability of surety on judgment against principal: proof of liability*—A judgment in an action against the principal debtor, or an award in an arbitration against such debtor, is not binding on the debtor's surety or evidence against him in an action against him by the creditor of the principal debtor, unless the surety shall in the clearest terms have agreed to be bound by such judgment or award. In any other case his liability must be proved in the same way as it would have to be proved against the principal debtor. *Ex parte Young; in re Kitchen* (App.), 824

— *banker: bill of exchange: general guaranty for payment of bill.* See BANKRUPTCY, 21.

— *right of surety to securities.* See BILL OF EXCHANGE.

Priority—costs: solicitor's lien. See SOLICITOR, 2.

— *legacies.* See WILL, 11.

— *mortgages.* See MORTGAGE, 10-13.

Production of Documents—privileged communication—The principle of protecting confidential communications is of a limited character, and is confined to communications which take place for the purpose of obtaining legal advice from professional persons. That principle is not to be extended to protect communications made by a third party to a solicitor for the purpose of enabling the solicitor to give legal advice to his client in a matter as to which no dispute has arisen and no litigation is pending or contemplated. *Wheeler v. De Marchant* (App.), 793
Production ordered of letters between the solicitors of the defendants and their surveyor and between the surveyor and the solicitors, except such (if any) as the defendants should state by affidavit to have been prepared confidentially after dispute had arisen between the plaintiff and the defendants, and for the purpose of obtaining information, evidence or legal advice with reference to litigation existing or contemplated between the parties to the action. *Ibid*.

- bankruptcy, in: discretion of court. See **BANKRUPTCY**, 18.
- inspection of proceedings in lunacy. See **LUNACY**, 1.
- Prohibition.** See **RAILWAY COMPANY**.
- Promoter.** See **COMPANY**, 6.
- Proof.** See **ADMINISTRATION**, 2; **BANKRUPTCY**, 19-21; **COMPANY**, 26-31.
- Prospectus.** See **COMPANY**, 7, 8.
- Protected Transaction.** See **BANKRUPTCY**, 4, 7, 11-13.
- Public Health Act, 1848**—ss. 2, 69, 90, 129: *local government act*, 1858, ss. 58, 62, 63: *local government amendment act*, 1861, ss. 23, 24: *Sir John Jervis's act* (11 & 12 Vict. c. 43), s. 11: *paving and sewerage expenses: private improvement expenses: limitation of time: charge on the premises*—In 1864 the plaintiff board, under the powers of the Public Health Act, 1848, incurred certain expenses in execution of certain works in the street adjoining R.'s premises, for which expenses he, as owner (among others), became liable under section 69 of that Act, and which the board by a resolution declared to be private improvement expenses, and for which, under the powers of section 90 of the Act, they levied on the owners and occupiers a private improvement rate, payable by annual instalments. These expenses constituted under section 62 of the Local Government Act, 1858, a charge on the premises, bearing interest at five per cent. per annum till payment. In 1872 they revoked the resolution, and made a fresh rate for the whole amount remaining unpaid to be paid by the owners and occupiers. R. not having paid this rate, the board, in 1875, brought an action against his representatives (he having died in 1874) to enforce the charge on his property:—*Held* (reversing MALINS, V.C.), that the charge under the 62nd section constituted an additional and not an alternative remedy, and that the bar of six months which applied to the summary remedy against the person before the Justices, and also in the County Court, did not apply to the additional remedy of enforcing a charge on the property, and that the board were not precluded by their election to treat the expenses as private improvement expenses from enforcing the charge, but that it was enforceable only in respect of the instalments for the time being in arrear. *The Tottenham Local Board of Health v. Rowell* (App.), 99
- perpetual injunction against local authority. See **NUISANCE**, 1.
- Public Health Act, 1875**, s. 39. See **NUISANCE**, 2.
- Railway Company**—*statutory traffic agreement: arbitration clause: jurisdiction of railway commissioners to decide points in difference: injunction: prohibition: regulation of railways act*, 1873, ss. 8 and 9: *the railway companies arbitration act*, 1859, s. 2—An injunction will not lie to restrain the railway commissioners from arbitrating on matters in difference between two railway companies on the ground of want of jurisdiction, but the objection, if well founded, is good ground for setting aside the award when made. *The Great Western Rail. Co. v. The Waterford and Limerick Rail. Co.* (App.), 513
- The Railway Companies Arbitration Act, 1859**, does not confer on railway companies any powers to refer to arbitration not theretofore possessed by them, but is merely a statutory embodiment of a code which prescribes the manner in which, when railway companies agree to arbitrate subject to its provisions, the arbitration shall be conducted. *Ibid.*
- The Regulation of Railways Act, 1873**, s. 8, does not apply to all differences of whatever kind that may arise between railway companies, but only to certain particular differences, which in any special or general Act are required or authorised to be referred to arbitration. *Ibid.*
- A special Act empowered two railway companies to enter into statutory traffic agreements, but contained no clause authorising or requiring differences to be referred to arbitration. The two companies entered into a statutory traffic agreement, which contained a special arbitration clause directing that matters in difference, if any should arise, should be referred to an arbitrator to be named and appointed in a particular manner. A difference having arisen as to the mode in which accounts should be taken under the agreement, one company applied *ex parte* to the railway commissioners, under the 8th section of the Regulation of Railways Act, 1874, to determine the matter, who thereupon cited the other company to appear before them:—*Held*, on writ for prohibition, that the railway commissioners had no jurisdiction to determine the matter in difference. *The Stokes Bay Railway and Pier Company v. The London and South Western Railway Company* (2 Nev. & Mac. 144); and *The Port Patrick Railway Company v. The Caledonian Railway Company* (3 Nev. & Mac. 189) overruled. *Ibid.*
- purchase under lands clauses act: interest on purchase-money. See **LANDS CLAUSES ACT**, 2.
- Rate**—private improvement expenses. See **PUBLIC HEALTH ACT**.
- Real Property Limitation Act.** See **LIMITATIONS, STATUTE OF**, 7.

Receiver—appointment of, after final judgment. See **BANKRUPTCY**, 22.

— appointment of, on interlocutory application. See **PRACTICE**, 21.

— appointment of: judgment creditor. See **PARLIAMENTARY DEPOSIT**.

— sum due from: statute of limitations. See **LIMITATIONS, STATUTE OF**, 2.

Registration. See **ANNUITY**, 1; **BILL OF SALE**, 3; **INJUNCTION**, 1, 2; **TRADE MARK**.

Remoteness. See **WILL**, 2, 3, 13.

Renewable Leaseholds. See **TENANT-FOR-LIFE**.

Restraint of Marriage. See **CONDITION**; **WILL**, 1.

Retainer. See **EXECUTOR**, 2, 3.

Riparian Rights. See **WATERCOURSE**.

Sale of Land by Auction Act. See **PRACTICE**, 22.

Satisfaction. See **WILL**, 10.

Secured Creditor. See **BANKRUPTCY**, 11-13; **COMPANY**, 30, 31.

Separation Deed—specific performance of. See **SPECIFIC PERFORMANCE**, 2.

Separate Estate. See **HUSBAND AND WIFE**, 5-7.

Sequestration. See **PRACTICE**, 23, 24.

Set-off—administration: assignment for value of unpaid legacy: executor's right of retainer: set-off against legatee for debt incurred to executor in administration]—An assignee for value of an unpaid legacy takes subject to liabilities attaching to the same as part of the assets, such as costs of administering the estate, and also subject to a lien for moneys owing by the legatee to the estate. *In re Knapman's Estate. Knapman v. Wreford* (App.), 629

The husband of a *feme covert* legatee takes his wife's legacy subject to the same liabilities. *Ibid.*

Where expenses in the administration, chargeable by the executrix against the estate, had been caused by a legatee's conduct and were a debt from him to the executrix,—*Held*, that his legacy was subject to a lien in the hands of the executrix for the amount, to the exoneration of the residuary and other legatees. *Ibid.*

Decision of **HALL, V.C.**, affirmed. *Ibid.*

2. — *bankruptcy act, 1869, s. 20: acceptance of composition and annulling of adjudication: remedy for provable debt: effect of composition and annulment of bankruptcy under section 28: statute of limitations*—Where a composition is accepted and a bankruptcy annulled under section 28 of the Bankruptcy Act, the amount of the composition on a provable debt is substituted for the debt, whether the creditor proves or not:—*Held*, therefore, that debts anterior in date to a bankruptcy which was so annulled could not be set off against a benefit afterwards coming to the debtor under the will of the creditor. One of the debts in question was for money lent more than six years before the bankruptcy. The Court refused to infer from the date that the debt had at the time of the bankruptcy been barred by the Statute of Limitations so as to be not provable. *In re Orpen's Estate. Bewick v. Orpen*, 25

— army agents: value of commission. See **ARMY AGENT**.

— by contributory. See **COMPANY**, 10, 12.

Settled Account—opening. See **ACCOUNT**.

Settled Estates Act—drainage of agricultural land: drainage act, 1845 (8 & 9 Vict. c. 56)]—The Settled Estates Act, 1877, does not empower the Court to direct the carrying out of schemes of drainage for agricultural purposes; but the powers given by sections 20 and 21 have reference to the development of lands for the purposes of a building estate. Order of reference under the Drainage Act (8 & 9 Vict. c. 56). *In re Poynder's Settled Estates. Dickson-Poynder v. Cook*, 753

2. — *practice: sale out of court: 19 & 20 Vict. c. 120, ss. 11 and 16*—A sale out of Court will not be allowed under the leases and sales of Settled Estates Acts. *In re Dryden's Settled Estates*, 752

Persons entitled to a part only of the rents and profits may petition. *Ibid.*

— costs of actions for benefit of inheritance. See **TRUST AND TRUSTEE**, 5.

— sale: renewable leaseholds: tenant-for-life and remainderman. See **TENANT-FOR-LIFE**.

Settled Estates Act, 1856, s. 23. See **LUNACY**, 2.

Settlement—breach of trust: employment of trust fund in trade: profits accrued: corpus or income—The plaintiff was tenant-for-life under the settlement executed on her marriage, part of the settled property consisting of a sum of 15,500*l.* This sum was allowed to remain in the

hands of the plaintiff's father, who employed it in trade, he covenanting at his death to pay it to the trustees. Upon the death of the father, 10,000*l.*, part of the 15,500*l.*, was allowed to remain in the business, such investment being unauthorised by the settlement. Large profits accrued to the 10,000*l.*, some of which, with the plaintiff's consent, had been paid to her husband:—*Held*, that the plaintiff was entitled in respect of income to four per cent. on the original 10,000*l.* and upon all accretions of profits retained and employed in the business, and that the rest of the profits must be regarded as capital subject to the trusts of the settlement, and must be made good out of the husband's estate, so far as he had received any part thereof. *In re Hill. Hill v. Hill*, 551

2. — *covenant to settle after-acquired property : exception of property previously otherwise settled : property coming to wife to her separate use*—A covenant in a marriage settlement by intended husband and wife for settlement of after-acquired property of the wife, except such as should previously be otherwise settled,—*Held*, not to embrace a fund coming to the wife under a bequest made to her during the coverture for her own sole and separate use, and free from the debts, control and engagements of her husband. *Kane v. Kane*, 72

3. — *marriage consideration, who within : wife's property : next-of-kin of wife : creditors of wife : volunteers*—By a marriage settlement moneys in the funds were covenanted to be paid to trustees, to be held by them in trust for the wife for life, then for the husband for life, and then for the children of the marriage, and if no children, then, if the wife died in the lifetime of her husband, for such persons as she should by will appoint, and in default of appointment, for her next-of-kin according to the statute, and if she should survive him, upon trust for her. The husband and wife were separated, and the wife had contracted debts. There were no children of the marriage and no possibility of any:—*Held*, that the *corpus* of the fund might be applied in payment of the debts of the wife, the next-of-kin being mere volunteers and not within the marriage consideration. *Paul v. Paul*, 14

— agreement for settlement : statute of frauds. See HUSBAND AND WIFE, 7.

— appointment of share of fund : postponement of enjoyment : interim income. See POWER, 4.

— condition precedent : marriage with consent of guardians. See WILL, 1.

— equity to : waiver of. See HUSBAND AND WIFE, 2.

— executory trust : power of court : form of settlement. See TRUST AND TRUSTEE, 4.

Share, shareholder. See COMPANY, 3, 5, 8–14, 27.

Shipping Law—*charter-party : construction* : “so near thereunto as she may safely get” : block in dock named in charter-party—A ship was chartered to proceed to “London Surrey Commercial Docks or so near thereunto as she may safely get and lie always afloat.” On arrival outside the dock admittance could not be obtained owing to the dock being already full. The master then went to Deptford Buoys, the nearest place where the ship could lie with safety, and called upon the charterer to take delivery there. On the charterer refusing to do so, the master discharged the goods by lighters on the wharves of the Surrey Commercial Docks. In an action by the shipowner for demurrage and charges,—*Held*, first, that the place of discharge being named by both parties in the charter-party, neither was bound to provide for the admittance of the ship or liable for its exclusion ; secondly, that the ship had not completed its primary contract to proceed to London Surrey Commercial Docks by merely arriving outside the dock gates ; but, thirdly, that it had carried out the alternative contract to go as near thereunto as it could safely get, and that the charterer was therefore liable for demurrage. *Dahl v. Nelson, Donkin & Co. (H.L.)*, 411

Solicitor—*lien : costs : inspection : subpoena duces tecum*—A solicitor being called as a witness by the plaintiff under a *subpoena duces tecum*, to produce her marriage settlement, to which she was a party, for her inspection,—*Held*, that he could not refuse to do so by reason of his lien for the unpaid costs of preparing it. *Fowler v. Fowler*, 686

2. — *lien : costs : practice : petition : order LI. rule 1 (a)*—A petition to enforce a solicitor's lien for costs is a further proceeding after trial within the meaning of Order LI. rule 1 (a). Judgment was given against a plaintiff who claimed money lent by A to B:—*Held*, that A's solicitor's lien on the fund was prior to B's right to costs. *Porter v. West*, 281

3. — *lien : mortgagees' solicitor subsequently acting for mortgagor*—A solicitor was entrusted with the custody of title-deeds as solicitor for mortgagees. He subsequently acted as solicitor for the mortgagor, who became indebted to him in costs on that account. The mortgage had not been paid off, but the mortgagor's trustee in bankruptcy was prepared with the money. Upon a claim by the solicitor to a lien upon the deeds for his costs against the mortgagor,—*Held*, that he had no lien. *In re Long ; ex parte Fuller*, 448

4. **Solicitor (continued)—negligence: mortgage: sale: notice: measure of damages**—A solicitor took a mortgage from a client with an unqualified power of sale, without explanation. He sold without giving notice to the mortgagor:—*Held*, that he was liable for damages to the extent, first, of the costs of the sale; second, the estimated costs of making a new investment; and, third, the difference between "solicitor and client" and "party and party" costs of the action. *Cockburn v. Edwards*, 181

— contributory's: right to sue in name of company to recover assets. See **COMPANY**, 16.

— notice to: constructive notice to client. See **MORTGAGE**, 7, 8.

— service on: attachment. See **ATTACHMENT OF PERSON**.

Solicitors Act. See **COSTS**, 10.

Specific Performance—evidence: fraud on public

—A contract was made by several writings of different dates. One such writing was not proved:—*Held*, that specific performance of the contract as shewn by the agreements proved could not be granted, nor damages for breach of contract given. Specific performance and damages for breach of a contract in respect of publishing a book were refused on the ground that the plaintiff had insisted on a title-page false in respect of authorship, for which the defendant had not contracted. *Post v. Marsh*, 287

2. — **separation deed: enforcement by action in one branch of the court of agreement providing for stay of proceedings in another branch: part performance: incomplete contract: provision for reference in case of difference: "usual covenants": "dum casta" clause: mutuality: agreement for custody of children by mother: judicature act, 1873, s. 24 (sub-s. 5): 36 Vict. c. 12, s. 2**—Specific performance was granted in the Chancery Division of an agreement come to by way of compromise at the trial of a petition for divorce, and which provided for the execution of a deed of separation and the dismissal of the petition; no proceedings having in fact been taken under the petition between the date of the compromise and the trial of the action for specific performance. Where an agreement has been in part performed, the Court struggles to overcome a difficulty in the way of its specific enforcement arising from vagueness in the terms. The terms of an agreement being sufficiently defined to present a concluded contract in all essentials, it may be enforced by the Court, although comprising a provision for reference to named persons in case of difference in working out the terms. *Gowlay v. The Duke of Somerset* (19 Ves. 429) and *Tillett v. The*

Charing Cross Bridge Company (26 Beav. 419; 28 Law J. Rep. Chanc. 863) distinguished and explained. An agreement between husband and wife, providing (*inter alia*) for the execution of a deed of separation, with usual covenants, and for an allowance to the wife, and that in case of difference in working out the terms of the agreement the matter should be referred to A and B, was decreed to be specifically performed. The judgment directed the deed to be settled by the Judge in case the parties differed. *Held* also, that "usual covenants" did not include a "dum casta" clause, or provision that misconduct on the wife's part should cause a forfeiture of the allowance. *Held*, further, that the term as to "usual covenants" imported that a trustee should be found by the wife, and therefore that the agreement was not in that respect unenforceable at her suit for vagueness or want of mutuality. *Hart v. Hart*, 697

Observations on the effect of the statute 36 Vict. c. 12 with regard to provisions for the custody of children in a deed of separation. *Ibid*.

3. — **subject to a contract to be settled**—Specific performance of an agreement "subject to a contract to be settled," or "subject to a proper contract," will not be enforced. *Harvey v. The Principal and Ancients of Barnard's Inn*, 760

— trial of action for. See **PRACTICE**, 27.

— And see **VENDOR AND PURCHASER**.

Stamp—mortgage-deed: stamp act, 1870, ss. 9 and 17—A mortgage-deed of leaseholds by demise made in 1879 was stamped merely with a 10s. deed stamp. On a sale by the mortgagor, it being arranged that the mortgagees were to be paid out of the purchase-money, and to join in the assignment to the purchaser,—*Held* (affirming *Jessel, M.R.*), that, notwithstanding, the purchaser was entitled to have the mortgage-deed stamped with the full *ad valorem* duty stamp. *Whiting to Loomes* (App.), 463

Statute—construction of: statutory fiction. See **BANKRUPTCY**, 23.

Subpoena duces Tecum. See **SOLICITOR**, 1.

Succession Duty—sale of settled estates by authority of the court: settled estates act, 1877, s. 22: succession duty act, s. 42—The 42nd section of the Succession Duty Act applies to a sale of real estate under the Settled Estates Act as well as to a sale of such estate under a power in a settlement so as, in either case, to discharge the estate in the hands of the purchaser from any liability to succession duty. *In re Warner's Settled Estates. Warner to Steel*, 642

Taxation. See **COSTS**, 6-10.

Tenant-for-Life and Remainderman—renewable leaseholds: settled estates acts—Leaseholds for lives in settlement subject to a trust for renewal were, after refusal of the lessor to renew, sold under the Leases and Sales of Settled Estates Acts:—*Held*, that the first taker was entitled only to the income of the purchase-money. *In re Barber's Settled Estates*, 769

— apportionment of income. See APPORTIONMENT.

— corpus or income: employment of trust funds in trade. See SETTLEMENT, 1.

— property subject to leases taken by railway company. See LANDS CLAUSES ACT, 1.

Tenant pur Autre Vie—executory devise: wasting security: tenant-for-life—Leaseholds for lives were devised to A and his heirs, and, in case A died without issue, to B:—*Held*, in analogy to a fee-simple, that A could not by dealing with the property defeat the executory interest of B. *In re Barber's Settled Estates*, 769

Third Party. See PRACTICE, 16, 20.

Trade-Mark—rectification of register: trade-marks registration acts, 1875 and 1877—The power conferred on the Court by the Trade-Marks Registration Acts to order rectification of the register of trade-marks is applicable only to cases in which there has been some mistake in the original registration, not to cases where the register has become defective by reason of circumstances which have occurred subsequently to such registration. *In re Ward, Sturt & Sharp's Trade-Marks*, 347

— distinction between, and copyright. See COPYRIGHT, 2.

Trade Name—company: injunction. See INJUNCTION, 1, 2.

Tramway Company—dividends out of capital. See COMPANY, 9.

Trust and Trustee—breach of trust: liability of trustee: company: shares: accretions—A trustee who had neglected to get in trust property was held liable to replace shares in a company allotted in respect of other shares subject to the trust, and which had been taken up. *Briggs v. Massey*, 747

2. — **breach of trust: trust for accumulation: wrongful retainer by trustees: compound interest: rate of interest**—A fund was held in trust for a minor, to be paid to him at twenty-one,

with a provision (in effect) for maintenance and advancement out of income, and accumulation of the surplus income during the minority. After the *cestui que trust* attained twenty-one, the trustee retained the fund without coming to any explanation with him:—*Held*, that the trustee wrongfully retaining the fund must be regarded as continuing under the obligation to accumulate, and was therefore chargeable with compound interest. *Wilson v. Peake* (3 Jur. N.S. 155) distinguished. *Amiss v. Hall* (3 Jur. N.S. 584) remarked upon. Part of the fund having been invested upon improper investments, or not kept distinct from the trustee's own moneys, he was charged in respect thereof as if it had been uninvested. Under the circumstances the interest was charged at four and not five per cent. *In re Emmet's Estate. Emmet v. Emmet*, 341

3. — **declaration of trust: husband and wife: intended gift by husband to wife**—The rule that words importing a present intention to give cannot be held to operate as a declaration of trust applies as much to the case of a gift by a husband to a wife as to that of a gift to a stranger. A husband, shortly after his marriage, purchased for his wife certain furniture, plate and other articles, and signed and gave to her three written documents by which respectively he purported to "give" her part of the furniture "for her own use and benefit," to "make her a present" of the plate "for her sole use and benefit," and to "present her with" the rest of the furniture and other articles, the same "to be hers and hers only from that date." The furniture, plate and other articles were used in the joint residence of the husband and wife until his death:—*Held*, that the husband had not constituted himself a trustee of the furniture, plate and other articles for his wife, and that they formed part of his estate. *Baddeley v. Baddeley* (48 Law J. Rep. Chanc. 36; Law Rep. 9 Ch. D. 113) not followed. *Richards v. Delbridge* (43 Law J. Rep. Chanc. 459; Law Rep. 18 Eq. 11) followed. *In re Bratton. Bratton v. Woolven*, 369

4. — **executory settlement: children: powers of appointment**—In making a settlement of property directed to be settled on the wife and children of the testatrix's son, the Court has jurisdiction to give to the husband a life interest and also power to appoint the fund amongst the issue of the marriage, jointly with the wife during the coverture, and alone if he survive her. *Oliver v. Oliver* (48 Law J. Rep. Chanc. 630; Law Rep. 10 Ch. D. 765) dissented from on this point. *Gowan v. Gowan*, 248

5. — **trustees' allowances: settled estates: tenant-for-life: actions for the benefit of the inheritance: Lord St. Leonard's act, 1859, s. 30: settled estates act, 1877, s. 17**—Order made, upon a petition by trustees of settled estates, under

section 30 of Lord St. Leonards' Act, 1859, sanctioning the payment by them, out of money in their hands applicable to the purchase of real estate to be held upon the uses of the settlement, of costs incurred by the tenant-for-life for the benefit of the inheritance in actions brought by him to repel claims of rights of common over the settled property. *In re Lord de la Warr's Settled Estates*, 383

Semble, such an order might be made under section 17 of the Settled Estates Act, 1877, although the sanction of the Court be not obtained before commencing proceedings. *Ibid*.

6. Trust and Trustee (continued)—trustee: discretion of: sale of infant's estate: request of guardians—Where an infant's estates are vested in trustees, with power to them to sell at the request in writing of the guardians of the infant, the Court will not control the discretion of the trustees and compel them to sell the estates against their wish, when they are honestly exercising their powers, and are not guilty of any *mala fides*. *The Marquis of Camden v. Murray*, 282

— breach of trust: employment of trust funds in trade. See **SETTLEMENT**, 1.

— mortgagee: constructive trust of surplus proceeds of sale. See **LIMITATIONS, STATUTE** OF, 3.

— power of sale, when determining: property "at home." See **POWER**, 7.

— resulting trust: appointment to trustee: failure of trusts. See **POWER**, 5.

Trustee Act—practice: lunatic trustee—One of three trustees had become lunatic. Upon a petition being presented in Lunacy and Chancery for the discharge of the lunatic and re-appointment of the two continuing trustees in place of the three, the Court refused to do so, and required the original number to be filled up. *In re Stokes's Trusts* (41 Law J. Rep. Chanc. 290; Law Rep. 13 Eq. 338); *In re Harford's Trusts* (Law Rep. 13 Ch. D. 135) not followed. *In re Colyer* (App.), 79

2. — practice: lunatic trustee: cestui que trust absolutely entitled: vesting order: new trustee appointed—When a sole trustee becomes lunatic, the Court, although the *cestui que trust* is absolutely entitled to the trust property, will not make an order vesting such property in the *cestui que trust*, but requires a new trustee to be appointed, in whom it will then vest the trust property. *In re Holland* (App.), 271

3. — vesting order in chambers: right to transfer stock: jurisdiction: trustees act, 1850, s. 43: 16 & 18 Vict. c. 80. s. 26: 18 & 19 Vict. c. 134. s. 16: consolidated order XXXV. rule 1—In

an administration action commenced by writ, an order was made in chambers directing the plaintiff and defendant to transfer a sum of stock into Court. Afterwards, as the defendant could not be found, an order was made in chambers vesting the right to transfer the stock in the plaintiff, and directing him to transfer it into Court. The Bank of England having objected to act on this order, on the ground of its having been made in chambers, JAMES, M.R., on the motion of the plaintiff, held that he had jurisdiction to make the order in chambers, and directed the bank to act upon it:—*Held*, on appeal, that, having regard to 18 & 19 Vict. c. 134. s. 16, the Consolidated Order XXXV. rule 1, and the course of practice, it was doubtful whether there was jurisdiction to make such a vesting order in chambers, and therefore that the order directing the bank to act upon it ought to be discharged. *Frodsham v. Frodsham* (App.), 233

— appointment of new trustees: form of order
— The report of this case (49 Law J. Rep. Chanc. 228) corrected. *In re Peacock* (App.), 380

Uncertainty. See **WILL**, 19.

Undue Influence—parent and child: purchaser for value: notice—A mortgage by persons over age but not fully emancipated to secure a debt of their father, the same solicitor acting for parent and children, was upheld in favour of the mortgagees, but was declared not binding in favour of the father. *Bainbridge v. Brown*, 522

Unity of Possession. See **PRESCRIPTION ACT**, 2.

Vendor and Purchaser—insurance by vendor: fire after contract but before completion: right to insurance-moneys—A house insured by the vendor was after the date of the contract for sale, but before completion, partly burnt down, and the vendor received the insurance-moneys. There was no provision in the contract as to insurance:—*Held* (per BAWR, L.J., and COTTON, L.J.; *dissentiente JAMES, L.J.*), that the purchaser as against the vendor could not recover the insurance-moneys either as an abatement of his purchase-money or for the re-instatement of the premises. *Semble*, in such a case the insurance company can compel the vendor to refund the money they have paid, if he receives the whole of his purchase-money, on the ground that the contract of fire insurance is merely a contract of indemnity. *Rayner v. Preston* (App.), 472

2. — sale of land: statute of frauds, s. 4: connection of documents by reference: referential force of word "purchase": description of subject-matter: "the property"—The auctioneer upon

a sale of lands and chattels by auction gave the purchaser a receipt in writing for his deposit, "on property purchased at the Sun, in Pinxton," at a certain date and price named. At the foot of the conditions of sale, bearing same date, the auctioneer signed a memorandum of the sale of "the property." The conditions were headed "Property sale at Sun Inn, &c. (date), Mr. George Cotterill, owner":—*Held*, first (on the authority of *Long v. Milar*, 48 Law J. Rep. C.P. 596; Law Rep. 4 C.P. D. 450), that the word "purchased" in the receipt was referential to an agreement for sale, and enabled the receipt to be read with the memorandum of sale upon the conditions; secondly, that the words "the property" did not describe the thing sold with sufficient definiteness to satisfy the Statute of Frauds or permit the parcels to be shewn by parol evidence. A poster, circulated before the sale and announcing it at the time and place mentioned, was not admitted by reference to supply the wanting description. *Shardlow v. Cotterill*, 613

— purchase under lands clauses act: interest on purchase-money. See LANDS CLAUSES ACT, 2.

— sale of house and land to different purchasers by simultaneous conveyances: right to obstruct lights. See LIGHT.

— sale of land by auction act. See PRACTICE, 22.

— stamp on mortgage-deed. See STAMP.

— And see SPECIFIC PERFORMANCE.

Vendor and Purchaser Act, 1874—notice of lessor's title: restrictive covenant. See COVENANT, 4, 5.

Vestry—power of, to commit nuisance. See NUISANCE, 2.

Volunteers—marriage consideration, who within. See SETTLEMENT, 3.

Warrant—extradition act, abuse of process under. See EXTRADITION ACT.

Watercourse—*easement: prescription: natural or artificial stream: riparian rights*—The plaintiff was the owner of a farm supplied with water by a small watercourse originating in a natural spring on the plaintiff's land, flowing, first, through the plaintiff's land, next through the defendant's land, and then through the plaintiff's land to the plaintiff's house. For seventy years and upwards, prior to 1879, the plaintiff had almost exclusively enjoyed the watercourse.

In 1879, however, the defendant, by means of a pipe, appropriated nearly all the water for the use of newly built houses. The plaintiff claimed the exclusive use of the water, and alleged that the watercourse through the defendant's land was artificial, and constructed, at a time immemorial, for the sole benefit of the plaintiff and his predecessors:—*Held*, that as no one could tell when the artificial part (if any) of the watercourse was made, the watercourse must be deemed to be a natural stream; or, if in part artificial, to have been made so as to give all the rights of a riparian proprietor to the defendant and his predecessors in title. *Sutcliffe v. Booth* (32 Law J. Rep. Q.B. 136) considered and approved. *Roberts v. Richards*, 297

— prescription: yearly tenant. See PRESCRIPTION ACT, 2.

Way—right of: general words. See EASEMENT.

Will, Construction of—*condition precedent: marriage with consent of guardian or guardians: infant*—A testator bequeathed 5,000*l.* to each of his daughters upon her attaining twenty-one, or on her marriage with the consent of her guardian or guardians, and gave his residue to trustees, upon trust, after the death of his wife, to pay to each of his daughters who should attain twenty-one, or should be or have been previously married with the consent of her guardian or guardians, 3,000*l.* He appointed his wife sole guardian of his infant children, and gave a power of maintenance and education out of the income of each child's presumptive share, to be paid after the death of his wife to his or her guardian or guardians. Under the testator's marriage settlement certain funds stood settled, on the death of his wife, on trust for all and every the children and child of the marriage who, being a daughter or daughters, should attain twenty-one or marry "with the consent of her or their parents or guardians." The testator's widow died, and no new guardian was appointed. C. E., one of the testator's daughters, after her death married, and died under age, leaving issue:—*Held* (affirming *Fay, J., ante*, p. 507), that C. E. did not take a vested interest either in the legacies or in the funds comprised in the settlement. *In re Brown's Settlement. In re Brown's Will* (App.), 724

Dawson v. Oliver Massey (45 Law J. Rep. Chanc. 519; Law Rep. 2 Ch. D. 753) distinguished. *Ibid.*

The consent of a guardian appointed by the infant herself would not have been an effectual consent within the meaning of the provision. *Ibid.*

2. — *contingent remainder: devise of real estate to trustees in fee: equitable limitations: executory devise: remoteness*—A testator devised real estate to trustees upon trust for A for life,

and after his decease upon trust to convey "to such son of B as should first attain twenty-five, when he should have attained twenty-five." A survived the testator, and B's eldest son attained twenty-five, after the death of the testator, but during the lifetime of A:—*Held*, that the gift to the son of B was not an equitable contingent remainder, but an executory devise, and that it was void for remoteness. *Decision of MALINS, V.C.* (49 Law J. Rep. Chanc. 710), reversed. *In re Finch. Abbeys v. Burney* (App.), 348

3. Will (continued)—*description of object of gift: gift in trust after life interest for "descendants" who shall "bear" a particular name: uncertainty: remoteness*—A testatrix bequeathed stock to trustees in trust for her brother R.-G. for life, and after his decease in trust for his son, J. R.-G., for life, and after the decease of both of them, upon trust for any immediate or direct descendants of her said brother or nephew, who should bear the name of R.-G. for life, and from and after his or her decease, or in case of failure of any such immediate or direct descendants of her said brother or nephew, who should bear that name, upon trust for certain charities, with a condition of forfeiture on abandoning the name of R.-G.:—*Held*, that the gift to descendants was not confined to those whose family name or birth name was R.-G., but included descendants who assumed that name. *Held* also, that the gift to descendants was void for remoteness, and that the gift, as well to the charities as to the descendant who had assumed the name of R.-G., failed. *In re Roberts. Repington v. Roberts*, 285

Quære, whether the gift to descendants would not (even if not void for remoteness) have been void for uncertainty. *Ibid.*

Semble, there is a difference between a gift to descendants who "bear" a certain name and a gift to descendants "of" a certain name. *Ibid.*

4. — *description of object of gift: "my nephews and nieces": consanguinity: wife's nephews and nieces*—A testator devised certain real estate to A. G. (sister of his late wife) for life, and upon her decease to her children and to S. H., E. A. and "my niece M. W."; and he devised other real estate upon trust for sale and investment, and to pay the income equally among "all my nephews and nieces," and bequeathed the money to the survivor of "my said nephews and nieces," and devised the residue of his real estate to the survivor "of my said nephews and nieces," and bequeathed his residuary personal estate "equally among all my nephews and nieces." M. W. was a child of a sister of the testator's wife. At the testator's death there were nineteen nephews and nieces living, children of the testator's brothers and sister, and seven nephews and nieces, children of sisters of the testator's wife:—*Held*, that none of the wife's nephews and nieces (including M. W., although called

"my niece"), but only the testator's nephews and nieces by consanguinity, were entitled to a share under the gifts to "my nephews and nieces." *Grant v. Grant* (39 Law J. Rep. C.P. 140; *ibid.* Exch. 272; Law Rep. 5 C.P. 380; *ibid.* Exch. 727) disapproved of. *Merrill v. Morton*, 249

5. — *description of objects of gift: second cousins: exclusion of children and grandchildren of first cousins*—Bequest of one-third to first cousins and two-thirds to second cousins:—*Held* (affirming the MASTER OF THE ROLLS), that the words "second cousins" did not include a son or a grandson of a first cousin. *In re Parker. Bentham v. Wilson* (App.), 639

6. — *description of objects of gift: "unmarried": primary meaning of word*—The ordinary meaning of the word "unmarried" in the absence of determining context is "never having been married." Therefore where a share of property was left in trust for one for life, but if he should die unmarried his share to be divided between the children of his brothers; and the tenant-for-life, who was at the date of the will a bachelor, died a widower without children, it was held that the gift to his brother's children did not take effect. *Dalrymple v. Hall*, 302

7. — *devise of real estate: bequest of farming stock: growing crops*—A gift of "farming stock" by will passes the growing crops to the legatee, although the real estate on which the crops are is devised to another person. *Faisey v. Reynolds* (5 Russ. 12; 6 Law J. Rep. (o.s.) Chanc. 172) dissented from. *Evans v. Williamson*, 197

8. — *hotchpot: advances: interest: gift of residue to widow for life, with remainder to children*—Where a fund is given by will to be equally divided amongst the testator's children, and the will contains a proviso for bringing into hotchpot advances made by the testator to any of them, the advanced children are chargeable with interest on their advances up to the time of the distribution of the fund; but such interest is to be computed from the time fixed for distribution only, not from the date of the respective advances. *In re Rees. Rees v. George*, 328

9. — *lapse*—Where there was a gift of residue among such of the children of A as are now alive, and fourteen named persons, and there were no children of A,—*Held*, that there was no lapse, but the residue was divisible among the fourteen persons named. *In re Spiller. Spiller v. Madges*, 750

10. — *legacy: satisfaction: annuity secured by bond: subsequent bequest of annuity by will*—A testator who had for valuable consideration covenanted by bond to pay an annuity of 10*l.* to

H. D. "so long as she should continue the widow of J. D.," by equal half-yearly payments on the 16th of June and the 16th of December, subsequently by his will bequeathed to her "an annuity of 30*l.* if she should so long continue a widow":—*Held*, that the circumstance that the annuity bequeathed by the will would not become payable until a year after the testator's death, while that secured by the bond was payable half-yearly, was sufficient to rebut the presumption that the one was intended by the testator to be in satisfaction of the other. *In re Dowse*. *Dowse v. Glass*, 285

11. — *legacy to widow: "to be paid to her immediately after my decease": payment in full: direction "in the first place to raise and appropriate 12,000*l.*": "in the next place to raise and appropriate 5,000*l.*"]*—R. H., by will dated in 1874, gave to his wife, M. A. H., all his household goods, &c., for her own use and benefit, together with the legacy or sum of 500*l.*, which he directed to be paid to her immediately after his decease; and he gave all his real estate and all the residue of his personal estate to trustees upon trust for sale and investment, and thereout "in the first place to raise and appropriate the sum of 12,000*l.*," and to invest the same and pay the dividends to his wife for life; and "in the next place to raise and appropriate the sum of 5,000*l.*," and to invest the same and pay the dividends of the sum of 2,000*l.*, part thereof, to T. for life; and of the sum of 1,000*l.* to C. for life; and of the sum of 2,000*l.*, residue thereof, to E. for life; and after the respective deaths of his wife, T., C. and E., he directed the sums of 12,000*l.* and 5,000*l.* to fall into and be divided with the residue of his estate; and after giving certain other legacies, he declared that till the sums of 12,000*l.*, 1,000*l.* and 2,000*l.* should be set aside for the benefit of his wife and C. and E. they should from the time of his decease be paid interest at four per cent. on such sums, and by a codicil gave divers other legacies:—*Held*, the estate proving insufficient to pay all the legacies in full, that the widow of the testator was entitled in priority to the payment in full of the legacy of 500*l.*, and that the two sums of 12,000*l.* and 5,000*l.* were to be raised and appropriated in priority to all the remaining legacies. *In re Hardy*. *Wells v. Barwick*, 241

12. — *power of appointment: execution of general power: lapse*—A testator by his will bequeathed a legacy of 770*l.* to M. I., in trust for the testator's daughter A. for her life, and after her decease in trust for such persons as she should by deed or will appoint, and in default of appointment in trust for M. I. A. by her will gave and bequeathed all her real and personal estate to her two sisters, M. and L., their heirs, executors, administrators and assigns in the shares following, namely, one-third to M. and two-thirds to L., and appointed

L. sole executrix of her will, and charged her said property and effects with the payment of her debts and funeral and testamentary expenses. L. having predeceased A.,—*Held*, that A. had by her will shewn an intention to make the legacy of 770*l.* part of her property for all purposes, and that the two-thirds which had been appointed to L. passed therefore to the next-of-kin of A., and not to M. I. as in default of appointment. *In re Davies' Trusts* (41 Law J. Rep. Chanc. 97; Law Rep. 13 Eq. 163) considered and distinguished. *In re Ickeringill*. *Hinsley v. Ickeringill*, 364

13. — *remoteness: bequest to a class*—A testator bequeathed a sum of 3,000*l.* in trust for his son for life, with remainder to the children of the son who should attain twenty-one years, and the issue of such as should die under that age leaving issue, which issue should afterwards attain the age of twenty-one years, or die under that age leaving issue, as tenants in common, if more than one; but such issue to take only the shares which their parents would have taken if living:—*Held*, that the words confining the gift to issue to such as should afterwards attain the age of twenty-one years could not be read as a superadded condition divesting the gift upon a contingency, but were to be treated as part of the description of the issue who were to take. *Held* also, that the gift to the children could not be severed from that to the issue of children. *Held*, consequently, that the whole gift to children and issue was void for remoteness. *Pearks v. Moseley* (H.L.), 57

14. — *residuary gift: direction to apply share of residue "as part of my residuary estate"]*—A testator, by his will, directed that his trustees should stand possessed of the residue of his estate upon trust, as to one-seventh part thereof, to invest the same, and pay the income to his daughter for life, and after her death to hold the same in trust for her child or children who should attain the age of twenty-one years; but if there should be no such child, then he directed his trustees "to apply the said share as part of his residuary estate." He afterwards declared trusts of the remaining six shares of his residuary estate. F. survived the testator, but left no child who attained the age of twenty-one years:—*Held*, that the share of F. was undisposed of by the will. *Humble v. Shore* (7 Hare, 247; 1 Hem. & M. 550 n) and *Lightfoot v. Burstall* (1 Hem. & M. 546; 33 Law J. Rep. Chanc. 188) followed. *Crawshaw v. Crawshaw* (49 Law J. Rep. Chanc. 662; Law Rep. 14 Ch. D. 817) distinguished. *In re Savage's Trusts*, 131

15. — *residuary legatee: after-purchased real estate*—A made a will whereby she "committed to paper" her "wishes respecting the disposal of" her "property," and left "everything she was possessed of" to her sister for

life; and after her death she "gave and devised" certain legacies, and concluded by appointing her two nephews (naming them) "her executors, and the latter residuary legatee." Afterwards she made a codicil which referred only to some of the legacies given by her will. She had no real property at the date of her will or codicil, but she purchased some subsequently, and it belonged to her at her death:—*Held*, that her real property did not pass by her will. *Hughes v. Fritchard* (46 Law J. Rep. Chanc. 840; Law Rep. 6 Ch. D. 24) distinguished. *In re Methuen and Blore*, 464

16. Will (continued)—*residuary or specific gift*: "all the rest of my money, however invested"—A testatrix, after making a pecuniary and two specific bequests, gave "all the rest of her money, however invested," to her nephew, "under deduction of 50*l.* to be paid to each of her executors after named." She then proceeded to make certain bequests of jewellery and other specific articles, and concluded by appointing executors:—*Held*, that the gift to the nephew was a residuary gift. *In re Pringle. Walker v. Stewart*, 689

17. — *specific bequest: pictures*: "objects of vertu or taste"—A testator, by his will, gave to his wife absolutely all his gold and silver plate, ornamental and other china, and all objects of vertu or taste; and he declared that his wife should be entitled during her life to his leasehold house in C. Terrace, and the furniture and other effects therein. At the death of the testator there were in his house in C. Terrace ten valuable pictures:—*Held*, that these pictures did not pass under the words "objects of vertu or taste," but passed with the furniture. *In re Londesborough. Bridgeman v. Fitzgerald*, 9

18. — *specific bequest: "stock-in-trade": bequest of business: business of barge-builder*—A testator, who was a barge-builder, specifically bequeathed to his son his business, "together with all and singular his stock-in-trade as a barge-builder." It is a custom in the testator's trade for a barge-builder when selling a new barge to accept an old barge in part payment, and to repair such old barge and let the same out on hire. At the testator's decease there were five old barges belonging to him which had been thus acquired, and were thus let out on hire:—*Held*, that these barges formed part of the testator's stock-in-trade as a barge-builder, and passed under the specific bequest. *In re Richardson. Richardson v. Pilliner*, 488

19. — *uncertainty: "others": "paid": accretion*—A testator, in case of the death of any of his children without leaving issue, before payment of any part of reversionary legacies, directed such parts to be divided

among the others and other of them, and in case of the death of a child leaving issue before such payment, he directed such parts to be divided among the children of such child:—*Held*, first, that "payment" referred to the time when the shares given over became payable, and the gift over was not void for uncertainty; secondly, that "others" meant children other than those who had died without leaving issue; thirdly, that the gift over applied to accrued as well as original shares. *In re Chaston. Chaston v. Seago*, 716

20. — *vesting: gift over: "final division"*—A testator gave each of four persons a fourth of the proceeds of his residue, and in case of the death of any legatee before the "final division" of his estate he gave that legatee's share over. One legatee died more than a year after the testator but before the estate had been distributed:—*Held*, that his personal representatives were entitled to his fourth share. *In re Wilkins. Spencer v. Duckworth*, 774

21. — *vesting: period of vesting*—A testator directed a legacy given to a son to be held on certain trusts in the event of the son's marrying a designated person:—*Held*, that the trusts took effect in the event of the son's marrying the designated person within a year of the testator's death, and before the legacy had been paid. *Money v. Money*, 623

— accumulation clauses: allowance for benefit of infant. See INFANT, 2.

— annuity: charge on rents. See ANNUITY, 2.

— condition: real estate: restraint of marriage. See CONDITION.

— execution of power. See POWER, 3, 6.

— executor: carrying on business: trade assets: judgment creditor. See EXECUTOR, 1.

— general bequest: execution of power. See POWER, 2.

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